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# HANDBOOK OF CRIMINAL CASES

REPRINTED VERBATIM FROM  
THE BENGAL LAW REPORTS,  
VOLS. I. TO XV.,  
AND  
THE SUPPLEMENTAL VOLUME,  
WITH  
A COMPLETE DIGEST.

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COMPILED BY

D. E. CRANENBURGH,  
PLEADER.

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Calcutta:

PRINTED AND PUBLISHED BY D. E. CRANENBURGH,  
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## PREFACE.

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THIS Handbook contains a verbatim reprint of all criminal cases reported in the Bengal Law Reports, Vols. I. to XV., and the Supplemental Volume.

The object of this work is to obviate, so far as criminal cases are concerned, all reference to the original Reports, which are very costly, and therefore beyond the reach of many.

To enhance the usefulness of the work I have added the following:

*1st.*—A nominal index of all cases reported in this book.

*2nd.*—A table showing the volume and the page in which each case is printed in the Bengal Law Reports, and the corresponding page in this book.

*3rd.*—An index in the form of a digest, which will be found to be very useful for reference.

D. E. CRANENBURGH.

*February 25, 1889.*





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7

**CASES DETERMINED BY**  
**The High Court of Judicature,**  
**AT FORT WILLIAM IN BENGAL,**  
**IN ITS APPELLATE JURISDICTION.**

**APPELLATE CRIMINAL**

*Before Mr. Justice Phear and Mr. Justice Hobhouse.*

**THE QUEEN v. TAJUMADDI LAHORY.<sup>1</sup>**

*Criminal Procedure Code (Act XXV. of 1861), s. 273—Jurisdiction of Deputy Magistrate, s. 219—Indian Penal Code (Act XLV. of 1860), s. 174—Non-attendance in obedience to an order from a public servant.*

1868.  
June 2.

1 B. L. R.  
A. Cr. 1.

In consequence of the default of appearance by the person bailed, the surety was compelled to pay the penalty mentioned in the recognizance. The Deputy Magistrate applied for and received the permission of the District Magistrate to try the accused under s. 174 of the Penal Code. *Held*, the Deputy Magistrate had no jurisdiction to try the case, it not having been referred to him "either on complaint preferred directly to the Magistrate, or on the report of a police-officer." *Held*, also, that notwithstanding s. 219 of Act XXV. of 1861, the accused might have been proceeded against under s. 174 of the Penal Code. [10 W. R. 4.]

The facts of this case were as follows :—

One Tajumaddi Lahory, who was defendant in a case under trial by the Deputy Magistrate of Burisal, forfeited bail by reason of default of appearance. The surety was compelled to pay the penalty mentioned in the recognizance, and the Deputy Magistrate applied for and received the permission of the District Magistrate to try Tajumaddi Lahory under s. 174 of the Indian Penal Code for non-attendance in obedience to an order from a public servant. The Deputy Magistrate found him guilty, and sentenced him to one month's simple imprisonment.

The Sessions Judge of Backergunge referred the case to the High Court under s. 434 of Act XXV. of 1861. The Sessions Judge considered the proceedings of the Deputy Magistrate (who was not in charge of a division of a district) illegal for two reasons :

"*Firstly*.—That the Deputy Magistrate acted without jurisdiction, the case not having been referred to him by the Magistrate on complaint preferred directly to the Magistrate, or on the report of a police-officer.<sup>2</sup>

<sup>1</sup> Reference under s. 434 of the Criminal Procedure Code by the Officiating Sessions Judge of Backergunge.

[This case has been distinguished in, and overruled by, *Queen v. Chandra Sekhar Roy* (13 W. R. 66; 5 B. L. R. 100), in which it was held that a Subordinate Magistrate has no power to try an offence punishable under s. 174 of the Penal Code committed against his own Court. The case of *Queen v. Chandra Sekhar Roy* has been followed by *Chutoorbhoof Bharikoe v. Mr. Macnaghten* (15 W. R. 2) and by *Tarrapros'ud Sakoo* (15 W. R. 88). Now see Ch. XXXV. (ss. 476—487) of the new Code of Criminal Procedure (Act X. of 1882).—Ed.]

<sup>2</sup> See s. 273 of Act XXV. of 1861.

1868.

QUEEN  
v.TAJUMADDI  
LAHORY,1 B. L. R.  
A. Cr. 1.

[10 W. R. 4.]

"Secondly.—That as s. 219 of the Criminal Procedure Code provided a specific punishment for default of appearance of the person executing a personal recognizance, viz., forfeiture of the bail-bond, any additional punishment for the same offence was apparently not contemplated."

The opinion of the Court was delivered by

PHEAR, J.—We think that the first objection made by the Sessions Judge, in his reference, to the conviction of the Deputy Magistrate, is good. We think that the Deputy Magistrate had no jurisdiction to entertain and decide the case for the reasons which the Sessions Judge has given in his reference. We think, however, that the second objection put forward by the Sessions Judge is not tenable. In our opinion, there is nothing to prevent the accused person himself from being proceeded against under s. 174 of the Indian Penal Code, notwithstanding that his surety had been already made to pay in consequence of the default of appearance of the accused person; but, as the first objection is good, the conviction must be quashed, the sentence set aside, and the prisoner, if still in custody, must be discharged.

Before Mr. Justice Kemp and Mr. Justice Glover.

THE QUEEN v. NAGARDI PARAMANIK.<sup>1</sup>

S. 411 of Act XXV. of 1861—Appeal—Separate offences.

1868.

June 2.

1 B. L. R.  
A. Cr. 8.

[10 W. R. 3.]

A was convicted of offences under ss. 143, 447, and 211 of the Penal Code, and sentenced by the Magistrate to one month's imprisonment for each offence. *Held*, that, under s. 411 of Act XXV. of 1861, there was no appeal. The separate sentences could not be taken together, and combined into one sentence, so as to give a right of appeal.

On the 29th February, Nagardi Paramanik was convicted by the Magistrate of Rajshahye under ss. 143 and 447 of the Penal Code, and sentenced to one month's rigorous imprisonment; and to furnish bonds and find securities on release to keep the peace. On the same date, the Magistrate convicted Nagardi, under s. 211, of having brought a false counter-charge against the prosecutor in the former case, and sentenced him to another month's rigorous imprisonment. One appeal was admitted by the Judge, from Nagardi Paramanik, against his conviction in both the above cases. The conviction under s. 211 was upheld, while that under ss. 143 and 147 was reversed. The Magistrate submitted that as the convictions were for perfectly separate offences, the sentences thereon were not capable of being taken together as forming one sentence for the purposes of appeal to the Judge.<sup>2</sup> The Judge, relying upon an alleged decision of the High Court of the N.-W. Provinces,<sup>3</sup> was of a different opinion.

Mr. R. T. Allan for the prisoner.

The judgment of the Court was delivered by

GLOVER, J.—In this case one Nagardi Paramanik was charged with being a member of an unlawful assembly, and with criminal trespass, under ss. 143 and 447 of the Penal Code; and whilst the case against him was pending, he brought a counter-charge of criminal trespass against his accuser.

<sup>1</sup> Reference from the Magistrate of Rajshahye, through the Judge of that district, under s. 404, Code of Criminal Procedure.

<sup>2</sup> [This case follows *Queen v. Morly Sheikh* (6 W. R. 51).—Ed.]

<sup>3</sup> S. 411 of Act XXV. of 1861.—"In all cases in which a Court of Session or the Magistrate of a district or other officer exercising the powers of a Magistrate shall pass a sentence of imprisonment not exceeding one month, or of a fine not exceeding fifty rupees, no appeal shall be allowed."

<sup>3</sup> No reference given.

Both cases were disposed of on the 29th of February 1868. The charges under ss. 143 and 447 were held to be proved against Nagardi, whilst his counter-charge was dismissed as false, and he was further convicted of bringing a false complaint under s. 211, Penal Code. Nagardi was sentenced in each case to one month's imprisonment, and the question is, whether these two sentences are to be taken as forming one and the same sentence, and as such appealable to the Sessions Judge.

The Magistrate at whose instance this case has been referred to us, under s. 404, Code of Criminal Procedure, holds that as the two convictions were of entirely different offences committed on different dates and in different places, the punishments awarded necessarily form separate and distinct sentences, and, being each within the limit of one month, were not appealable.

The Sessions Judge, on the other hand, following a decision of the High Court, N.-W. Provinces, holds that the two sentences form together one ground of appeal, and, being beyond the limit, are appealable to his Court.

The Judge has not referred us to the decision on which he relies, nor have we been able to find it; but we do find one of this Court, dated the 6th August 1866, *The Queen v. Morly Sheikh*,<sup>1</sup> in which the contrary principle is distinctly laid down.

In support of the Judge's ruling, it is contended that the words of s. 46 of the Code of Criminal Procedure suppose that any number of different penalties imposed for different offences tried at the same time make up only one sentence, but there is nothing in the section to bear out such a construction; on the contrary, the Court convicting a prisoner of several offences is bound to sentence such prisoner to the *several* penalties prescribed by law, the one penalty commencing after the expiry of the other, and the only limit (under a certain proviso) is the extent of punishment which the particular Court before which the cases are tried is competent to inflict. The object of the section is to award a specific punishment for each particular offence of which an accused person may be proved guilty when all the charges against him are tried together, so that, in case some one or other of the charges break down on appeal, the amount of punishment to be remitted may be known.

S. 411, Code of Criminal Procedure, lays it down most clearly that in all cases a sentence of one month's imprisonment passed by a Magistrate exercising full powers is not appealable; and if it had been the intention of the legislature to circumscribe a Magistrate's powers in this respect, and by lumping together two sentences each within the limit, because they happened to be passed at the same time, to make up one whole sentence, which would be beyond the limit, and therefore appealable, it would, no doubt, have said so. The principle laid down by the Judge would be applicable to cases where an accused person has been punished separately for what are really parts of one and the same offence, and not to cases like the present, where the offences are essentially different, and were committed at different times and places.

We think, therefore, that the Magistrate was right, and that no appeal lay to the Judge. The accused should be re-committed to jail to undergo the remaining portion of his sentence.

1868.

QUEEN  
v.  
NAGARDI  
PARA-  
MANIK,  
I B. L. E.  
A. Cr. 8.

[10 W. R. 3.]

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<sup>1</sup> 6 W. R. 51.

Before Mr. Justice Loch and Mr. Justice Glover.

THE QUEEN v. JOSEPH MERIAM.<sup>1</sup>

1886.

July 8.

1 B. L. E.

A. Cr. 5.

[10 W. R. 10.]

*Attempt at Rape—Punishment—Commutation of Sentence—Ss. 59, 376, and 511 of the Penal Code (Act XLV. of 1860).*

A was convicted of an attempt to commit rape, and was sentenced by the Judge to rigorous imprisonment for 7 years, which he commuted, under s. 59 of the Penal Code, to transportation for the same term. *Held*, that, under ss. 376 and 511 of the Penal Code, a sentence to imprisonment for the offence committed could not be for a longer term than 5 years, and such sentence could not be commuted, under s. 59, to transportation for a longer term.

J. Meriam was convicted of an attempt to commit rape. The Judge sentenced him to 7 years' rigorous imprisonment, which he commuted, under s. 59 of the Penal Code, to 7 years' transportation. The prisoner appealed generally against the Judge's decision.

No one appeared for the prisoner.

The judgment of the Court was delivered by

GLOVER, J.—We see no reason to interfere with the finding of the Sessions Judge and assessors in this case. The evidence clearly proves the prisoner's guilt, and his appeal must be rejected.

But the sentence appears to us illegal. S. 376 of the Penal Code makes the offence of rape punishable with transportation for life, or imprisonment of either description for ten years, and fine. Attempt at rape (there being no express provision made by the Penal Code for its punishment) would be punishable under s. 511 "with transportation or imprisonment of any description provided for the offence, for a term of transportation or imprisonment which may extend to one-half of the longest term provided for that offence." Now, had the Sessions Judge sentenced the prisoner under s. 511 to transportation, he could, by s. 57 of the Code, in calculating the half of the punishment for the substantive offence of rape, have taken that punishment as a sentence of 20 years' transportation, and in that case his present sentence of 7 years would have been less than the half of the full punishment awardable, and would, in consequence, have been legal. But the Sessions Judge has sentenced the prisoner to rigorous imprisonment, commuted, under s. 59, to 7 years' transportation; the commutation does not change the nature of the punishment, for there is no such substantive punishment in the Penal Code as transportation for any period short of life; rigorous imprisonment, although afterwards commuted to transportation, is still, in the terms of the Code, rigorous imprisonment; and if this be so, then by s. 511, only one-half of the maximum rigorous imprisonment awardable under s. 376 could be inflicted. The maximum imprisonment for rape is 10 years; and, therefore, the sentence upon the prisoner in this case cannot exceed 5 years' rigorous imprisonment.

<sup>1</sup> Committed by the Magistrate, and tried by the Sessions Judge of Shahabad, on a charge of attempt to commit rape.

Before Mr. Justice Lach and Mr. Justice Glover.

**THE QUEEN v. MAHENDRANARAYAN BANGABHUSHAN.<sup>1</sup>**

1868.  
July 13.

*Act XXV. of 1861, ss. 411, 424, & 436—"Accused Person"—Power of Court of Session to admit to Bail.*

1 B. L. R.  
A. Cr. 7.

[10 W. R. 16.]

A person sentenced to one month's imprisonment by a Magistrate, from which sentence no appeal is allowed under s. 411 of Act XXV. of 1861, is not an accused person within the meaning of s. 436 of the same Act, so as to be admitted to bail by the Court of Session, when his case is referred to the High Court under s. 434 of the same Act.

The prisoners were charged with having ploughed up paddy-land alleged to be held and cultivated by the prosecutor. The Joint-Magistrate found them guilty of having committed mischief under s. 426 of the Penal Code, and sentenced each to one month's rigorous imprisonment. The Sessions Judge referred the case for the orders of the High Court under s. 434 of Act XXV. of 1861, and at the same time submitted the following question: "Whether, under s. 436 of Act XXV. of 1861, the Court of Session has power to release on bail any 'accused person,' on the ground that when a sentence has been referred to the High Court, under s. 434, as illegal and unjust, the prisoner can only be considered in the light of an 'accused person,' as the sentence is, by the act of reference, suspended."

The judgment of the Court was delivered by

LOCK, J.—With regard to the question asked by the Sessions Judge, we think that the words "accused person" used in s. 436 do not apply to a party who has been convicted by the Magistrate, and from whose sentence there is no appeal under s. 411 of the Criminal Procedure Code.

Before Mr. Justice Lock and Mr. Justice Glover.

**THE QUEEN v. OHANDRAKANT CHUCKERBUTTY.<sup>2</sup>**

1868.  
July 13.

*Privileged Communications—S. 24 of Act II. of 1855—Mookhtear and Client—Verdict of Jury—Procedure in Revision.*

1 B. L. R.  
A. Cr. 8.

[10 W. R. 14.]

The question whether a communication between the accused and a witness is privileged, is a question of law for the Judge to decide. Communications between mookhtears and their clients are not privileged within s. 24 of Act II. of 1855.

The High Court sitting as a Court of Revision cannot interfere to set aside a verdict of acquittal by a jury on the ground of misdirection by the Judge.

This case was called for by the Court under s. 404 of Act XXV. of 1861.

Ohandrakant had been charged with forgery of a receipt, by ante-dating it, with the intention of defrauding the Land Mortgage Bank. The evidence relied on against the accused was the evidence of a witness, who stated that, on the day previous to that on which the document was filed in Court, he had seen the same in the hands of the accused, who showed it to him. On

<sup>1</sup> Reference from the Sessions Judge of West Burdwan under s. 434 of the Code of Criminal Procedure.

<sup>2</sup> Revision under s. 404, Code of Criminal Procedure, of proceedings held before the Sessions Judge of East Burdwan, on a charge of forgery.

[This case has been referred to in the following cases: *Gorachand Ghose*, Petitioner (11 W. R. 29; 8 B. L. R. A. Cr. 1); *Queen v. Goshto Lal Dutt* (7 B. L. R. Ap. 62; 15 W. R. 68); *Queen v. Gorachand Gope* (B. L. R. Sup. Vol. 448; 5 W. R. 45); *Queen v. Sheikh Basu* (B. L. R. Sup. Vol. 750; 8 W. R. 47).—Ed.]



1868.  
 QUEEN  
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 CHANDRA-  
 KANT  
 CHUCKER-  
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 1 B. L. R.  
 A. Cr. 8.  
 [10 W. E. 14.]

examination it appeared that this witness was, at the time he saw the document, acting as mookhtear of the accused, and it was objected that the showing of the document, if it were shown, was a privileged communication. The jury were told to determine whether, in their opinion, the evidence of the witness showed that what he detailed had taken place between a client and his mookhtear; and it was unanimously found by the jury that either it was a communication by the accused to his mookhtear as such, or the story of the witness was utterly incredible. The Judge was of opinion that the communication was privileged. A verdict of acquittal was, therefore, recorded, and the accused was discharged.

Baboo Ashutosh Dhur, Chandra Madhab Ghose, and Dwarkanath Bhattacharjee for the prisoner.

Baboo Jagadanand Mookerjee (Junior Government Pleader) for the Crown.

GLOVER, J.—This was a case of forgery in the matter of a receipt, and “the main proof against the accused” (I quote the Sessions Judge’s words) “was the evidence of a witness who declared that on the day previous to that on which the document was filed in Court, he had seen the same in the hand of the prisoner, who had showed it to him.”

The Judge, on the prisoner’s objection that the substance of the above statement was privileged—the deponent having been at the time of the alleged occurrence the prisoner’s mookhtear—put it to the jury to say whether the communication between the two was as between mookhtear and client, and on the jury finding that it was, he directed the jury to find a verdict of acquittal, on the ground that there was no evidence to support the case for the Crown.

It appears to me that the Judge in this direction to the jury made two grave mistakes.

In the first place, the question as to whether the communication which was alleged to have taken place between the accused and the witness was one as between mookhtear and client, was not a matter for the jury’s consideration at all—it was a point of law for the Judge to decide.

And, secondly, if he had decided, instead of letting the jury do so, that it was such a communication, he was wrong in telling the jury that the communication was privileged. S. 24, Act II. of 1855, says that barristers, attorneys, and vakeels, shall not disclose any communications, &c., &c. From the position of the word “attorney” in the sentence, it is clear that attorneys of the High Court only are meant, and not mookhtears, who, if included in the privilege, would naturally follow in their proper order after vakeels. There is, therefore, by law no privilege as to communicating between mookhtears and their principals, and the witness’s testimony ought to have been received and laid before the jury. The jury might, of course, have given what weight they pleased to it; but it is wrongly kept back from them.

The question remains as to whether this Court can interfere in cases where a verdict of acquittal has been recorded, and order a new trial on the ground of misdirection; and in support of the proposition we have been referred to the case of the *Queen v. Gorachand Gope*.<sup>1</sup> As it appears to me, the utmost which this decision lays down is, that this Court, as a Court of Revision, can interfere with and set aside a verdict of acquittal illegally come to by a Sessions Judge and assessors, and either pass such order as may be legally proper, or order a new trial. The case in question came before the

<sup>1</sup> 5 W. E. 45.

High Court from the Judge of Mymensingh—a non-jury district—and the decision seems to have reference solely to cases tried with the aid of assessors. At all events, the only mention therein of a jury is to be found in page 48, where the Court say: “As a Court of Revision, the Court cannot reverse the finding of a jury.”

I take the precedent of Gorachand Gope's case, therefore, to refer solely to non-jury trials, and I do not see that this Court has any power to interfere with, or to set aside, verdicts of acquittal come to by a jury, notwithstanding that such verdicts have been come to in consequence of misdirection on the part of the Judge.

LOOH, J.—The question raised in this case is of much importance. The question is this: If a prisoner be acquitted by a jury owing to a misdirection in his charge by the Judge, can the High Court as a Court of Revision quash the proceedings, and order a new trial? The judgment in Gorachand Gope's case is pressed upon our attention as supporting the view that this Court can interfere. That case was tried with assessors, and the Court as a Court of Revision held that, even when a party had been acquitted, the Court might set aside the judgment of acquittal for ever in point of law. There is, however, one passage in that judgment which appears to draw a distinction between cases tried by assessors and by a jury, and it is in the following words: “As a Court of Revision, the Court cannot reverse the finding of a jury.” In these words reference appears to be made to the proviso in s. 406, which lays down that the Sudder Court, in any case revised under Chapter XXIX. of the Criminal Procedure Code, shall not be competent to reverse the verdict of the jury. This appears to be conclusive that the High Court as a Court of Revision cannot reverse the verdict of a jury, and the fact that the verdict has been come to through the misdirection of the Judge to the jury does not, in my opinion, give the Court any power of interference. I concur with my colleague in thinking that the Judge was in error in his summing up, and that owing to that error the prisoner was acquitted by the jury.

1888.

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v.  
CHANDRA-  
KANT  
CHUCKER-  
BUTTY,  
1 B. L. R.  
A. Cr. 8.

[10 W. R. 14.]

Before Mr. Justice Looh and Mr. Justice Glover.

THE QUEEN v. HARI GIRI.<sup>1</sup>

*Culpable Homicide—Provocation—Act XLV. of 1860, s. 300 (Penal Code).*

1888.

Aug. 7.

Culpable homicide, though committed under provocation, will amount to murder, unless it is proved not only that the act was done under the influence of some feeling which took away from the person doing it all control over his actions, but that that feeling had an adequate cause.

1 B. L. R.  
A. Cr. 11.

[10 W. R. 26.]

This was a case tried with the aid of assessors.

The prisoner was committed for trial on charges under s. 304 (culpable homicide not amounting to murder) and s. 335 (causing grievous hurt on provocation). The Sessions Court added a charge under s. 302 (murder), “in order that the question of the sufficiency of the provocation might be adequately disposed of.” The assessors found the prisoner guilty under s. 304, being of opinion that his offence was reduced from murder under exception 1 of s. 300.

It appeared that deceased had gone accompanied by the police to serve a notice of sale of prisoner's crop. When the police and deceased separated, prisoner

<sup>1</sup> Committed by the Magistrate, and tried by the Officiating Sessions Judge of Cuttack, on a charge of culpable homicide.

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1 B. L. R.

A. Cr. 11.

[10 W. R. 26.]

rushed out with a sword, and struck deceased on the head with it, so that he died within four days. The Judge found that the act was not excused by its being in lawful defence of person or property, but he remarked : " I am, however, quite of opinion that a sufficient cause of provocation existed to remove the offence from the definition of murder to that of culpable homicide not amounting to murder, knowing the way in which legal rights are exercised in the mofussil ; and, looking at the fact of the imperfect way in which the exact circumstances have been brought out, and to the probability of the attacking party having over-stopped the law to a greater degree than is apparent, I think the prisoner is entitled to the benefit of the exception. I do not place full reliance upon the evidence for the defence, or believe in the plunder of the crop, though I think it probable that wanton damage may have been done. If the exact facts as deposed to by the witnesses for the prosecution are to be credited, the offence would, I consider, amount to murder, but the witnesses are, so to speak, all on one side and in one interest, and would not, of course, depose to any facts which might tend to implicate them in an illegal act. I convict him of culpable homicide not amounting to murder. I consider the facts show that the act was committed with the intention of causing such bodily injury as was likely to cause death, and sentence him, as stated in the finding, to 5 years' rigorous imprisonment."

The prisoner appealed.

The judgment of the High Court was delivered by

GLOVER, J.—We see no reason whatever to interfere in the prisoner's favour, and his appeal is rejected. Indeed, we are very decidedly of opinion that, on the evidence, the prisoner should have been convicted of murder.

The Sessions Judge has found that the prisoner killed the deceased with a sword, and that he (the prisoner) was not at the time acting in defence of either life or property. But he has considered his case to come within exception 1, s. 300 of the Indian Penal Code, on the ground of grave and sudden provocation. No doubt, the question, whether such provocation was sufficient to take the case out of the purview of s. 300, was a question of fact. But the Sessions Judge has not given any tangible reasons for giving the prisoner the benefit of the exception. He thinks that the restraint was probably carried out without exact warrant of law, but how, or in what point, he does not say. He does not believe that the prisoner's field was plundered, although he thinks that some damage may have been done. In short, he gives the prisoner the benefit of various possibilities, the existence of which has only been surmised.

This does not seem to us the correct way of treating the case. To give an accused person the benefit of exception 1, it ought to be shewn distinctly, not only that the act was done under the influence of some feeling which took away from the person doing it all control over his actions, but that that feeling had an adequate cause.

Now, taking the case in the most favourable light for the prisoner, we cannot find anything that satisfies these conditions. It is clear that the prisoner was not taken unawares, but had some expectation of what was likely to happen, and had placed his sword in readiness for the emergency.

However indignant he may have been at the wrong he supposed to have been done to him, it seems impossible to say that the provocation he received was of such a nature as would take away from him all power of self-control in any case, the provocation was certainly not sudden.

As the Judge and assessors have found on the evidence that the prisoner is not guilty of murder, and have acquitted him thereof, this Court cannot interfere, no question of law being involved; but we think it right to express our dissent from that finding, and to say that, in our opinion, it was not justified by the evidence.

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v.  
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1 B. L. E.  
A. Cr. 11.

Before Mr. Justice Phear and Mr. Justice Hobhouse.

THE QUEEN v. FATIK BISWAS.<sup>1</sup>

*False Evidence in a Judicial Proceeding—Charge—Evidence—Handwriting of Magistrate—Indian Penal Code (Act XLV. of 1860), s. 193.*

1868.  
Sept. 10.  
1 B. L. E.  
A. Cr. 13.  
[10 W. B. 37.]

It is essential, in order to sustain a charge under s. 193 of the Penal Code, that it should be proved that there was a judicial proceeding, and that the false statement alleged to have been made in the course of that proceeding was made. A charge under this section should specify not only the judicial proceeding in the course of which the prisoner is accused of having made the false statement, but the particular stage of the proceeding in which the statement is made.

The knowledge by the Sessions Judge of the handwriting of the judicial officer before whom the statement was made is no evidence of the statement having been made before that officer.

The prisoner in this case was charged under s. 193 of the Penal Code with having intentionally made a false statement in a stage of a judicial proceeding. He was found guilty by the Judge and the assessors by whom he was tried, and was sentenced to six months' rigorous imprisonment. The facts of the case were as follows:

The house of the prisoner had been searched in connection with a case of forgery, in which one Erfanulla and one Haralal Bose were convicted and sentenced to transportation, on the 4th September 1867. Among the papers were found letters implicating two of the amla of the Court of the Judge of Jessore, who were, accordingly, made over to the Magistrate to be prosecuted. The postscripts of two letters appeared to be in the handwriting of the prisoner; and he was accordingly summoned to prove them. He was examined by the Joint-Magistrate, and he then denied having written either of them. He was, therefore, prosecuted, and he was committed to the Sessions on two charges of having given false evidence in a stage of a judicial proceeding. The Sessions Judge and the assessors found the prisoner guilty, and he was sentenced to six months' rigorous imprisonment.

The prisoner appealed to the High Court.

Mr. Mackenzie for the prisoner.—It is not proved in evidence in what proceeding, or in what stage of such a proceeding, the prisoner made the false statement; there is no evidence to show where, or when, or by whom such a proceeding was held. The charges are defective, and the Sessions Judge was wrong in regarding his knowledge of the handwriting of the Magistrate as any evidence at all of such handwriting. The evidence is wholly insufficient to support the conviction.

The judgment of the Court was delivered by

PEAR, J.—We think that the prisoner must be acquitted in this case. He was tried before the Sessions Court upon two charges. The first one

<sup>1</sup> Committed by the Magistrate, and tried by the Sessions Judge of Jessore, on a charge of giving false evidence in a judicial proceeding.

[This case is referred to in *Queen v. Ameer Khan* (7 B. L. R. O. Cr. 240; 15 W. B. 69).—Ed.]

1868.

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[10 W. R. 37.]

was, "that he, on or about the 2nd day of April 1868, at Jessore, in the Court of the Joint-Magistrate, being lawfully bound on oath to state the truth, intentionally gave false evidence in a stage of a judicial proceeding by stating;" and then follows the statement alleged to be false; and the second charge was, "that he, on or about the 2nd day of April 1868, at Jessore, in the Court of the Joint-Magistrate, being lawfully bound on oath to state the truth, intentionally gave false evidence in a stage of a judicial proceeding by stating," and so on. It was essential to both these charges that the prosecution should make out that there was, on or about the second day of April, a judicial proceeding pending in the Joint-Magistrate's Court; and that the prisoner, in the course of that proceeding, made the statement which was alleged to be false. But we can find no evidence on the record that there was any such judicial proceeding pending in the Joint-Magistrate's Court at Jessore at any time. The proper mode of proving that fact would have been to produce the record of the proceeding which the prosecution referred to. If this was actually done, that record has become detached from the papers in this case, and has not come up to us as part of the Session's record.

We think it right to remark here that, in our opinion, both the charges made against the prisoner are seriously defective, in not specifying the judicial proceeding in a stage of which the prisoner is accused of having made the false statement. We even think that the particular stage of the proceeding ought to have been mentioned. It is only fair to the prisoner that the charge which is to stand for ever on record against him should be made as definite and specific as it reasonably can be; and, on the other hand, the prosecution too often needs to be definitely told what is the burden of proof which lies upon it. Had the charge in this case been properly specified, it could hardly have happened that the evidence which was most material to the issue to be tried should not be forthcoming.

We also cannot discover that there is any evidence in the Sessions record of the prisoner having made the statement in the Joint-Magistrate's Court which he is alleged to have made there. The Judge says: "The deposition he gave," that is, in the Joint-Magistrate's Court, "is marked A, and I know it to be in the Joint-Magistrate's handwriting." It is scarcely necessary for us to remark that the knowledge of the handwriting possessed by the Judge did not, of itself, constitute evidence, such as even he himself could have looked at or considered that the prisoner made that the statement which appeared in the deposition. The handwriting of the Magistrate did not afford legal evidence that the prisoner made the statement which was written down in that handwriting. There are one or two instances mentioned in the Code of Criminal Procedure when the attestation by the Magistrate and his signature is of itself sufficient proof of the document, such as that to be found in s. 366, relative to the examination of the accused person before the Magistrate. But there is nowhere any general provision, apart from these special instances, that the deposition of a witness, either written out or signed by a Magistrate, shall be evidence of itself, without more to the effect that the witness deposed before that Magistrate the words which appear in the deposition, and this case does not fall within the meaning of any of those instances. Moreover, even if the Judge's knowledge of the handwriting of the Joint-Magistrate could have been supposed to afford to himself any evidence in proof of the deposition, it obviously could not be such evidence to the assessors. The only mode of conveying it to them would be by the Judge stating on oath before them what he actually knew upon the point.

It appears to us that, in the absence of any evidence of there having been in fact a judicial proceeding pending in the Joint-Magistrate's Court on or about the 2nd of April 1868; and, further, in the absence of any evidence of the prisoner having made the statement alleged against him in any such proceeding, the whole foundation of the two charges upon which the prisoner was tried in the Sessions Court breaks down. We have had some hesitation in our minds whether or not we should exercise the powers which are given to us, sitting here in appeal, by the provision of s. 422 of the Criminal Procedure Code, and send back the case to the Sessions Court, in order that any additional evidence on these two points might be produced by the prosecution. It is clear that evidence relevant thereto, either affirmative or negative, must exist. But upon a consideration of all the circumstances of the case, including even some of the collateral matter to which the Judge has referred, and bearing in mind that the prisoner has already undergone nearly two months' rigorous imprisonment, we don't think it necessary to exercise the discretion which is given to us by that section; and we think it is proper to say that, on the evidence which appears on the record, the prisoner ought to be acquitted. He will, therefore, be discharged from custody, so far as this conviction is concerned.

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A. Cr. 13.

[10 W. R. 37.]

*Before Sir Barnes Peacock, Kt., Chief Justice, and Mr. Justice Mitter.*

D. ABRAHAM v. THE QUEEN.<sup>1</sup>

1868.

Sept. 12.

*British Burmah—Lord's Day Act—Abkari Rules.*

1 B. L. R.

A. Cr. 17.

The Lord's Day Act does not extend to criminal cases in British Burmah. A was convicted and fined for the breach of an abkari rule. *Held*, the conviction could not be supported, on the ground that the abkari rule had not the force of law.

THE following case was submitted for the opinion of the High Court by the Recorder of Rangoon :

The appellant, D. Abraham, a Jew, has been convicted by the Town Magistrate, of a breach of abkari rules, a copy of which rules is attached to this reference. The 28th rule is the one under which the charge was laid, and the fine inflicted was 400 rupees, the offence being a second offence.

The first question upon which I would ask the opinion of their Lordships is, whether the proceedings ought to be quashed, the appellant having been arrested on a Sunday.

The Advocate for the appellant cites the Lord's Day Act of 29 Car. 2, c. 7, and the case of *Taylor v. Phillips*.<sup>2</sup> It is contended that this Act applies to the case, because s. 21 of Act XXI. of 1863 declares that, in all suits cognizable by the Recorder's Court, all questions, as well of fact as of law or equity, shall be dealt with and determined according to the law administered by the High Court of Judicature at Fort William in Bengal in the exercise of its Ordinary Original Civil Jurisdiction. Assuming that the Lord's Day Act was in 1863 a part of the law administered in the High Court at Fort William in its Ordinary Original Civil Jurisdiction, I do not think that it applies, therefore, in a criminal appeal in the Recorder's Court in Burmah. S. 21 refers, in my opinion, to civil suits alone; and as the Criminal Procedure Code, which, I think, is the law which must guide me, is

<sup>1</sup> Reference from the Recorder of Rangoon.

<sup>2</sup> 3 East, 155.

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silent upon the point, I see no reason why the proceedings should be quashed, because the appellant was arrested on a Sunday.

The second question is, whether the abkari rules, under which the appellant has been convicted and fined 400 rupees, have the force of law; and, if not, whether the conviction can be supported.

Upon this point I have very considerable doubt, and when it arose in the case, I desired the Government Advocate, who did not, in the first instance, appear for the Crown, to ascertain under what authority those abkari rules were passed. The case was adjourned for the purpose of ascertaining this, and on its coming on for hearing again, the Government Advocate informed me that he could point to no authority under which the Chief Commissioner of British Burmah, who appears to have issued the rules in question, had power to do so.

The abkari revenue is collected in the Bengal Presidency under Act XXI. of 1856, amended by Act XXIII. of 1860; and by Act XX. of 1864, power is given to the Governor-General in Council to extend those Acts to places under their immediate administration. I conceive that British Burmah is a place under the immediate administration of the Governor-General in Council. I find, however, that the Abkari Acts have not been extended to British Burmah; but that the rules, which I enclose, are quite independent of the Acts of the Governor-General in Council relating to abkari, and are entirely different in principle to the rules applying in Bengal. They are modified to a certain extent every year, but similar rules have been in force in the province for about fifteen years.

It appears to me that, if these rules have any legal effect, it must be by virtue of some power vested in the Chief Commissioner as representing, in British Burmah, the Board of Revenue. The powers of the Chief Commissioner are defined in a Resolution printed in the *Gazette of India Extraordinary*, January 31st, 1862. But it appears to me that the powers of the Chief Commissioner as a Board of Revenue cannot extend so far as to enable him to pass rules containing penal clauses, such as are contained in the rules in question.

The subject appeared to me to be of so much importance, that I requested the Chief Commissioner to cause a search to be made for any document which might give him any power in the matter; and as I am now informed by the Government Advocate that no such document can be found, I beg to refer the matter to your Lordships.

It seems to me that there is no power at present vested in any one but in the British Parliament, or the Legislative Council of the Governor-General, to make laws for this province, and that laws can only be extended to the provinces by the Local Government, that is, the Governor-General in Council, or by the Chief Commissioner exercising the powers of a Local Government under Act XXXI. of 1867.

These abkari rules have not been made or extended by any of these authorities; and I would, therefore, express my opinion that they have not the force of law, and consequently that the conviction in this case cannot be supported.

The opinion of the High Court was delivered by

PEACOCK, C.J.—We are of opinion that the Lord's Day Act does not extend to criminal cases in British Burmah, and that the conviction is not bad because the defendant was arrested on Sunday.

We are of opinion that, upon the facts stated, the abkari rules passed by the Chief Commissioner have not the force of law, and that the conviction cannot be supported.

Before Mr. Justice Phear and Mr. Justice Hobhouse.

IN THE MATTER OF HARIMOHAN MALO<sup>1</sup>

AND

QUEEN v. JAYAKRISHNA MOOKERJEE.<sup>2</sup>*Act XXV. of 1861, ss. 62 and 308—Removal of Nuisances—Orders to prevent Obstructions.*1868.  
Nov. 20.1 B. L. E.  
A. Cr. 20.  
[10 W. R. 53.]

When a case falls both under s. 62 and under s. 308 of the Criminal Procedure Code, the order of the Magistrate ought not to be absolute in the first instance. He should give the defendant an opportunity to show cause against the order.

*Semble.*—Whether a case comes under either of these two sections, or under both, the order of the Magistrate ought to contain a clear statement of the facts upon the basis of which the Magistrate has made the order.

These two cases were heard by the High Court together. In the first, a petition had been presented by Harimohan Malo and five other fishermen, inhabitants of Radhanagar, in the district of Jessore, in which they stated that they were the lessees, under Raja Barada Kant Roy, of part of the jalkar in the river Bhairab, in the district of Jessore; and that the Magistrate of the District had directed them to remove certain *kumars* which they had placed in the river to catch fish. The petitioners further stated that they had submitted to the Magistrate a petition, praying that the order be cancelled, on the ground that it was unjust, but the Magistrate declined to grant their prayer. They now petitioned the High Court to send for the record of the Magistrate, and to set aside his order, on the grounds that “the order, being made *proprio motu*, did not disclose that the interests of the public required its issue,” and that there was “no evidence to show that the *kumars* were a nuisance, or in any way injurious to the interests of the public.” The record was accordingly sent for; and it appeared that the Magistrate’s order was absolute in its terms, and that he did not give the petitioners an opportunity of showing cause against it.

The second case came before the High Court on a reference from the Sessions Judge of Hooghly, under s. 434 of Act XXV. of 1861. The reference was as follows:—

“It appears that the Deputy Magistrate of Serampore, considering that a public foot-path had been obstructed, proceeded under s. 63 of the Code of Criminal Procedure, and directed the removal of the obstruction. The opposite party remonstrated, and stated it was their private property, and requested an enquiry.

The Deputy Magistrate, however, acted summarily, and disposed of the case.

I think that the Deputy Magistrate was wrong in making his order absolute, and without proceeding under s. 310 of Ch. XX., his original order was one which would be required by s. 308; and as this was not a case in which speedy action was required, or in which immediate danger might be

<sup>1</sup> Petition under s. 404 of the Code of Criminal Procedure.

<sup>2</sup> Reference No. 155 of 1868, from the Sessions Judge of Hooghly, under s. 434 of the Code of Criminal Procedure.

[This case has been distinguished in *Uttam Chunder Chatterjee v. Ram Chunder Chatterjee* (13 W. R. 72; 5 B. L. R. 131); and referred to in *Rai Luchmeeput Singh*, Appellant (14 W. R. 17; 5 B. L. R. Ap. 81), in *Pitambur Dey*, Reference in the Case of (17 W. R. 57), and in *Gopi Mohun Mouluk v. Taramoni Chowdhurani* (4 C. L. R. 309; 1. L. R., 5 Cal. 7, Civ. Rul.).—Ed.]



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[10 W. R. 53.]

apprehended, he ought to have proceeded under Oh. XX. Undoubtedly, the Deputy Magistrate had discretion to adopt either procedure, but I think that ss. 62 and 63 expressly are intended for emergencies when prompt action is necessary, and not for a case like the present, which is certainly contained in s. 308, and in which individual private rights are in question."

Baboo *Debendra Chandra Ghose* for the petitioners in the first case.

The judgment of the Court in both the cases was delivered by

PHEAR, J.—In these two cases we have had to consider the effect of ss. 62 and 308 of the Code of Criminal Procedure, as operating to give authority to the Magistrate under certain circumstances to issue injunctions against individuals, controlling them in the exercise of their proprietary rights. On the whole, we have come to the conclusion that these two sections are not in conflict with one another, and also that they are not, properly speaking, alternatives. The essential difference between them is that s. 308 expressly directs that the injunctive order of the Magistrate should, in cases to which that section applies, be an order *nisi* so to speak, that is, an order accompanied by a condition that it is not to operate, if the party show cause, within a specified time, why the order should not be obeyed; while, on the other hand, s. 62 speaks only of an order absolute, without saying that the party is to be afforded an opportunity for showing cause against the order. In cases falling under either the one section or the other, the order must clearly be in writing. This is expressed in so many words by the provisions of s. 62, and it is also implied by the terms of s. 308, followed as it is by the provisions which appear in s. 309. Now, it appears to us that, in these two cases, it is not necessary that we should determine exactly what is the meaning or scope of s. 62. It is enough for us to say that, in our judgment, if any part of the ground covered by that section also falls within the scope of s. 308, then the Magistrate must conform to the more particular directions of the latter section, and it is not sufficient that he should comply merely with the general words of the former; that is, he cannot choose whether he will issue an order without a condition, or whether he will issue an order with a condition, but is bound, in all cases which fall within the operation of s. 308, to comply with the provisions of that section. Now, it appears to us that, in both the cases which are before the Court, the subject or the occasion of the order fell directly within the meaning of s. 308. In each case, according to the view of the facts which the Magistrate apparently took, the obstruction or nuisance, which it was the object of the order to remove or abate, occurred in a public place or a public highway. Consequently, s. 308 applied; and from what I have already said, it follows that the Magistrate had not any authority in either of these cases to issue an order absolute, but was bound to give in his order an opportunity to the person to whom it was directed to show cause against it; and I need hardly say that in neither of the orders complained of was this opportunity given.

The Jessore case was brought before us by petition of parties aggrieved. The Magistrate had directed in his order that certain *kumars* should be removed from a piece of water, and it appeared that his reason for directing this was two-fold: namely, that they constituted an obstruction to persons lawfully using this piece of water as an highway, and also that this produced a nuisance by causing the accumulation of decaying vegetation in a public place. We think that the complainants have made out that this order was an improper one. It was absolute in its terms, and did not comply with the provisions of s. 308. We are, therefore, of opinion that it should be quashed.

The Hooghly case has come before us in the shape of a reference from the Judge, who recommends that the order of the Magistrate be quashed on the ground of its illegality. There the Magistrate had issued an absolute order for the removal of a fence which he thought was an obstruction to a certain public path or highway. For the reasons which I have already mentioned, this order also is bad, because it did not give the persons affected by it the opportunity to show cause against it. Accordingly, we think that the Judge is right in considering that the order is illegal, and ought to be quashed.

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[10 W. R. 53.]

I think it right to add that it seems to me that, in all cases, whether cases falling exclusively under s. 62 or cases coming under the provisions of s. 308, the order ought to contain a clear statement of the facts which the Magistrate, in the exercise of his judicial discretion, considers to constitute the material facts of the case, and upon the footing of which he has made the order. It is only fair, I think, to the party against whom the order is made that he should be made to know distinctly the grounds upon which the Magistrate has acted, in order that he may be better guided to a conclusion as to whether the order is one which he is bound to obey, or whether he can safely resist it either under the penal procedure which is laid down by s. 188 of the Penal Code, or by showing cause under the provisions of s. 308 and the following section. But whether an order would be bad or not when it did not contain a statement of the material facts in the way I have indicated, I still think that at least the record which is sent up to this Court when the validity of the Magistrate's order is put in question should disclose all the facts upon which the Magistrate acted, and upon which he relied for justification of his order. I may say that in neither of the cases before us is this so. We can perhaps just gather from some rather informal orders endorsed upon the back of successive petitions in each case what view the Magistrate took of the general facts. But there is no formal adjudication, no formal statement of those facts either in the order itself for the information and benefit of the parties, or in the record for the purpose of enabling this Court to come to a judgment upon the validity of the order; and I am inclined to the opinion that this alone would justify us in quashing the order, because I think we ought not to maintain orders of this kind in force, unless we see that the facts of the case as exhibited in the record justify them in law.

CASES DETERMINED BY  
The High Court of Judicature,  
AT FORT WILLIAM IN BENGAL,  
IN ITS ORIGINAL JURISDICTION.

ORIGINAL CRIMINAL

*Before Sir Barnes Peacock, Kt., C.J., Mr. Justice Phear, and Mr. Justice Macpherson.*

THE QUEEN v. THOMPSON.<sup>1</sup>

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Sept. 3.

1 B. L. E.  
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*Offence upon the High Seas—Punishment—Procedure—17 & 18 Vict., c. 104, s. 267; and 18 & 19 Vict., c. 91, s. 27—12 & 13 Vict., c. 96; and 23 & 24 Vict., c. 88—Act XIII. of 1865.*

In prosecuting a British subject for an offence committed on board a British ship upon the high seas, *Held* (*dubitante Phear, J.*), that he must be charged with an offence under English law; 2. That the punishment must be according to English law; 3. That the trial must be according to the procedure of the local Court.

Therefore, where a British subject was charged before the High Court with having committed an offence under 7 William IV. and 1. Vict., c. 85, s. 2, on board a British ship, upon the high seas, within the Admiralty jurisdiction of the Court, and found guilty of an offence under 14 and 15 Vict., c. 19, s. 5, *Held* that the conviction was good, and that the prisoner would be rightly punished with "rigorous imprisonment," which is defined by s. 53 of the Indian Penal Code to be "imprisonment with hard labour," and that the trial had been rightly proceeded with under Act XIII. of 1865.

It ought to appear upon the face of a charge that it had been delivered to the Clerk of the Crown by a Justice of the Peace or a Magistrate, but its not so appearing is a formal defect only, to which objection can only be taken under s. 41 of Act XVIII. of 1862 before the jury has been sworn, and it is not ground for arrest of judgment.

On 31st August 1867, C. Thompson, a British subject, was tried before the High Court upon the following charge:

"Fort William in Bengal to wit—that Charles Thompson, on the 25th day of May 1867, on board the British ship or vessel *Scindia*, upon the high seas, and within the Admiralty jurisdiction of this Court, with a certain knife, feloniously, unlawfully, and maliciously stabbed, cut, and wounded one Edward Ned, with the intent in so doing him, the said Edward Ned, thereby then to disable, against the form of the Statute in such case made and provided."

The jury returned the verdict, "guilty of unlawfully wounding."

PHEAR, J., declined to pass judgment until he had taken the opinion of the full Court on the following points, namely: 1st, whether there had been a due trial in the case; 2nd, whether there was anything which appeared on the record which would be good in arrest of judgment.

The case now came on for argument upon the points reserved.

Mr. *Ingram*, for the prisoner, contended, 1st.—That even if the English law applied, there was such grave irregularity in the trial, that the verdict ought to be set aside. 2nd.—The English law applicable to this case does not

<sup>1</sup> [This case has been referred to in *Reg. v. Elmstone, Whitwell, et. al.* (7 Bom. H. C. B. 89); and commented on in *Reg. v. Rastya Rama* (8 Bom. H. C. B. 63).—Ed.]

extend to this country. 3rd.—The directions contained in the Statutes, which give jurisdiction in such cases as this, had not been followed. 4th.—The Indian Legislature, by the Act for the abolition of the Grand Jury (Act XIII. of 1885), has made it impossible for this Court to follow those directions. 5th.—On a trial for felony, this Court cannot find the prisoner guilty of misdemeanour, the English Statute which gives that power in England not having been applied here.

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There can be no doubt that the prisoner was tried under English law, and so the jury were told by the Judge (Phear, J.) in summing up. If so, there is a want of caption in the indictment. If the prisoner was rightly tried under the English law, he was entitled to all the advantages and privileges pertaining to an English trial. The first step of an English criminal trial is the presentment of a Grand Jury. The differences between the privileges of a prisoner tried under the English law and one tried under the Indian law ought to have been pointed out to the jury, if not to the prisoner. For instance, the differences in the law of challenges, the law of evidence, &c.

But the English law does not extend to India. Then, if the English law does not apply, what meaning is there in the indictment? It certainly is not under any section in the Penal Code. If it is under 17 and 18 Vict., c. 104, s. 267, it ought to have described the prisoner as a master, seaman, or apprentice; for this Statute is not declaratory, and therefore the indictment must show on the face of it the jurisdiction and authority of the Court. But that section is repealed by 18 and 19 Vict., c. 91, s. 21, which, as I read it, directs that the person charged shall be tried under the local law and according to local procedure. Act XIII. of 1865 makes it impossible for the prisoner to be tried under the Penal Code, for since the abolition of the presentment by Grand Jury, the charge ought to be based on one sent up by a Magistrate or Justice of the Peace, but he would not have jurisdiction in an Admiralty case, but only in one falling within the Ordinary Original Criminal Jurisdiction. [PHEAR, J.—The words of s. 3 of Act XIII. are very large.] Yes. But the preamble of the Act limits the application of the Act to the procedure of the High Courts in the exercise of their Original Criminal Jurisdiction. It may well be that the Grand Jury is not abolished on the other side of the Criminal Jurisdiction of the Court, but here there was none summoned, and no presentment.

The Charter of the Supreme Court, s. 27, gave that Court full power and authority to enquire, hear, try, examine, and determine crimes according to the laws and customs of the Admiralty, in that part of Great Britain called England. No change has been made in this. See 33 Geo. III., c. 52, s. 156; 53 Geo. III., c. 155, s. 110; 24 and 25 Vict., s. 9; Letters Patent of High Court, 1862, s. 21., Letters Patent of High Court, 1865, s. 22.

There could not be a conviction for misdemeanour when felony was charged. *Rex v. Westbeer*.<sup>1</sup> The indictment here was for felony under 7 Wm. IV., and 1 Vict., c. 85, s. 2, which defines the offence; 14 and 15 Vict., c. 19, s. 5, which empowers the jury to convict of misdemeanour, where the felonious intent is negatived, relates only to procedure, and, as such, does not apply in this country, and it does not apply in this case.

The *Advocate-General*.—The first point reserved by the learned Judge involves the question, in what sense is it to be said that a person tried under the Merchant Shipping Amendment Act, 19 and 20 Vict., c. 97, is to be tried

<sup>1</sup> 2 Strange, 1136.

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according to English or to local law? I submit that the Legislature meant that law to be applicable which would define the offence and impose the punishment, namely, the Criminal Law of England; but as regards procedure, the provisions of the local law if differing from the English Criminal Law. It is only on that construction of the Amendment Act that the difficulty of the absence of a Grand Jury can be avoided. That puts this Court in the position of a Court in a place where there could be no jury at all. It is clearly the intention of the Act to provide for the punishment of offences as early as possible, and as near as possible to the place where the offence had been committed. But the substantive law, that is, the law defining the offence and punishment, is not the law of the Court in which the offence is to be tried. "Crime or offence" must be construed to mean a crime or offence under the English law. Has the local law here been extended by any thing beyond what its extent is defined to be by its own provisions? If the Governor-General in Council had power to pass a law rendering a person liable to be tried under the Penal Code for an offence committed beyond the limits of the territories which are vested in Her Majesty by 21 and 22 Vict., c. 106, it is sufficient to say that no such law has been passed which would bring such person under the provisions of the 3rd section of the Code. By s. 2, the liability of a person to punishment under the Code is limited to the case of an offence committed within the said territories. The Code is silent also as to crimes maritime. This is strong to shew that it has not been the intention of the local Legislature to take away the old Admiralty jurisdiction.

Shortly before the establishment of the High Court, Act XVIII. of 1862 was passed "to improve the administration of Criminal Justice in Her Majesty's Supreme Courts of Judicature." Ss. 39 and 56 of that Act make it clear that, in theory, at any rate, there are offences punishable otherwise than under the Penal Code. S. 56 says that Act XVI. of 1852 is repealed so far as it relates to indictments and proceedings in the Court, except as to offences not punishable under the Indian Penal Code. This is such a case. It would have been a strong measure for the Legislature of this country, if they would have done it, to stop the application of the Merchant Shipping Acts to this country. When the Penal Code received the assent of the Governor-General in Council in 1860, it is clear that he had no power to alter or modify Acts of Parliament relating to India. This is to a certain extent altered by the Indian Councils Act, 1861 (24 and 25 Vict., c. 67), which repeals s. 43 of 3 and 4 Wm. IV., c. 85, but see the 22nd section.

But, whatever may be the substantive law applicable, I contend the case must be dealt with under the local procedure. The correct way of framing the charge has been followed, namely, of framing it as if the accused had been put on trial at the Central Criminal Court, though I am not sure whether, as a question of pleading, either mode of framing the charge would not be good, i. e., whether under the English Statute, of cutting and wounding; or, under the Penal Code, of doing hurt or grievous hurt. The charge, if not absolutely right in form, would either way be substantially good and sufficient. Then, having been charged with felony, can the prisoner be found guilty of a misdemeanour? I submit, he can. The offence must be taken as an offence against the English Criminal Law. 14 and 15 Vict., c. 19, s. 5, was part of that law at the time of the passing of the Merchant Shipping Acts.

If the Court should hold that the charge ought to be under the Penal Code, I contend that the counts are substantially sufficient. Act XVIII. of 1862, s. 40, says: "No indictment shall be held insufficient for unnecessary

averments or mere formal defects." There is a perfectly good finding by the jury of an offence under s. 324 of the Penal Code. [MACPHERSON, J.—12 and 13 Vict., c. 96, has been extended to India by 23 and 24 Vict., c. 88.] That makes the procedure to be that of the local Courts. That does away with the difficulty which has been urged as regards the abolition of the Grand Jury, but does not touch the argument as to the law creating the offence and punishment. On the contrary, s. 2 of 12 and 13 Vict., c. 96, makes the punishment to be that to which the accused would be liable, had the offence been committed and tried in England.

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Mr. Ingram in reply.—The effect of s. 21 of 18 and 19 Vict., c. 91, appears to be that the Court, outside whose jurisdiction the offence has been committed, has only jurisdiction when, if it had been committed inside, it could be treated as one under its ordinary original jurisdiction. But this is not the case here. The indictment itself speaks of the act having been on the high seas out of the jurisdiction of the Court. How then can this case come under the words of s. 3 of Act XIII. of 1865. That section speaks of an offence committed, or which, according to law, may be dealt with as if it had been committed, within the local limits of the civil jurisdiction.

PEACOCK, C.J.—When I first saw the charge, I thought it had been preferred in the High Court without having been made by a Justice of the Peace. I thought then that it could not be supported, because when the Legislature by Act XIII. of 1865 abolished the Grand Jury, they enacted that a Justice of the Peace or Magistrate should deliver to the Clerk of the Crown a written instrument of charge, and that the Clerk of the Crown may, if he consider it necessary or expedient so to do, amend, alter, or add to the same. A Justice of the Peace or Magistrate is put in the place of a Grand Jury, and the written instrument of charge takes the place of a presentment or inquisition of a Grand Jury.

Formerly in England the Master of the Crown Office used to present criminal informations for misdemeanours without the authority of the Court of King's Bench. Great abuses arose from the exercise of this power, and much oppression and injustice was done. In consequence the Statute 4th and 5th William and Mary, c. 18, was passed, whereby it was enacted that no such informations should be filed without the express direction of the Court of King's Bench. That Statute applies only to motions filed by the Master of the Crown Office, and not to *ex officio* informations by the Attorney-General. When the Grand Jury was abolished in this country, the Legislature made such provision as it considered necessary, and provided that a charge should be sent and delivered to the Clerk of the Crown by the committing officer, and it is important to see that a proper charge is sent up in the mode enacted. In the present case, such a charge has, in point of fact, been sent up. The only defect in the charge is that it does not appear on the face of it to have been delivered to the Clerk of the Crown by a Justice of the Peace. But we are not sitting here as a Court of Error, in which we could know nothing but what appeared on the face of the record. We are sitting as a Court which has all the proceedings before it, and therefore, although we do not see on the face of the record that the charge has been preferred by a Justice of the Peace, we know that it was so, and the Judge presiding at the trial would not have quashed the charge for the defect now relied upon, but would have caused it to be amended. Under these circumstances, although I think it ought to appear on the face of the charge that it was delivered to the Clerk of the Crown by a Justice of the Peace or Magistrate, still I think the defect of its not so appearing is a mere formal defect,

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to which objection could only have been taken, under s. 41 of Act XVIII. of 1862, before the jury was sworn, and that it is not ground for arrest of judgment. S. 41 speaks of an "indictment," but s. 7 of Act XIII. of 1865 says that "in Act XVIII. of 1862 the word "indictment" shall be understood to include the word "charge," and all the provisions of the said Act shall apply to charges recorded as aforesaid and the trial of such charges."

Next, was the charge in accordance with English law? The prisoner was charged with cutting and wounding with an intent which rendered the act an offence under 7 Wm. IV., and 1 Vict., c. 85, s. 2, and he was found guilty under 14 and 15 Vict., c. 19, s. 5. The question has been raised whether a charge made under 7 Wm. IV., and 1 Vict., c. 85, followed by a conviction under 14 and 15 Vict., c. 19, can be upheld in this Court, in the exercise of Criminal Jurisdiction under its Charter.

By the Merchant Shipping Act, 17 and 18 Vict., c. 104, s. 267, it is enacted that "all offences against property or person committed in or at any place, either ashore or afloat, out of Her Majesty's dominions, by any master, seaman, or apprentice, who at the time when the offence is committed is, or within three months previously has been, employed in any British ship, shall be deemed to be offences of the same nature respectively, and be liable to the same punishment respectively, and be enquired of, heard, tried, determined, and adjudged in the same manner, and by the same Courts, and in the same places, as if such offences had been committed within the jurisdiction of the Admiralty of England." The section applies to offences committed ashore or afloat out of Her Majesty's dominions. The word "offences" did not, in strict terms, mean offences against the law, but acts which, according to English law, would amount to offences, if committed in England. The section is not applicable to this case; but I refer to it to shew what must be the meaning of "any crime or offence" in s. 21 of 18 and 19 Vict., c. 91 (the Merchant Shipping Amendment Act of 1855). S. 1 of that Act enacts that "it shall be taken to be part of the Merchant Shipping Act, 1854, and shall be construed accordingly." The Merchant Shipping Act has not been shewn to apply to this case, for it is not charged or found that the prisoner was a "master, seaman, or apprentice," and we cannot assume that he was.

The 12 and 13 Vict., c. 96, extended to the Colonies generally, but "all such parts and places as are under the Government of the East India Company" were excepted. But c. 88 of 23 and 24 Vict. extends it to India. S. 1 of that Act enacted that "so much of the said Act 12 and 13 Vict., c. 96, as excepts the parts and places then under the Government of the East India Company from the interpretation of the word "colony" shall be repealed, and for the purpose of the said Act the word "colony" therein shall include and apply to every part and place heretofore under the Government of the East India Company, or which may be under the Government of Her Majesty in India, and all the provisions of the said Act shall be construed and take effect accordingly."

The second section of 12 and 13 Vict., c. 96, enacts "that, if any person shall be convicted before any such Court of any such offence, such person so convicted shall be subject and liable to and shall suffer all such and the same pains, penalties, and forfeitures as by any law or laws now in force, persons convicted of the same respectively would be subject and liable to in case such offence had been committed, and were inquired, tried, heard, determined, and adjudged in England, any law, statute, or usage to the contrary notwithstanding." The only possible construction of that sentence is that they shall be liable to "all such and the same pains, &c.," and those only. I

can well understand that Parliament would prefer to make such person subject to the punishment imposed by English law rather than by that of the colony. They might not be certain what that law was, or, if aware of it, might not wish to extend it. For instance, a person convicted here of certain offences may be punished by whipping. The British Parliament, except in one or two special cases, has not sanctioned that punishment, and it may well be that it would not render a person so convicted liable to a punishment which it had not sanctioned for offences committed in England.

The prisoner being punishable then, as I think, according to English law, it seems to me that he ought to be charged with an offence against the English law. If he was charged with hurt under the Penal Code, how should we know what punishment to inflict. It appears to me that a charge according to English law is necessary to enable the Judge presiding at the trial to know what sentence he ought to pass.

S. 21 of the Merchant Shipping Amendment Act, 1855, enacts that, "if any person" (it does not say a master, seaman, or apprentice), "being a British subject, charged with having committed any crime or offence on board any British ship, on the high seas, or in any foreign port or harbour; or if any person, not being a British subject, charged with having committed any crime or offence on board any British ship, on the high seas, within the limits of its ordinary jurisdiction, such Court shall have jurisdiction to hear and try the case as if such crime or offence had been committed within such limits." This is the case with the present prisoner, that is, he, a British subject, has committed such crime or offence on board a British ship, on the high seas, as this Court would have had cognizance of, if committed within the limits of its ordinary jurisdiction; therefore the Court has jurisdiction to hear and try the case as if such crime had been committed within such limits.

In hearing and trying the case in the same manner as if committed in India, we must try him according to the provisions of Act XIII. of 1865. The prisoner having been sent up by a Justice of the Peace with the charge on which he has been tried (or he has been tried on that charge amended by the Clerk of the Crown), the trial has been conducted according to the procedure of this country (see ss. 3 and 4), although he is punishable according to English law.

The 23 and 24 Vict., c. 88, s. 2, says: "The Supreme Court and all public officers and other persons in the Presidency shall have the same jurisdiction and authorities, and proceed in the same manner in relation to the person charged with such offence, as if the same had been committed, or originally charged to have been committed, within the limits of the ordinary jurisdiction of such Supreme Court." S. 21 of 18 and 19 Vict., c. 91, says: "If the person is found within the jurisdiction of any Court of Justice in Her Majesty's dominions, which would have had cognizance of such crime or offence if committed within the limits of its ordinary jurisdiction, such Court shall have jurisdiction to hear and try the case as if such crime or offence had been committed within such limits: provided that nothing contained in this section shall be construed to alter or interfere with the Act of the thirteenth year of Her present Majesty, chapter ninety-six."

The 23 and 24 Vict., c. 88, very properly extended the provisions of 12 and 13 Vict., c. 96, to this country, and thereby makes the prisoner subject and liable to "all such and the same pains, penalties, and forfeitures as by any law or laws which at the time of the passing of that Statute were in force, persons convicted of the same, respectively, would be subject and liable

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to, in case such offence had been committed, and were inquired, tried, heard, determined, and adjudged in England, any law, statute, or usage to the contrary notwithstanding."

The 14 and 15 Vict., c. 19, s. 5, enacts that, "if upon the trial of any indictment for any felony, except murder or manslaughter, where the indictment shall allege that the defendant did cut, stab, or wound any person, the jury shall be satisfied that the defendant is guilty of the cutting, stabbing, or wounding charged in such indictment, but are not satisfied that the defendant is guilty of the felony charged in such indictment, then and in every such case the jury may acquit the defendant of such felony, and find him guilty of unlawfully cutting, stabbing, or wounding, and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for the misdemeanour of cutting, stabbing, or wounding."

The charge then has been preferred under English law, and it has been tried according to the procedure of Indian law, and the punishment must be according to English law. A sentence to imprisonment with hard labour is the same as rigorous imprisonment under s. 53 of the Indian Penal Code.

I think there are no grounds shewn for arresting judgment.

PHEAR, J.—I think, whether the offence be measured by English or by local law, at any rate the procedure is that prescribed by local law.

This appears, I think, from a comparison of s. 267 of the Merchant Shipping Act of 1854 with s. 21 of the Amendment Act of 1855. Although the first of these sections does not apply to the case before the Court, so far as the facts are disclosed in the record, it seems to me that the words in s. 267 are as explicit as words can be, to say that the manner and substance of the trial shall be that of the English Admiralty Court, while the words in s. 21 are quite different, and they certainly apply to this case. In view of this difference, it appears to me that when this latter section gives jurisdiction to this Court to hear and to try as if the offence had been committed within the local limits of the Ordinary Original Criminal Jurisdiction, it means at least to direct that the trial should be conducted according to the procedure of the Court in that jurisdiction. If so, the mode of procedure proper to this trial would be that declared in Act XIII. of 1865. Then, has that procedure been followed?

It has, if there was a charge preferred by a Magistrate or Justice of the Peace; and if the charge on which the prisoner was tried was framed on that by the Clerk of the Crown. There is no doubt this was the case. The record is, in truth, unimpeachable, as the Chief Justice has stated, except so far as it does not disclose the written charge of the Magistrate. But as the written charge of the Magistrate is actually before the Court, that point, I agree, cannot arise now as matter of objection.

As to the question whether the offence is to be measured by English law or local law, I do not now feel myself in a position to give an answer. The matter hangs upon statute, and not upon principle, and the two or three enactments which constitute the statute-law on the subject seem to have been passed without much reference the one to the other. Consideration of 18 and 19 Vict., c. 96, s. 21 (entirely different as it is from s. 267 of the Act of the previous year) together with s. 1 of 12 and 13 Vict., c. 96, which was made applicable here by 23 and 24 Vict., c. 82, leads me rather to the present conclusion that the offence must be measured by local law. But if it were necessary to decide that point, I should like to have time for further consideration. At the same time I must say that I do not feel the force of

the argument drawn by the Chief Justice from the supposed meaning of the word "offence" in s. 267. I do not think that the words there used were intended to make a "master, seaman, &c.," punishable in an English Court of Admiralty for an act committed in foreign territory, merely on the ground that it was such that, if it had been done within the jurisdiction of the Admiralty of England, it would have been criminal, and independently of whether it was justifiable under the law prevailing in that territory. During the short period of my legal experience—short compared with that of the Chief Justice—I have become very familiar with discussions among the ablest and most learned men in England as to the proper meaning to be attached to the terms "offence" and "crime;" and the most common result arrived at by the disputants was that the words meant any thing that was *malum in se*, and that an English Court of Criminal Justice ought always, theoretically, to punish an act falling under this head (whatever it may amount to) if it had the malefactor in its power. It appears to me, for the moment, that the word "offence" in s. 267 is used in some such vague sense as this, and I do not feel at all sure that an offence out of the British Territory does not there mean something different from that which is an offence under English law alone. But whether the offence be governed by English or by Indian law, singularly enough, perhaps, the finding of the jury as duly recorded applies to either. Naturally the verdict of the jury in its terms finds the prisoner guilty of an offence which conforms to the definition of English law, because the directions received by the jury from the Judge were given in the words of the English Statute. It seems to me, also, that the jury have, in so many words, found the prisoner guilty of inflicting hurt upon the prosecutor with a knife. This results from the negativing of particular intents laid in the several charges, which is effected by the special finding of the jury. For these intents being out of the way, the remaining part of the charges describes so closely an offence defined by s. 324 of the Penal Code, that I cannot say that the small apparent discrepancies make it bad after verdict. Therefore, as I view the record, it exhibits a good conviction, whether under the English law or under the Penal Code.

The only remaining difficulty which has occurred to me, is one regarding the punishment to be awarded. Is it to be that which is directed by English law, or that of the Penal Code; and, if the former, how is it to be carried out here? Fortunately again, in this particular case, the two melt into one. S. 2 of 12 and 13 Vict., c. 96, provides that the punishment shall be the same as if the matter were tried and adjudged in England, *viz.*, that in this case it must be "imprisonment with hard labour," while the punishment directed by the Penal Code for offences under s. 324 is "rigorous imprisonment." But, further, the 53rd section of the Penal Code, in defining this first-mentioned class of imprisonment, says that it is "rigorous, that is, with hard labour." I therefore think that a sentence can be passed which shall be legally good, whether the offence be measured by English law or by the Indian Penal Code.

MACPHERSON, J.—I think the conviction is good, whether the English or the local law applies to the case. The verdict has been given according to English law, but it is substantially a sufficient finding of an offence under the Indian Penal Code.

I am of opinion, however, that the English law is the law by which the prisoner was triable, and upon that point I concur generally with the Chief Justice. There is no doubt that the English law was the law which originally applied to offences committed on the high seas on board British ships;

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and this was continued by the Merchant Shipping Act, 1854. The question is whether, by the Amendment Act of 1855, or by the 12 and 13 Vict., c. 96 (extended to this country by 23 and 24 Vict., c. 88), this state of things was changed, and the local law was substituted for the English. I think it was not. I do not think it can be said that in either Act there is anything which distinctly shows an intention to alter the law by which such cases are to be tried, except in matters of mere procedure. But I have no doubt that, under these Statutes, the local procedure is the procedure which is to be followed.

Sentence :—*Six months' rigorous imprisonment.*

Attorney for the Crown : *Mr. Stack* (Govt. Solicitor).

*Before Sir Barnes Peacock, Kt., Chief Justice, Mr. Justice Norman,  
and Mr. Justice Markby.*

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THE QUEEN v. NABADWIP CHANDRA GOSWAMI AND  
KUSHADHWAJ MANDAL.

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*Evidence—Answers to Police Constable or Magistrate—Jurisdiction—Arrest of Judgment—S. 29 of the Letters Patent—S. 41 of Act XVIII. of 1862—Judicial Notice.*

G. D. presented a Government Promissory Note, at the Bank of Bengal, bearing a forged endorsement, and was arrested. A police-constable asked N. if he knew G. D. N. replied that he knew him as a common man. The police-constable then asked N. if he knew anything about the Note. N. replied that he did not. No threat or inducement was held out, nor was any caution administered to N. *Held*, that the statement made by N. in answer to the questions of the police-constable were admissible.

N. was afterwards brought before R., the Deputy Magistrate of Serampore, who told him, before any depositions were taken, that he (N.) was charged with having received a stolen Promissory Note, and R. asked him if he wished to say anything. N. replying in the affirmative, R., without administering any caution to him, asked him how or where he had obtained the Note, and other questions, the answers to which were taken down. N. was again brought up before R., and was asked whether a Promissory Note then produced was the one he had delivered to G. D. to take to the Bank. R. told N. that he was not bound to answer the question, but that if he did, the answer would be taken down; and that, if he objected to answer, that would also be noted. R. committed N. to take his trial before the High Court. *Held*, that on the trial, the answers of N. to the questions of R., whether R. acted as a Justice of the Peace for Bengal, or as a Magistrate, were admissible.

Where the High Court had jurisdiction to try a prisoner for the offence committed, if a charge had been made against him by a person authorized to make that charge, and the prisoner pleaded 'not guilty,'—*Held*, proof need not be given that the officer had authority to send up the charge. Objections to the jurisdiction should be made before pleading to the general issue.

The construction of s. 29 of the Letters Patent is, that the High Court has power, if in its discretion it thinks right to exercise it, to transfer the investigation or trial of any criminal offence committed in Calcutta to a Mofussil Court, which is otherwise competent to try it, or to direct the trial by the High Court of an offence committed in the Mofussil. "Competent to investigate it" does not include competency as regards local jurisdiction; but only competency with regard to the offender, the nature of the offence, and the punishment.

The High Court could have directed the preliminary investigation of the charge against N. by the Deputy Magistrate of Serampore, but that it did not appear in the caption of the charge or in evidence that the Court had so directed it. *Held*, no ground for arrest of judgment, but the objection might have been raised before the jury was sworn, under s. 41 of Act XVIII. of 1862.

[This case has been referred to in *Queen v. Ameer Khan* (7 B. L. R. O. Cr. 240; 15 W. E. 69).—ED.]

The High Court being a Court of superior jurisdiction, the want of jurisdiction is not to be presumed, but the contrary.

*Semle.*—The High Court was bound to take judicial notice that B. was a Justice of the Peace for Bengal.

This case came on for argument on points reserved. The prisoners had been tried before Markby, J., at the Sessions, in March 1868, and convicted of dishonestly retaining, forging, and uttering a Government Promissory Note, and were sentenced to two years' rigorous imprisonment.

Mr. *Newmarch* and Mr. *Woodroffe* for the prisoners.

Mr. *Eglinton* (Officiating Standing Counsel) for the Crown.

The facts of the case were as follow :

In October 1867, a dacoity had been committed in the house of the prosecutor, and property had been carried off, including the Government Promissory Note in question ; subsequently, a demand for interest due upon the Note was made by one *Guru Das* at the Bank of Bengal, the Note at that time bearing a forged endorsement of receipt for the interest. *Guru Das* was arrested, and it was found that he had been employed to draw the interest by the prisoner, *Nabadwip*. The prisoner, *Nabadwip*, had received the Note from the prisoner, *Kushadhwaj*.

*Guru Das* was tried with the other two prisoners, but was acquitted.

The prisoner, *Nabadwip*, was arrested at Serampore.

The preliminary investigation was held before the Deputy Magistrate at Serampore, and the prisoners were committed by him to take their trial before the High Court.

Upon the trial, an Inspector of Police was called as a witness, and stated that when he arrested *Nabadwip*, he asked him if he knew *Guru Das* ; that, in reply to this question, *Nabadwip* said he knew him as a common man, and that then the witness asked *Nabadwip* whether he knew anything about the Note ; and he replied that he did not. Then the witness detailed an observation made by *Nabadwip* to *Guru Das*, who was present in custody, and it was after that observation that the witness charged *Nabadwip* with receiving the Note, knowing it to have been stolen, and took him into custody.

This evidence was objected to by counsel on behalf of the prisoner, *Nabadwip*, on the ground (1) that no caution had been administered to the prisoner ; (2) that the answers had been obtained by questions ; (3) that the principle of s. 148<sup>1</sup> of the Code of Criminal Procedure applied.

Mr. *Ryland*, the Magistrate at Serampore, was also called. He stated that the prisoner, *Nabadwip*, was brought before him, for the first time, on the 14th December ; and that, before any depositions were taken, he told *Nabadwip* that he was charged with receiving a stolen Promissory Note, and asked him if he wished to say anything. On the prisoner, *Nabadwip*, expressing his desire to do so, the Magistrate did not administer any caution to him, but asked him how or where he had obtained the Note. Other questions and answers followed, which were taken down in writing by the Magistrate at the time. This writing was produced by the witness and sworn to be correct, and it was thereupon read as evidence on the trial.

On the 21st December, the prisoner was again brought up before Mr. *Ryland*, when he was asked whether a Promissory Note then produced was

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<sup>1</sup> Act XXV. of 1861, s. 148.—“ No confession or admission of guilt made to a police-officer shall be used as evidence against a person accused of any offence.”

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the one he had delivered to Guru Das to take to the Bank. The pleader who appeared on behalf of Nabadwip on that occasion objected to this question being put, but Mr. Ryland told the pleader he could not object to any question being put to the prisoner; but that the prisoner was not bound to answer it. If the prisoner made an answer, it would be taken down; and if the prisoner objected to answer, that fact would be noted. The question was then put, and the answer was taken down in writing at the time. The writing was produced by the Magistrate, and sworn to be correct, and was read as evidence on the trial.

Both these statements were objected to on the grounds (1) that they had been obtained in answer to questions put by the Magistrate; (2) that the prisoner had not been cautioned before making them.

The other prisoners made statements under circumstances precisely similar.

At the close of the case for the prosecution, it was objected on behalf of prisoner, Nabadwip, (1) that no proper evidence had been given of any order having been made by the High Court, duly directing the preliminary investigation to be made by the Magistrate at Serampore; (2) that no proper evidence had been given of any direction to transfer the trial of the prisoner to this Court, and that, accordingly, the Judge ought to direct the prisoner to be acquitted. The only evidence before the Court on these points were three letters signed by Mr. Field, the Registrar of the Court on the Appellate Side, and which, he said, were written by him in his official capacity.

The learned Judge held that there was no evidence whatever of any order by the High Court for a preliminary investigation by the Magistrate at Serampore, or of any direction to transfer the trial to this Court; but he held at the same time that it was not necessary for the Crown to produce such evidence in support of the prosecution; and the case was, accordingly, left to the jury without any such evidence.

After the jury had delivered their verdict, and before sentence was passed, a motion was made in arrest of judgment on behalf of the prisoner, Nabadwip, on the ground that he was not properly before the Court. It was contended that s. 29 of the Letters Patent, 1865, did not apply to the transfer of a criminal case from the High Court or to the High Court, but only to the transfer of such a case between such Courts as are, by ss. 27 and 28, made subject to the Appellate Jurisdiction of this Court.

A motion was also made in arrest of judgment on behalf of the prisoner, Nabadwip, on the ground that he was not properly before the Court, as there was no instrument of charge upon which the trial could proceed. It was contended that the charge sent up by the Magistrate at Serampore was not within the provisions of s. 3 of Act XIII. of 1865, because the Magistrate of Serampore could not, according to law, deal with the offences charged in the indictment.

MARKBY, J., refused to arrest judgment on the above ground, but reserved the following points:

1. Whether the statements of the prisoner, Nabadwip, in answer to the police-constable, were admissible.
2. Whether the statements of the prisoners in answer to the Magistrate were admissible.
3. Whether the Judge was right in holding that it was not necessary that evidence should be given of any proceeding having been had by the High Court, duly directing the preliminary investigation to be made by the Magistrate.

## 4. Whether the Judge was right in refusing to arrest the judgment.

Mr. *Newmarch*, in arguing the two first points, objected to the reception of the statements as evidence against the prisoner: *1st*, because they had been elicited by question; *2nd*, because the prisoner had not been cautioned; and, *3rdly*, because there was a kind of threat in the words used to the prisoner, "that, if he did not answer, that fact would be noted." The principle is that confession to be admissible must be voluntary, but the application of it, owing to the different opinions of the Judges on the point, is doubtful. This doubt arises from the difficulty of determining whether the statements are entirely voluntary, and not elicited by any inducements of hope or fear. If these are held out, they are clearly inadmissible. Even in cases where statements in answer to questions have been held admissible, this mode of getting evidence has been much censured by the Judges. Where there is any doubt as to voluntariness of statements, the best course is to reject them. No caution was given here, but something in the nature of a threat was held out. See *Lambe's case*; <sup>1</sup> *Baldrey's case*; <sup>2</sup> *Hawkin's Pleas of the Crown*, c. 46, s. 34; *Reg. v. Arnolt*; <sup>3</sup> *Rex v. Wilson*; <sup>4</sup> *Reg. v. Pettit*; <sup>5</sup> *Reg. v. Berriman*; <sup>6</sup> *Reg. v. Toole*; <sup>7</sup> *Reg. v. Bodkin*; <sup>8</sup> *Reg. v. Mick*; <sup>9</sup> *Reg. v. Cheverton*; <sup>10</sup> *Reg. v. Hassett*. <sup>11</sup>

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Mr. *Woodroffe* on the same side.—The difference in the position of the questioner and the party questioned must be taken into account, as it makes it very doubtful whether the confession is entirely voluntary. The prisoner, being ignorant of the law, might have supposed that the Magistrate or police-officer had the power to compel him to answer, and this must have influenced his mind. It lies with the Crown to shew that the prisoner's mind has not been influenced by hope or fear in making any statements in answer to questions put to him, *per Parke, B.*, in *Baldrey's case*; <sup>12</sup> also see the observations of *Parke, B.*, in *Reg. v. Warringham*, in the note to *Baldrey's case*; *Reg. v. Warwickshall*. <sup>13</sup> In most of the cases in which such evidence has been held to be admissible, a caution has been given to the prisoner. The learned counsel cited a case (not reported), which was tried before Mr. Justice *Phear*, at the Criminal Sessions of April 1865. There the prisoner's answers to interrogations put to him by a Magistrate and Justice of the Peace in the Mofussil, during the investigation preliminary to commitment, were held inadmissible, on the ground that it did not appear that the prisoner had been duly cautioned before examination, and he might have thought that it was obligatory on him to answer the questions. *Reg. v. Parker*. (MARREBY, J.—Mr. Justice *Phear* explained to me that he had held that the mere fact of examination by a Magistrate raises a presumption of hope or fear; and, therefore, it must be shown that a caution was given.] See also *Reg. v. Cheverton*; <sup>14</sup> *Reg. v. Court*. <sup>15</sup>

Mr. *Eglinton* for the Crown was not called upon.

PEACOCK, C.J.—Upon the questions argued before us I entertain no doubt.

<sup>1</sup> 2 Leach, 625.

<sup>2</sup> 2 Denison, 446.

<sup>3</sup> 8 C. & P. 621, per Lord Denman.

<sup>4</sup> 1 Holt. N. P. 597, per Richards, C.B.

<sup>5</sup> 4 Cox, C. C. 164, per Wilde, C.J.

<sup>6</sup> 6 Cox, C. C. 388, per Erie, J.

<sup>7</sup> 7 Cox, C. C. 244.

<sup>8</sup> 9 Cox, C. C. 403.

<sup>9</sup> 3 F. & F. 822.

<sup>10</sup> 2 F. & F. 333.

<sup>11</sup> 8 Cox, C. C. 511.

<sup>12</sup> 2 Denison, 445.

<sup>13</sup> 1 Leach, 298.

<sup>14</sup> 2 F. & F. 833.

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The first relates to the answers given to the police-constable when he arrested the prisoner. The answer did not amount to a confession of guilt, but was a statement of facts which, if true, showed that the prisoner was innocent; it is not a confession obtained under an inducement of hope or fear. The only objection to the statement being admissible in evidence is, that it was made in answer to a question put by the police-officer.

The cases upon this subject in England are conflicting; but the later cases seem to show that statements made by a prisoner in answer to a question put by a police-officer are admissible in evidence. In the case of *Reg. v. Berriman*,<sup>1</sup> Erle, C.J., refused to admit as evidence an answer given by a prisoner to a question put to him by a Magistrate, and a similar ruling by Wilde, O.J., is to be found in the case of *Reg. v. Pettit*.<sup>2</sup> But in a later case, the *Queen v. Cheverton*,<sup>3</sup> Erle, C.J., admitted as evidence against the prisoner a statement which she had made in answer to questions put to her by a police-officer. In that case it appeared that Baxter, the police-officer, had said to the prisoner, "You had better tell all about it; it will save trouble," and then put certain questions to the prisoner, which she answered. It was held that the answers given to Baxter were inadmissible, because they had been made under the influence of something in the nature of a threat or inducement. Afterwards another policeman put questions to the prisoner which she answered, and it was objected that those answers were inadmissible, as they had been made under the inducement held out by the former police-officer. Erle, O.J., after consulting Wightman, J., admitted the statements made to the second police-officer, holding, as I suppose, that the answers were not given in consequence of the inducement held out by the first officer. That is a distinct authority that statements made by a prisoner in answer to questions put by a police-officer are admissible, and it may be remarked that in that case the answers were held to be admissible, though the prisoner had not been cautioned.

In the case of *Reg. v. Mick*,<sup>4</sup> it was held by Mellor, J., that the confession made by a prisoner in answer to a question put to him by a police-officer was admissible. A similar decision will be found in *Rex. v. Thornton*,<sup>5</sup> in which it was held that a confession obtained without threat or promise from a boy 14 years old, by question put to him by a police-officer, in whose custody the boy was, on a charge of felony, and when the boy had had no food for nearly a whole day, was properly received as a evidence against him. That was held by six Judges to three upon a point reserved. The majority held that the confession was rightly received, as no threat or promise had been made.

Mellor, J., in the case of *Reg. v. Mick*, to which I have referred, remarked that many Judges would not receive the evidence, and that he highly disapproved of the course the police-officer had taken in asking questions.

Having these conflicting decisions before us, I should be disposed to act upon the decision given in the case reserved, even if it were not borne out by every principle of common sense. If an inducement is held out to a prisoner to make a confession, by telling him he will be better off if he makes a confession, he may be induced, if he knows that circumstances are strong to lead to a presumption of guilt, to make a confession, although he is innocent. There may be reasonable grounds against the admission of such a confession, though perhaps it would be better to admit it, and to leave those who have to determine as to the guilt or innocence of the prisoner to judge of the weight

<sup>1</sup> 6 Cox, C. C. 388.<sup>2</sup> 4 Cox, C. C. 164.<sup>3</sup> 2 F. & F. 836.<sup>4</sup> 3 F. & F. 822.<sup>5</sup> 1 Moody, C. C. 27.

which ought to be attached to it. The object of the Criminal Law is to punish the guilty for the purpose of deterring them and others from committing offences. The object of the Law of Procedure, including the Law of Evidence, is or ought to be that the innocent shall be protected, and the guilty punished. I cannot, therefore, at all agree with the remarks of Mellor, J., and in the expression of his disapproval of the conduct of the police-officer in asking questions, provided he does not hold out hope or fear as an inducement to confess.

Some cases have gone to the extent of saying that a statement is not admissible, if it is obtained by telling the prisoner he had better tell the truth. For my own part I cannot see any objection to telling every man that he had better tell the truth, but that is very different from telling a man that he had better confess, when you do not know whether he is innocent or guilty. Though it has been held in some cases that confessions obtained by asking questions are not admissible, and although the law is said to be the perfection of reason, it has been distinctly ruled in England, and I believe without a dissentient voice, that confessions obtained by artifice or deception are admissible. Therefore, where a confession was obtained by a person who took an oath that he would never mention what the prisoner told him, the statement made, when disclosed, was held to be admissible. So where it appeared that one of the prisoners had made a statement to a constable whilst he was drunk, and it was imputed to the constable that he had given him liquor to cause him to do so, the statement was held to be admissible evidence against the prisoner, the statement not having been made under the inducement of hope or fear. See the cases collected in Roscoe on Evidence in Criminal Cases, 47.

It is high time, I think, that we should decide according to principles which are founded on reason and good sense. I, therefore, hold that what the prisoner said in answer to questions put to him by the police-officer was admissible, no threat or deception having been used, or any false hope held out.

The other question remaining is, whether statements made in answer to questions put by a Justice of the Peace or Magistrate are admissible against the prisoner. I do not wish to put this question upon any technical ground. S. 202 of the Criminal Procedure Code (Act XXV. of 1861) says that "it shall be in the discretion of the Magistrate, from time to time, at any stage of the enquiry, to examine the accused person, and to put such questions to him as he may consider necessary. It shall be in the option of the accused person to answer such questions." It does not appear whether Mr. Ryland was acting as a Deputy Magistrate or in his character as a Justice of the Peace when the charge was first brought before him. I have no doubt that answers given by a prisoner to questions put by a Magistrate under s. 202 are admissible in evidence, although the Magistrate may omit to inform the prisoner what the law is, and that he is not bound to answer the questions. I apprehend that any statement which is made by the prisoner in answer to such a question is admissible against him, not only in regard to cases within the jurisdiction of the Magistrate or bearing upon the case before the Magistrate, but it would be admissible against the prisoner with regard to other offences of which he might be charged in another Court. For instance, if a prisoner were apprehended at Howrah upon a charge of murder at Howrah, and if the policeman should say, "when the prisoner saw me coming up dressed as a police-officer, he immediately ran away." Suppose the Magistrate should ask the prisoner, "Why did you run away when you saw a police-officer?" and he were to answer, "I had stolen some money from

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A. B. in Calcutta. I had just crossed the ferry, and when I saw the officer coming up, I thought he was going to take me into custody for stealing the money, and therefore I ran away." That statement, being made in answer to a lawful question put to him by the Magistrate, would, I have no doubt, be evidence against the prisoner, if he were acquitted of murder, and indicted at the Sessions in Calcutta for stealing the money.

I have no doubt, therefore, that what the prisoner said to the Magistrate would, in this case, be admissible against him, even if the questions put by the Magistrate were put whilst he was acting in his character as a Magistrate. But, as I said before, I do not wish to put this case upon technical grounds, and I will assume, therefore, that Mr. Ryland was acting throughout as a Justice of the Peace for Bengal with reference to an offence committed in Calcutta.

There is not much difference as regards the common sense point of view between statements made in answer to questions put by Mr. Ryland as a Justice of the Peace, and statements made in answer to questions put by the police-officer, assuming it to be true that the statements were made. There would, however, be this difference, that when the questions were put by a Magistrate, the prisoner might have believed that the Magistrate had the same power to compel him to answer the questions, as he would have had with regard to a witness; and that, therefore, it may be urged, the Magistrate ought to have explained the law to the prisoner, and told him that, although he asked the questions, the prisoner was not bound by law to answer them.

In *Rex v. Wilson*,<sup>1</sup> it was held by Richard, C.B., that the examination of a prisoner before a Magistrate, who examined him as a witness, though he held out no threat or inducement, could not be used as evidence against the prisoner. The Judge says, "No matter whether a prisoner be sworn or not, an examination of itself imposes an obligation to speak the truth." Suppose the prisoner in this case was ignorant of the law, and believed that when the Magistrate asked him these questions, without telling him that he was not bound to answer, he was under a legal obligation to speak the truth, when the law allowed him to be silent. The Magistrate did not deceive him, nor did he use artifice; and if artifice or deception would be no legal answer to the reception of the statements against the prisoner, why should the statements be rejected because the Magistrate omitted to tell the prisoner what the law was? There was no torture used, no threat of punishment; and if the prisoner answered under a belief that he was bound to speak the truth, it appears to me that there was no injustice in receiving against him the answers he gave under that belief. We are not to infer that the prisoner said what was not true, because he erroneously believed himself to be under an obligation to speak the truth. Even if what the prisoner had stated amounted to a confession of guilt, it would be very different from a confession made under an inducement of hope or fear; because, as I have already remarked, a confession made under an inducement held out to make a confession may be made falsely by a prisoner under a belief that he will benefit by it.

In *Rex v. Ellis*,<sup>2</sup> Littledale, J., held that an examination of a prisoner charged with felony, taken without threat or promise, by questions put by a Magistrate, was admissible. He there says, referring to Starkie on Evidence,<sup>3</sup> where the case of *Rex v. Wilson*, to which I have referred, is also

<sup>1</sup> 1 Holt's Reports, 597.<sup>2</sup> 1 Ryan and Moody, 432.<sup>3</sup> Appendix, Part IV., 52.

noticed, Mr. Justice Holroyd received an examination to which "there was this objection," and he added, "I think his decision is the correct one, and that the evidence is on principle admissible."

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For these reasons I think that the statements made by the prisoner in answer to the questions put by Mr. Ryland were admissible as evidence against the prisoner.

The decision of Mr. Justice Phear was made during a trial and without full argument on the whole question, and it does not appear that any of the authorities to which I have referred had been brought to his notice. It was in the nature of a *nisi prius* decision, by which Courts sitting in Banc do not usually consider themselves bound.

I wish to add a few words on one point which escaped me. It was said that on the second occasion, when the Magistrate informed the prisoner that he was not bound to answer the questions, he informed him that, if he objected to answer, that fact would be noted. It was contended in argument that that amounted to a kind of threat; but I think the Magistrate was quite right when he told the prisoner that he was not bound to answer, and that, if he objected to answer, the fact would be noted. The Magistrate, by telling the prisoner he was not bound to answer, without adding that, if he objected, a note would be taken, might have induced the prisoner to decline to answer the question, when the fact of his declining might have raised a prejudice against him.

NORMAN, J., concurred.

MARKBY, J.—I only wish to add a few words. If this matter had now to be discussed for the first time, I should have concurred with the eminent Judges and writers on the Law of Evidence, who have expressed the opinion that the rule which excludes statements made by prisoners to police-constables or Magistrates ought never to have been established. I think it would have been better to have left the whole to the Judge or jury, including the circumstances which go to detract from the value of the statements, and leave them to judge of the value of the statements. The cases are so various that it is impossible to ground on them any general rule of exclusion which does not exclude many statements that ought to be received, or admit many that are worthless. It is too late now, however, to discuss the validity of the rule.

The rule I take to be this: that statements are excluded if made under any threat or inducement of a temporal nature held out by a person in authority. If not of a temporal nature, they are admissible; and, similarly, if not held out by a person in authority. It is doubtful whether the threat or inducement must have reference to the charge.

The question in this case is whether statements by the prisoner made first before a police-constable, and secondly before a Magistrate, in answer to questions put by them, are admissible, no actual threat or inducement having been made. It seems to me that such statements can only be excluded on the ground that the relation between the accused and the police-constable or Magistrate necessarily implies that the answer is given under an inducement. Two cases have been quoted, in which expressions used by the English Judges go to show that such statements are not admissible for that reason; but I think it will be found that wherever the Judges have expressed an opinion, after deliberation and argument, they have held otherwise. I should not, for a moment, weigh a hasty expression, falling from the mouth of a Judge in the course of a trial, against a deliberate opinion expressed by a Court engaged in consideration of the law. I believe we are laying down the law in strict

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accordance with the rule of Evidence in England, when we hold that answers to questions put by a police-constable or Magistrate are not to be presumed to be given under such a threat or inducement as to render them inadmissible, and I believe that on all rational principles we must come to the same conclusion.

Mr. *Newmarch*, on the other two points reserved, then contended that Mr. Ryland had no jurisdiction to try this case, and, therefore, it had not come properly before the High Court. By 53 George III., c. 105, s. 105, enlarged jurisdiction is given to Magistrates in certain cases to deal with British subjects accused of certain specified offences. But the 42nd section of the Criminal Procedure Code, after enacting that nothing therein shall interfere with the above Act, goes on to say, "provided that the jurisdiction shall be exercised only by a Justice of the Peace." Now, it does not appear distinctly that Mr. Ryland was a Justice of the Peace for Bengal, and I contend that the Court cannot take judicial notice of his being a Justice of the Peace. Ss. 4 and 5 of Act II. of 1855 do not authorize the Court to do so. [PEACOCK, C.J.—They do not forbid this Court to take notice of any other than those mentioned there.] Even if the Court below could have taken notice of it, it did not do so, and I submit that this Court cannot do so now. [PEACOCK, C.J.—Suppose a Justice of the Peace commits a European, are we bound to have it proved that he was a Justice of the Peace?] Yes, if he does not describe himself so. Here there is not a description particular and distinct enough to show that he was a Justice of the Peace. He was acting only as a Magistrate of Serampore under the Criminal Procedure Code, and had no jurisdiction. This objection ought to have been allowed in arrest of judgment. The charge or indictment now takes the place of the finding of the Grand Jury, and it ought to show every thing as distinctly as that would have done, but here no jurisdiction appears.

The 29th section of the Charter, 1865, does not authorize the Court to direct the preliminary investigation to take place at Serampore. Reading the Charter from cls. 22 to 26, it will be seen that such preliminary investigation is not authorized. These clauses have reference to the jurisdiction of the High Court. Cls. 27 and 28 refer to the jurisdiction of Courts not established by Royal Charter. The first part of cl. 29 is still dealing with the same Courts, as in cls. 27 and 28, and only authorizes a transfer of cases from one Court to another of an "equal," that is, a similar jurisdiction; and the test of whether the jurisdiction is equal or not should be, not the difference in power of awarding punishments, but the difference in manner of trial, in manner of taking evidence, and in the rules of the Court. Taking this to be the meaning of cl. 29, I contend that the Court had no jurisdiction; the learned Judge ought to have arrested the judgment, and discharged the prisoner.

Mr. *Eglinton*, for the Crown, was not called upon.

PEACOCK, C.J.—The prisoner in this case is charged with having committed an offence in Calcutta. The caption of the charge stated that he had been committed to trial before the High Court, by W. H. Ryland, Esq., Deputy Magistrate and Justice of the Peace of and for the district of Serampore. At the close of the case for the prosecution, it was objected on behalf of the prisoner, Nabadwip: 1st, that no proper evidence had been given of any proceeding having been had by the High Court, duly directing the preliminary investigation to be made by the Magistrate at Serampore; and, 2ndly, that no proper evidence had been given of a direction to transfer the trial of the prisoner to this Court, and that, accordingly, the learned

Judge who tried the case should have directed the prisoner to be acquitted. The prisoner had pleaded not guilty, and the question which arises upon this portion of the case is, whether the plea of not guilty of the offence stated in the charge raised any question of fact as to the authority of the officer who preferred that charge.

There is no doubt that this Court had jurisdiction to try the prisoner for the offence committed, if a charge had been made against him by a person authorized to make that charge (reads ss. 3, 4, and 6 of Act XIII. of 1865);<sup>1</sup> and when this Court, being a Court of superior jurisdiction, put the prisoner on his trial upon that charge, it must, in my opinion, be assumed, until the contrary was shown, that the charge has been preferred by an officer competent to prefer it; and even if the charge had no caption at all, in my opinion when he was put upon trial by this Court, it must be assumed that this Court had jurisdiction to try him. The rule as to jurisdiction is that nothing shall be intended to be out of the jurisdiction of a Superior Court but that which specially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an inferior Court but that which is so expressly alleged, *Peacock v. Bell and Kendal*.<sup>2</sup>

S. 3 of Act XIII. of 1865 does not require the officer making the charge to set forth his jurisdiction, but it merely requires the charge to state for what offence the person is so committed or held to bail; and I am of opinion that the charge would be presumed to be sufficient if the caption had merely stated that a charge had been duly preferred against him; and if that would have been sufficient, it would also have been sufficient if the Court had stated that the charge had been preferred against him, because when a Superior Court put him on his trial upon a charge preferred against him, it would be presumed that it had been duly preferred. I by no means intend to say that the prisoner would have no remedy if the charge had not been duly preferred, but I am of opinion that when the prisoner pleaded to the charge that he was not guilty of the offence stated therein, he raised no question as to whether the charge was duly preferred or not. It is stated in the caption that Mr. Ryland was a Deputy Magistrate and Justice of the Peace for Serampore, but I think that makes no difference with regard to the question now under consideration, which is merely whether proof ought to have been given as to whether Mr. Ryland had authority to send up the charge. If he had no authority to send up the charge, there were two courses open to the prisoner. He might have applied to the Court to quash the charge, bringing to the notice of the Court the facts upon which he contended that the officer had no

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<sup>1</sup> *Act XIII. of 1865, s. 3.*—Any Justice of the Peace or Magistrate who shall commit to custody or hold to bail any person for trial before the High Court, for an offence committed, or which, according to law, may be dealt with as if it had been committed, within the local limits of its ordinary original civil jurisdiction, shall, together with all examinations, informations, bailments, and recognisances, now required to be delivered to such Court before the trial, deliver to the Clerk of the Crown a written instrument of charge signed by him, stating for what offence such person is so committed or held to bail.

*Act XIII. of 1865, s. 4.*—The Clerk of the Crown shall peruse and consider the charge, and may, if he consider it necessary or expedient so to do, amend, alter, or add to the same; the charge with such amendments, alterations, or additions, if any, shall be recorded in the High Court, and the person charged shall be entitled to have a copy of such charge with such amendments, alterations, or additions (if any) gratis.

*Act XIII. of 1865, s. 6.*—Upon charges recorded as aforesaid, persons committed to custody or held to bail shall be deemed to have been brought before the High Court in due course of law, and (subject to the provisions contained in the 8th section of the Act) shall be arraigned at the suit of the Crown, and the verdict shall be recorded thereupon.

<sup>2</sup> 1 Williams Saunders, 74b.

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jurisdiction to prefer it; or he might have pleaded to the jurisdiction of the Court, showing that Mr. Ryland had no jurisdiction to prefer it; or if it appeared on the face of the charge and the caption that Mr. Ryland had no jurisdiction to prefer it, he might possibly have demurred. It has been held that objections to the jurisdiction may be taken by demurrer, if the objection appears upon the face of the indictment and caption, and that the want of jurisdiction may also be pleaded specially, if the defect does not appear on the face of the indictment. But it has been held that from the nature of the plea of want of jurisdiction, it must evidently be pleaded before the general issue, because by pleading Not Guilty, the defendant admits the power of the Court to try him, and refers his case to their decision. See Ohitty's Criminal Law, 438, and cases there cited. The prisoner, therefore, pleading Not Guilty in this case, admitted the jurisdiction of the Court and of the jury to try him for the offence, and it was no part of the issue which the jury were sworn to try upon the plea of Not Guilty, whether Mr. Ryland had jurisdiction or not.

I am, therefore, clearly of opinion that the ruling of the learned Judge was right in holding that, upon the issue which the jury had then to try, it was unnecessary to give any evidence with regard to Mr. Ryland's jurisdiction.

The next point is whether the learned Judge was right in refusing to arrest the judgment. We are not called upon to arrest the judgment, but to say whether the learned Judge was right or not in refusing to arrest it.

It has been contended, upon the construction of s. 29<sup>1</sup> of the Letters Patent, that the High Court would have no power to direct the transfer of any criminal case or appeal from any Court in the Mofussil to the High Court itself; and it is also further contended, upon the force of that argument, that the High Court has no power to direct the preliminary investigation or trial of any criminal case, in which the offence has been committed in Calcutta, to any officer or Court who would be competent to investigate or try it, if the offence had been committed in the Mofussil within the jurisdiction of that officer. It appears to me, however, giving the best construction I can to s. 29, that the High Court has power, if in its discretion it thinks right to exercise it, to transfer the trial of any criminal offence committed in Calcutta to a Mofussil Court, which is otherwise competent to try it, or to direct the trial by the High Court of an offence committed in the Mofussil. The trial can only be transferred to a Court or officer otherwise "competent to investigate it." "Competent to investigate it" does not, as it appears to me, include competency as regards local jurisdiction; but only competency with regard to the offender, the nature of the offence, and the punishment. For instance, the Court could not transfer to the Judge of the 24-Pergunnahs the trial of an offence committed by a European British subject in Calcutta, because the Sessions Judge of the 24-Pergunnahs could not have tried the offender even if the offence had been committed in his own jurisdiction. So the Court could not transfer to a Magistrate in the Mofussil the trial of any offence, which, by the terms of the Criminal Procedure Code, could be tried only by a Sessions Judge, because the Magistrate would not be a Court competent to try the offence, if committed within his jurisdiction.

<sup>1</sup> S. 29 of the Letters Patent, 1865.—The High Court shall have power to direct the transfer of any criminal case or appeal from any Court to any other Court of equal and superior jurisdiction, and also to direct the preliminary investigation or trial of any criminal case by any officer or Court otherwise competent to investigate or try it, though such case belongs in ordinary course to the jurisdiction of some other officer or Court.

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If we hold that the Court can transfer the investigation of a case committed in Calcutta to a Mofussil Magistrate otherwise competent to make the preliminary investigation, I do not see how we can stop short and say that the Court could not direct the trial of that case before an officer or Court in the Mofussil otherwise competent to try it. The words "to investigate or try it" are coupled in this section in such a manner that I think, if the Court has power to transfer the investigation, it has also power to transfer the trial. It might be very inconvenient in many cases if the Court had not this power. Suppose two men were indicted for forging and uttering a forged Note, and the evidence tended to show that the forgery was committed on the side of the Circular Road within the district of the 24 Pergunnahs, and that the uttering took place in Calcutta at the Bank of Bengal, it would be very inconvenient that the prisoners should be tried first at Alipore for the forgery where they might be acquitted on the ground that the Note was a genuine one, and that they should afterwards be tried in Calcutta, and convicted of uttering a forged Note, on the ground that it was a forgery. It would be much more convenient that the Court should remove the trial for forgery into this Court, and to have the questions as to the forgery and uttering tried by the same Court. It might be convenient under certain circumstances that, if an offence should be committed in Calcutta, and the prisoner should escape and be caught in some district in the Mofussil, to allow the Magistrate of the district in which the offender was caught to make the preliminary investigation. The words of the section, therefore, being sufficiently large, and the convenience greatly in favour of the construction which I am about to put upon this section, I have no doubt that the High Court would have had power, if they thought fit to exercise it, to have directed the preliminary investigation in this case by Mr. Ryland, the Deputy Magistrate of Serampore. I cannot say that the Court did so in the present instance, for the letters have been rejected, and we have no evidence of the fact. I can only say Mr. Ryland might have had that jurisdiction. The question then is, Is this indictment bad in arrest of judgment, because it does not appear that the High Court did authorize Mr. Ryland to make the preliminary investigation?

It is unnecessary for the Court to determine whether they can take judicial notice that Mr. Ryland was a Justice of the Peace for Bengal, or whether the Court would be bound to ignore that fact, even if they issued the commission appointing him, and the Chief Justice had signed it. If it should so happen that the High Court did issue a commission, and the Chief Justice signed it, it would be a great failure of justice that this judgment should be arrested, and the prisoner sent to a Justice of the Peace of Calcutta, for the purpose of having a new preliminary investigation; and this failure of justice would be the more apparent and glaring, if the commission should happen to be proved. In such a case the prisoners must be committed for trial, and the time of this Court, and of a new jury, would have to be occupied in re-trying him, and the witnesses be again brought from their homes and from their business, in order to re-prove the guilt of the prisoner, because this Court would not, or could not, by law, take judicial notice of the fact whether Mr. Ryland was or was not a Justice of the Peace for Bengal, though they had appointed him themselves. If it became necessary to decide the point, I should hold that this Court could take judicial notice of the fact whether Mr. Ryland was or was not a Justice of the Peace for Bengal, if from the records of this Court it should appear that a commission had issued, as it has in fact issued. In fact, I hold that commission in my hand under my own signature, and it would be monstrous to hold that I cannot take judicial notice of its existence; but it is not necessary to determine the question, for I

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have already held that, as a Magistrate of Serampore, he might have had power conferred upon him to make the preliminary investigation, and, if so, he would be a Magistrate having power to prefer the charge.

I am of opinion that it would be no ground for arrest of judgment, if a prisoner were put upon his trial by this Court upon a charge preferred by a Mofussil Magistrate subordinate to this Court, who might have had the power of making the preliminary investigation conferred upon him, although the caption of the charge should not show on the face of it that that jurisdiction had been conferred. In the case of *Knowlden v. The Queen*,<sup>1</sup> a case arose in reference to the Vexatious Indictments Act. 23 and 24 Vict., c. 17, s. 1 of that Act, enacts that no bill of indictment for conspiracy, among other officers, shall be presented to or found by any Grand Jury, unless such indictment be preferred by the direction, or with the consent in writing, of a Judge, or of the attorney or solicitor. It was held that it was not necessary that the indictment should aver, or that it should be proved before the petty jury, that the conditions imposed by that Statute had been performed. The judgment of Blackburn, J., puts the case in a very clear light. It appears to me that this case is a very important one with reference to the point as to whether it was necessary for the charge to state whether Mr. Ryland was empowered by this Court to make the preliminary investigation. But, even if this case is not a sufficient authority, I apprehend that the only proper course would have been to move the Court to quash the indictment, if Mr. Ryland had no jurisdiction; or to plead the want of jurisdiction, if the prisoner wished to have the fact tried by a jury, or if the objection had appeared on the face of the record to have raised it by demurrer. It is said in Chitty's Criminal Law that "the omission in the caption of an indictment of the words *then and there*" in the statement of the swearing of the jury was formerly held fatal; because without them it did not appear that the oath was taken in the county where the offence is alleged to have been committed; but the law is now otherwise; and it will be no ground for arresting the judgment, after special verdict removed by certiorari, that the Judge who tried the prisoner is not stated to have been of the quorum; that no issue appears on the record; or that the authority of the Justices of Gaol Delivery is not stated." The cases are referred to in Chitty's Criminal Law, Vol. I., pages 661 and 662. Further, as this is a Court of superior jurisdiction, the want of jurisdiction is not to be presumed. Act XIII. of 1865 does not require the officer making the charge to state the jurisdiction under which he is acting, and by s. 6 of that Act it is enacted that "upon charges recorded as aforesaid, that is, by the Clerk of the Crown, persons committed to custody or held to bail shall be deemed to have been brought before the High Court in due course of law."

Looking at all these grounds, it appears to me that if the indictment ought to set forth in the caption the facts which constituted the jurisdiction of the officer who made the charge, the omission of stating that, which ought to be presumed, and which might have been raised by the prisoner by pleading to the want of jurisdiction, or by motion to quash the charge, would be a mere formal defect, which, under the provisions of s. 41 of the Act XVIII. of 1862, ought to be taken by demurrer, and not by motion in arrest of judgment after the prisoner has pleaded to the charge, and thereby admitted the jurisdiction of the Court to try him.

If the objection had been taken in this case that Mr. Ryland's jurisdiction did not appear on the face of the record, for want of the Court authoriz-

<sup>1</sup> 33 L. J. M. C. 219.

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ing him as a Magistrate to hold the preliminary investigation, the Court might have made an inquiry into the fact; and if they had found that he had had that authority conferred upon him, or that he was a Justice of the Peace for the whole of Bengal, and, therefore, might have investigated the charge without such authority, the Court might have ordered the caption of the indictment to be altered, and every thing would have been right. If the facts did not exist which conferred jurisdiction upon Mr. Ryland, and the prisoner had wished to have those facts tried by a jury, he might have pleaded to the jurisdiction. But it appears to me that the omission to show all the facts which constituted jurisdiction, or the allegation that Mr. Ryland was a Justice of the Peace for Serampore, instead of a Justice of the Peace for Bengal, is no ground for arresting the judgment.

It appears to me, therefore, that the present is one of those technical objections which tend to defeat justice, and to which the Court ought not to yield, unless it is compelled to do so by law. I am of opinion that the learned Judge was right in proceeding to pass sentence, and not yielding to the objection and arresting the judgment, which, unless we believe that the jury was wrong in the verdict they pronounced, could only have led to a verdict of guilty, upon which the prisoners must have been ultimately sentenced after a fresh preliminary investigation, and the waste of the time of the Court, the jury, and of the witnesses, who would all have been required to go through the farce of a new trial for the sake of a mere technical objection, the sole tendency of which is to defeat and not to promote the due administration of justice. If the learned Judge had yielded to the objection, he would merely have held out false hopes to the prisoners, which, if the verdict of the jury who tried them is correct—and I see no reason to doubt it—could never have been realized, and which must have ultimately turned out to be a mere delusion.

It appears to me that there is no force in the objections, and that the judgment must stand. The prisoners will be remanded to jail to undergo the sentence which has been passed upon them.

NORMAN, J., concurred.

MARKBY, J.—I agree substantially with the Chief Justice. I think all that is put in issue by the plea of not guilty on this charge is what follows the word “charge,” just as on an indictment presented by a Grand Jury all that is put in issue is what follows the word “present.” I think it would lead to the greatest inconvenience if on every trial the correctness of the procedure by which the prisoner was brought before the Court was considered as challenged.

I, therefore, think I was right at the trial in refusing to leave to the jury any question as to whether the Magistrate at Serampore had been duly authorized to hold the preliminary inquiry.

With regard to the motion in arrest of judgment, I concur in the construction which has been put upon s. 29 of the Charter by the Chief Justice.

Attorney for the Crown : Mr. *Mirfield* (Offg. Govt. Solicitor).

Attorneys for the prisoner, Nabadwip : Messrs. *Swinhoe, Law, and Co.*

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Before Mr. Justice Norman.

THE QUEEN v. RAJKRISHNA MITTER.

*Irregular Deposition—Act XIII. of 1865, s. 8.*

1868.  
Aug. 11.

1 B. L. R.  
O. Cr. 37.

The Magistrate took the depositions by reading over to the witnesses depositions made by them in another case, at the hearing of which the prisoner was not present, and procuring them to affirm the truth of the same. *Held*, that the depositions were illegally taken, and, therefore, could not sustain a charge.

THE prisoner was charged with cheating.

Before the prisoner was arraigned, Norman, J., asked Mr. Marindin, Officiating Counsel, whether he thought the charge could be sustained upon depositions taken in the manner appearing on the face of the depositions in this case, sent up by the Magistrate. The manner in which the depositions were taken is fully set out in the judgment of the learned Judge.

Mr. *Marindin*, without admitting that the depositions were absolutely illegal, did not think it necessary to argue the point on behalf of the Crown.

NORMAN, J.—On the 3rd of October 1867, one Gopal Ghose was charged with cheating. The evidence of a number of witnesses was taken in the case of Gopal Ghose, and I suppose he was committed for trial in the usual way. Recently, the prisoner, who is alleged to have been the principal offender in the case of Gopal Ghose, was apprehended. The depositions taken before the Magistrate in the case of Gopal Ghose were read over to the witnesses in the presence of the prisoner, and the Magistrate made a note as follows upon each of the depositions: "Recalled before me, Justice as aforesaid, on the 28th day of July 1864, in the presence and hearing of Rajkrishna Mitter, and on oath confirms his former statement, and further saith, my above deposition is true;" and the witnesses were not cross-examined by the prisoner.

The only evidence taken against the prisoner is, evidence so taken, and it appears to me that it is not sufficient legally to enable me to try the case. It appears to me that a charge supported only by evidence not taken in a legal manner is no charge at all, and I feel bound to enter a minute in terms of s. 8 of Act XIII. of 1865.

The evils of such a mode of taking evidence are shown in the case of the *Attorney-General of New South Wales v. Bertrand*.<sup>1</sup> It was then objected that this mode of taking evidence deprived the jury of the opportunity of observing the demeanour of witnesses. The objection in this case is analogous, though not similar. The witnesses against Gopal Ghose stated what they supposed to be true, but the prisoner was not present to cross-examine them, or elicit anything that might be in his favour. It is like evidence elicited by leading questions. Asking the witnesses, "If this is what they said on a former occasion, and whether what they said is true," is the worst form of leading question. It is giving a value to it which it cannot have, if taken afresh. It appears to me that this mode of taking the evidence is entirely erroneous, and that the Magistrate ought not to have taken it, or to have committed the prisoner. A note must be made that the charge is not sustainable.

The prisoner was thereupon taken before the Magistrate, and the depositions taken afresh.

Attorney for the Crown: Mr. *Mirfield* (Offg. Govt. Solicitor).

<sup>1</sup> 1 L. R. (P. C.) 520.

Before Mr. Justice Norman.

THE QUEEN v. MAHBUB KHAN.

Act IV. of 1866 (B.C.) s. 26—Penal Code (Act XLV. of 1860), s. 116.

1868.  
Aug. 12.

Police Magistrate has power to convict summarily, under Act IV. of 1866 (B.C.), s. 26, for an offence punishable under s. 116 of the Penal Code.

1 B. L. R.  
O. Cr. 39.

THE prisoner was charged with having abetted an offence by offering a bribe to a Custom House officer, whereby he became punishable under s. 116 of the Penal Code.

The prisoner pleaded guilty.

Mr. *Marindin* (Officiating Standing Counsel) stated that the committing Magistrate had been asked by the Crown Solicitor to convict summarily under the 26th section of Act IV. of 1866 (B.C.), but that the Magistrate had declined, on the ground that he had no power to do so, inasmuch as s. 116 of the Penal Code is not mentioned in that Act. The learned Counsel asked for an expression of the opinion of the Court upon this point.

NORMAN, J.—I think it quite clear that the Magistrate might have convicted summarily in this case, under the 26th section of Act IV. of 1866 (B.C.). The prisoner is rightly charged with abetting the offence described in s. 161 of the Penal Code. The Custom House officer, on board the ship "Solway," was offered a rupee by the prisoner, to induce him to receive on board a case for which there was no Custom House pass. Had the officer received the bribe, he would have committed the offence described in s. 116 of the Penal Code, and the prisoner, by trying to induce him to do so, would have abetted that offence.

S. 116 of the Penal Code enacts, that "whoever abets an offence punishable with imprisonment shall, if that offence be not committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished," &c.

S. 26 of Act IV. of 1866 (B.C.) enacts, that "when any person is charged before a Magistrate with having committed, within the said town, &c., any of the offences specified in this section, &c., it shall be lawful for the Magistrate to proceed to try the case summarily," &c.

The offences referred to in this section include offences under s. 161 of the Penal Code, and cl. 25 adds, "abetment of any of the foregoing offences." It is clear that the prisoner is rightly charged with abetment of an offence under s. 161, and the Magistrate, therefore, had power try the prisoner summarily for abetting the offence.

Attorney for the Crown : Mr. *Mirfield* (Offg. Govt. Solicitor).

Before Mr. Justice Norman and Mr. Justice Phear.

IN THE MATTER OF SAGAR DUTT.—THE QUEEN v. THE JUSTICES OF THE PEACE.

1868.  
Sept. 10.

1 B. L. R.  
O. Cr. 41.  
[18 W. R. 44,  
foot-note.]

*Writ of Certiorari—Conviction under Act VI. of 1866 (B.C.).*

Sagar Dutt was convicted before a Justice of the Peace, for using a warehouse, &c., in the Town of Calcutta, for the keeping and storing of jute, other than jute screwed for shipment, without a license; and for his said offence was fined Rs. 300, and adjudged to pay a further fine of Rs. 25 for every day, after the conviction, in which the offence was continued. *Held*, that the conviction was bad.

A writ of *certiorari* had been granted to remove the proceedings in this case to the High Court, and a rule *nisi* had been obtained by the *Advocate-General*, calling on Kasiprasad Ghoses one of the Justices of the Peace for the Town of Calcutta, to shew cause, why a conviction and judgment pronounced by him, as such Justice of the Peace, on one Sagar Dutt, should not be quashed. The affidavit of Sagar Dutt's attorney, upon which the rule was granted, stated that, on the 12th August 1868, the said Sagar Dutt was summoned before Kasiprasad Ghose, one of the Justices of the Peace for the Town of Calcutta, to answer a charge made by A. H. Pereira, Inspector of Licenses, for making and storing jute at 31, Durmahatta Street, without having a license for the same in violation of s. 39 of Act VI. (B.C.) of 1866;<sup>1</sup> and, being convicted of such charge, was adjudged by the said Kasiprasad Ghose to pay a fine of Rs. 300, and a further penalty of Rs. 25 for every day the offence should be continued, after the conviction. It was admitted that the premises had been used for storing, &c., jute, before the passing of Act VI. of 1866.

The following grounds for quashing the conviction were set forth in the affidavit:—

1. That there was no evidence to shew that the premises had been burnt down, as is contemplated by s. 39 of Act VI. of 1866.
2. That there was no evidence to shew that the said premises had been rebuilt as contemplated by the said section.
3. That there was no sufficient evidence that the said Sagar Dutt was not licensed.
4. That there was no evidence of any authority from the Justices of the Peace for Calcutta, for the institution of the prosecution, as is required by s. 233 of Act VI. of 1863.

[This case is explained in *Kristodhone Dutt v. Chairman of the Municipal Commissioners of the Suburbs of Calcutta* (25 W. R. 6); and followed in the following three cases:—*Chairman of the Municipal Commissioners for the Suburbs of Calcutta v. Anweruddin Meah* (12 B. L. R. Ap. 2; 20 W. R. 64); *In the Matter of the Petition of W. N. Love* (9 B. L. R. Ap. 35; 18 W. R. 44); and *Queen v. Tarinee Churn Bose* (21 W. R. 81).—Ed.]

<sup>1</sup> Act VI. 1866, s. 39.—“After the passing of this Act, it shall not be lawful to use any warehouse, store-depôt, yard, or other place within the limits of this Act, for the keeping or storing of jute other than jute screwed for shipment, unless before the same is so used a license for such use be obtained from the Justices. Provided that this section shall not apply to warehouses, store-depôts, yards, or places already used at the time this Act comes into operation for the keeping or storing of such jute. Provided, nevertheless, if any such last-mentioned warehouse, store-depôt, or place shall be burnt down, and shall be re-built, it shall not be so used for the keeping or storing of such jute, unless such license as aforesaid be previously obtained. Every person who, without such license, shall so use any warehouse, store-depôt, yard, or other place in cases in which a license ought to be obtained, shall be liable to a penalty not exceeding Rs. 500, and to a further penalty not exceeding Rs. 50 for every day during which any such warehouse, store-depôt, yard, or other place is so used without a license, after a conviction under this section, or after written notice from the Justices to discontinue such use.”

5. That the English witnesses were not sworn, but merely gave their evidence upon solemn affirmation.

6. That improper and illegal evidence was admitted, and proper legal evidence shut out at the trial.

The conviction ran as follows :

"Be it remembered that, on the 12th day of August, in the year of our Lord 1868, at Calcutta aforesaid, Sagar Dutt is convicted before the undersigned, one of the Justices of the Peace for the Town of Calcutta aforesaid, upon an information and complaint exhibited against him, on the 16th day of July, in the year aforesaid, by order of the said Justices of the Peace for the Town of Calcutta ; for that he, the said Sagar Dutt, on the 9th of July, in the year aforesaid, used a certain warehouse, store-depôt, and yard situate at, and being No. 31, Durmahatta Street, in the Town of Calcutta aforesaid, for the keeping and storing of jute other than jute screwed for shipment, he the said Sagar Dutt not having, before such use of the warehouse, store-depôt, and yard aforesaid, obtained, in manner provided by law, a license for such use, from the said Justices ; and the said warehouse, store depôt, and yard being a place for the keeping and storing of jute, for which, previously to such use, such license ought to have been obtained under the provisions of Act VI. of 1866 of the Council of the Lieutenant-Governor of Bengal for making laws and regulations in that behalf made and provided ; and I adjudge the said Sagar Dutt, for his said offence, to forfeit and pay the sum of Rs. 300 as a penalty, and to forfeit and pay a further sum of Rs. 25 for every day, after the date of this conviction, during which the said warehouse, store-depôt, and yard shall be used for the keeping and storing of jute other than jute screwed for shipment by the said Sagar Dutt, without his having previously to each and every day's such use duly obtained a license from the said Justices in that behalf to be paid and applied according to law ; and if the said penalty of Rs. 300 be not paid forthwith, I order that the same be levied under the warrant of the said undersigned by distress and sale of the goods of the said Sagar Dutt, according to law ; and if the said further penalty of Rs. 25, for every day, after the date of this conviction, during which the said warehouse, store-depôt, and yard shall be used, without such license as aforesaid, be not paid forthwith, on the same becoming due and payable, I order that then and so often as the said further penalty shall not be paid, that the same be levied in like manner under the warrant of the undersigned by distress and sale of the goods of the said Sagar Dutt according to law. Given under my hand and seal the day and year first above-mentioned, at Calcutta aforesaid."

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[18 W. R. 44,  
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The *Advocate-General* (Mr. Ingram with him)—There are two defects on the face of the conviction. The conviction says that Sagar Dutt was using warehouses, &c., for storing jute, without taking out a license for so doing ; and it avers that such license is necessary. But this is not sufficient, for the 39th section of Act IV. of 1866 excepts warehouses in existence at the time of the passing of the Act. A license would not be required, unless such warehouses had been burnt down and re-built ; and it is not shown, in the conviction, that this warehouse did not come under that exception. It should appear, on the face of it, that it had been burnt down and re-built. The second defect is that, besides a fine of Rs. 300, there has been imposed on Sagar Dutt a fine of Rs. 25 for every day, after the conviction, during which he should use the warehouse for storing jute without a license. This is fining him for an offence which has not been committed, and it makes the conviction bad.

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IN THE  
MATTER OF  
SAGAR  
DUTT,

1 B. L. R.

O. Cr. 41.

[18 W. B. 44,  
foot-note.]

On the *Advocate-General* proceeding to shew grounds for quashing the conviction other than those appearing on the face of the conviction, Mr. *Woodroffe* objected, referring to *Paley on Convictions*, 231; *Burn's Justice of the Peace*, 558, 574, 575; and the case of *The Queen v. Bolton*.<sup>1</sup> Anything not appearing on the face of the conviction must be brought forward, if at all, by affidavit: *The Queen v. Siddulph*.<sup>2</sup> Want of jurisdiction might be shown by affidavit, but not that the Justices have come to a wrong conclusion on the merits. *Paley on Convictions*, 246, and cases there cited. [NORMAN, J.—We think it should be done by affidavit, *In re Baker*.<sup>3</sup>] There is nothing to shew that the prosecution took place by order of the Justices. This order is made necessary by s. 233 of Act VI. of 1863 (B.O.). A conviction must be wholly good or wholly bad, though it is otherwise as to an order. *The King v. Solomons*.<sup>4</sup> *Paley on Convictions*, 46, 167, 233, ed. of 1814. [NORMAN, J., referred to *The King v. Patchett*.<sup>5</sup>

Mr. *Woodroffe contra* submitted that the conviction might be amended.

The judgment of the Court was delivered by

NORMAN, J.—We are of opinion that the conviction is bad, on the second ground stated by the *Advocate-General*. In addition to the fine of Rs. 300, the Judge imposed a further fine of Rs. 25 for every day during which the warehouse was kept for storing jute, after the date of the conviction. It was in fact an adjudication in respect of an offence which had not then been committed. The conviction cannot be amended; a conviction must either be wholly good or wholly bad. Part of it being bad, it is bad altogether, and must be set aside.

Attorneys for Sagar Dutt; Messrs. *Carruthers, Pittar, and Dignam*.

Attorneys for the defendant: Messrs. *Berners, Sanderson, Upton, and Co.*

<sup>1</sup> 1 Q. B. 66.

<sup>2</sup> 1 Tay. & Bell, 507.

<sup>3</sup> 2 H. & N. 219.

<sup>4</sup> 1 T. R. 251.

<sup>5</sup> 5 East, 339.

## Short Notes of Cases.

**EXAMINATION OF PURDA LADIES.**—Mr. *Newmarch* moved for a rule nisi to be directed to Mr. Roberts as Coroner of Calcutta, requiring him to show cause why a writ of Mandamus should not issue out of and under the seal of the High Court, directed to the said Coroner of Calcutta, commanding him to allow Bibi Rookia Banu, a witness summoned to appear before the said Coroner, at his Court, to give evidence, and be examined on H. M.'s behalf before the said Coroner, and his inquest on an inquisition there being held by the said Coroner *super visum corporis*, to enquire into the cause of death of one Seikh Sher Ali, who lately died in the town of Calcutta, to be brought before the said Coroner and his inquest at his Court, in a palanquin; and that the said Coroner do proceed to examine the said Bibi Rookia Banu as a witness on H. M.'s behalf in her palanquin, she having been previously identified to the satisfaction of the said Coroner.

The rule was moved for on an affidavit disclosing the status of the lady as a Mohammedan of rank and respectability, and the circumstances out of which this application arose. It appeared that the Coroner had issued a summons to Bibi Rookia Banu, calling upon her to attend and give evidence at his Court, on February 15th, before himself and his inquest, touching the death of Seikh Sher Ali, her son. She, accordingly, attended outside the Court on the day ordered, prepared to give evidence in Court, if allowed to do so without leaving her palanquin. The Coroner refused to allow her to be brought into his Court in a palanquin, and required her to quit her palanquin and enter his Court to give evidence, with no further concealment than might be afforded by any veil which she might choose to throw over her head. At the request of Counsel, the Coroner adjourned the proceedings to enable the present application to be made to the High Court.

Mr. *Newmarch* referred to the invariable practice of the examination of purda ladies in the High Court in palanquins for upwards of half-a-century. The practice arose out of respect to the customs of the country. There was no Act regulating the practice. It was difficult to understand why a different practice should obtain in the Coroner's from that in the other Courts in Calcutta, and that contended for by the Coroner might lead to dangerous consequences. The learned Counsel referred to the following Acts as showing the spirit of the legislature in dealing with questions affecting the customs of the native ladies: Act VIII. of 1859, s. 21; Act X. of 1855, s. 13; the Code of Criminal Procedure, ss. 95 and 124. He also referred to the note of a case at p. 9 of 2nd volume of Smoult and Ryan's Rules and Orders, and also to a rule at p. 89 of the same, and the case of *Krishna Mohan Mookerjee v. S. M. Adarmani Debi*,<sup>1</sup> when the Court, rather than offend native prejudice, allowed a lady not a purda-nishin to be examined in her palanquin.

Mr. J. B. Roberts, the Coroner, appeared in person, and stated that he was willing to be guided by the present opinion of the Court, without further proceedings. He stated that he had followed the practice now complained of for 11 years, and had never found inconvenience in it, but considerable advantage. He liked to hear what the witness said, which he could not, if she were shut up in a palanquin, unless he left the bench and listened at the door. There would be the additional difficulty imposed on the Court of determining in each case the right of the lady to claim the indulgence.

1868.

BIBI  
ROOKIA  
BANU  
v.  
JOHN  
BLESSINGTON  
ROBERTS,  
1 B. L. R.  
8. N. 5.

<sup>1</sup> 2 Hyde's Reports, p. 88.

1868.

BIBI  
ROOKIA  
BANU  
v.  
JOHN  
BLESSINGTON  
ROBERTS,  
1 B. L. R.  
S. N. 5.

*Norman, J.*—It has become unnecessary for me to make any order upon the application before the Court after the expression by Mr. Roberts of his readiness to be bound by the present opinion of the Court. The learned Coroner has not set up any special circumstances in this case, but relies on the general principle. In order to support the position contended for by the Coroner, it would be necessary to make out that the Coroner's Court stands in a different position to the other Courts in Calcutta. The High Court has no power to compel a purda lady to leave her palanquin in order to give her evidence. The case in *Smoult and Ryan* is much stronger than the present: that was for manslaughter and murder on the Coroner's inquest. These the prisoner, a woman of rank, was brought into Court in a covered tonjon, and arraigned without shewing her face, her identity having been first ascertained by the oath of a credible witness. Under s. 21 of Act VIII. of 1859, it is enacted that a "woman who, according to the custom and manner of the country, ought not to be compelled to appear in public, shall be exempt from personal appearance in Court." This lady does not claim such exemption; therefore her right to it is not now in question; she merely claims to be allowed to remain in her palanquin while giving her evidence in Court. In the case I have referred to, it was not a witness, but the prisoner herself who was allowed to remain in her palanquin. The Coroner seems to think there would be a difficulty in determining who is entitled to the privilege. In this Court, I am not aware of any difficulty being found in practice; and I have been present at some 50 examinations of ladies in their palanquins; if at any time I had any doubt, I should be inclined to rule in favour of the lady. As regards the difficulty of the Coroner leaving his seat to hear what the lady may say, I do not see that there is any. If I wish to hear what a lady in her palanquin said, did I understand her language, I should feel no difficulty in leaving my seat to hear what she said. The learned Coroner has intimated his readiness to accept my opinion, and my opinion is that he should admit the lady into his Court in her palanquin, and allow her to give her evidence in it after having been properly identified.—*Per Norman, J.*, The Queen on the prosecution of *Bibi Rookia Banu v. John Blessington Roberts*, Esq., Coroner of Calcutta. 17th February 1868.

1868.

QUEEN  
v.  
BOLAKI  
JOLAHAD,  
1 B. L. R.  
S. N. 8.  
[10 W. R. 9.]

**PRIVATE DEFENCE OF PROPERTY—HOUSE-BREAKING.**—The right of private defence of property against house-breaking does not extend to causing the death of the house-breaker when he has made his escape from the premises empty-handed, and is at some distance from the place.

The Sessions Judge found that the prisoner caused the death of deceased, "in the exercise, in good faith, of the right of private defence of his property, and in endeavouring to secure the person of an escaping thief, without any intention of doing more harm than was necessary for the purpose." It was remarked by the High Court, in appeal, that "it cannot be said that the driving of a spear several inches deep into the body of a half-naked and unarmed man evinces an intention of doing no more harm than was necessary to effect his capture."—*Per Glover, J.*, *Queen v. Bolaki Jolahad*, from Shahabad. 3rd July 1868.

1868.

BIHOORAM  
v.  
ALLAHU  
KOLITA,  
1 B. L. R.  
S. N. 8.

**EXAMINATION OF WITNESSES AND PASSING SENTENCE IN THE ABSENCE OF THE ACCUSED.**—A was charged with theft; he cited certain witnesses in his defence; prior to their appearance, A. made his escape from custody. On the arrival of the witnesses, the Assistant Commissioner of Assam, who tried the case, proceeded to take their evidence, and to pass sentence upon A. The Judicial Commissioner of Assam referred the case to the High Court

under s. 434 of Act XXV. of 1861. *Held* "the Assistant Commissioner's order in this case must be quashed. It was illegal to examine the witnesses for the defence, and to pass sentence in the absence of the accused.—*Per Loch and Glover, J.J., Bihooram v. Allaho Kolita*, Reference from the Judicial Commissioner of Assam. 6th July 1868.

COMMITMENT BY SESSIONS JUDGE—INTERFERENCE OF HIGH COURT—S. 435, CRIMINAL PROCEDURE CODE—CROSS-EXAMINATION.—"If the Judge did, as the copy of his order seems to make out, censure the Joint-Magistrate for not having examined the accused himself upon the matter of the charge, we think that he is wrong on this point, for it is, in our opinion, quite matter of discretion for the Magistrate himself to judge whether, during the enquiry before him, it is right and proper that the accused should be examined or not, and we agree with the learned Counsel who has appeared here on behalf of the accused, in the expression of opinion, that it is very undesirable that the accused should be examined by the Magistrate under the power, which he, no doubt, possesses for that purpose, when the Magistrate is satisfied that the evidence adduced by the prosecution does not disclose any proper subject of criminal charge against him."—*Per Phear and Hobhouse, J.J., In the Matter of Shama Sankar Biswas and Samacharan Bose*,<sup>1</sup> appeal from Bhaugulpore. 4th August 1868.

1868.

IN THE  
MATTER OF  
SHAMA  
SANKAR  
BISWAS,  
1 B. L. R.  
S. N. 16.  
[10 W. R. 25.]

CRIMINAL BREACH OF TRUST—PRESUMPTION—REVISIONAL JURISDICTION.—Prisoner, a gomasta, took from his employers, between the 15th April and 30th June, sums aggregating rupees 600-2-3, for the purchase of wood. During that period he supplied wood to the value of rupees 234-7-6, but the prosecutor alleged that most of that was to be set-off against the balance at debit of prisoner on account of the year before; and that, as a fact, the value of fire-wood supplied from the advances of April to June was only rupees 34. Prisoner was charged with criminal breach of trust as a servant. The defence was, that he had purchased wood, and made advances on that account. This defence was shown to be false, and the Joint-Magistrate convicted the prisoner, and sentenced him to 15 months' rigorous imprisonment.

1868.

WATSON  
v.  
GOLAB  
KHAN,  
1 B. L. R.  
S. N. 21.  
[10 W. R. 28.]

On appeal, the Judge held that the prosecutor's right to set-off a portion of the wood supplied, to an old balance, was a question for a Civil Court, and a criminal charge could not be decided by the result of any such proceeding. The mere non-supply of the wood raised no presumption of misappropriation of the advances. See Roscoe's Digest, page 429. The Judge reversed the Joint-Magistrate's decision, and acquitted the prisoner.

The prosecutor applied to the High Court for a revision of the proceedings under s. 404, Criminal Procedure Code.

The judgment of the Court was delivered by *Glover, J.*—We think the view taken by the Judge in this case is incorrect. He holds that in this case the prisoner has merely failed to account satisfactorily for sums received; and that this failure to account does not establish a charge of embezzlement; and in support of his view he has quoted the case of a clerk on a Mail Coach Establishment reported in Roscoe's Digest, who, when charged with embezzlement for not entering in account and remitting to his employers money received for passengers and parcels, was held not to be guilty of embezzlement, but only of default of payment. If the prisoner regularly admits "the receipt of the money, the mere fact of not paying it over is not a felony: it is only a matter of account."

<sup>1</sup> [This case is referred to in *Queen v. Ghasee* (4 N. W. P. 50).—ED.]



1868.

WATSON  
v.  
GOLAB  
KHAN,

1 B. L. R.  
S. N. 21.

[10 W. R. 28.]

Had the Judge gone a little further in *Roscoe*, he would have found these words: "In general, the act of embezzlement cannot be said to take place until the party who has received the money refuses to account for it, or *falsely* accounts for it."

The facts in the present case are patent. The prisoner admits that he received money from the complainant to procure wood for the use of the factory. He has not supplied wood, and he has attempted falsely to account for the expenditure of the money advanced to him, and the parties to whom, he says, he paid money, and from whom he purchased wood, deny the transaction, and it is not said that their evidence is not worthy of credit. Under these circumstances, the Joint-Magistrate convicted the prisoner of criminal breach of trust under the provisions of s. 408 of the Penal Code, and sentenced him to rigorous imprisonment for 15 months.

The prisoner was in the employment of Messrs. Watson as a gomasta, and in that capacity was entrusted with sums of money aggregating rupees 600, between 15th April and 30th June 1867. He did not supply the wood, and, when called upon to account for the money, falsely stated that he had purchased wood from various parties, though it is proved that he had not purchased a stick from any of them. We think the finding of the Judge on the point of law is incorrect, and that the prisoner is guilty of a criminal breach of trust. We, therefore, reverse the order of the Judge, and restore that passed by the Joint-Magistrate upon the prisoner.—*Per Loch and Glover JJ., Watson v. Golab Khan, Criminal Revisional Jurisdiction. 22nd August 1868.*

1868.

RAMLAL  
TEWARI  
v.  
SUPHARAM,  
1 B. L. R.  
S. N. 26.  
[10 W. R. 31.]

BAIL—S. 212 OF CRIMINAL PROCEDURE CODE (ACT XXV. OF 1861).—

The accused in a case of dacoity and assault were discharged by the Joint-Magistrate of Gya for want of evidence. At the same time he ordered them to give security to the amount of Rs. 250 to appear before him any time within the next six months, when their presence might be required. The Judge referred the question of the legality of the order to the High Court. The judgment of the High Court was delivered by *Glover, J.*—I think that the Joint-Magistrate was not justified in demanding bail in this case. The accused, after a lengthened enquiry, were discharged by the Joint-Magistrate, he being of opinion, and after hearing the witnesses for the defence, that the assault was not proved; and that in any case there had been no dacoity, as alleged. S. 212 of the Criminal Procedure Code authorizes Magistrates in certain cases to demand bail from accused persons, but this refers solely to cases where further enquiry is pending, and the accused have not been discharged. In the present case, after hearing all the evidence, the Joint-Magistrate arrived at the conclusion that there was no sufficient proof against the accused; no future enquiry is pending; but they have been called upon to give security for their attendance, when required, in case, as the Joint-Magistrate puts it, any other evidence should turn up. From the nature of the case, as detailed in the Joint-Magistrate's decision, it is absolutely impossible that any further evidence should "turn up," and the accused ought not to have been unnecessarily harassed. I would quash the order calling upon these men for security.—*Per Loch and Glover, JJ., Ramlal Tewari v. Supharam, Reference from the Sessions Judge of Gya. 9th September, 1868.*

1868.

QUEEN  
v.  
SHEIKH  
GOLAM  
DARBESH,

1 B. L. R.  
S. N. 27.  
[10 W. R. 36.]

ACT XXXV. OF 1861, s. 62—NUISANCE—OBSTRUCTION.—This was a reference by the Officiating Sessions Judge of Nuddea. The facts of the case were as follows:

The Assistant Magistrate of Kooshtea received petitions from certain inhabitants of the district, who complained that the defendant, Golam Darbesh, had made a tank in the bed of a *khal*, by throwing two bunds across it; and thus obstructed the passage of water in the rainy season, causing thereby injury to the drainage of the country. The Assistant Magistrate held an enquiry, and found that the tank had existed in that state for about six years, but stated that "five years of a manifest act of trespass on a navigable channel could give the defendant no possible right to continue the trespass." He, accordingly, directed the defendant, under s. 62 of Act XXV. of 1861, to destroy the bunds.

1868.

QUEEN  
v.  
SHEIKH  
GOLAM  
DARBESH,  
1 B. L. R.  
S. N. 27.  
[10 W. R. 36]

The Sessions Judge of Nuddea considered this order of the Assistant Magistrate illegal, for the following reasons :

"1st.—As the bunds have been in existence for six years, the case ought to have more properly fallen under Chap. XX. of Act XXV. of 1861.

"2nd.—It appears to this Court that the order of the Assistant Magistrate in this case has been somewhat summary. The special grounds of public inconvenience and danger to public health do not, by the Assistant Magistrate's own showing, appear to have been so imminent as to justify his passing so peremptory an order. If the bunds (which appear to have been in existence for six years, by the Assistant Magistrate's own showing) had to be removed as being a local nuisance, the proprietor ought, at least, to have had the benefit of the provisions of Chap. XX. of Act XXV. of 1861."

The opinion of the High Court was delivered by

JACKSON, J.—This is a reference made by the Sessions Judge of Nuddea, asking the Court to set aside an order of the Assistant Magistrate of Kooshtea, dated the 30th June 1868, passed under s. 62, Act XXV. of 1861, by which he has ordered the owner of a certain tank in the dry bed of a river to destroy the banks of that tank, on the ground that they are an obstruction to the public in their lawful enjoyment of the river in the rainy season; and that, by stopping the water, the bunds interfere with the drainage of the country, and affect the health of the villagers in the surrounding places, and tend to injure the crops and lessen the value of land. This order has been passed specially under s. 62 of the Procedure Code. We are of opinion that the section does not authorize any such order. The section allows the Magistrate to direct a person to abstain from a certain act, or to take certain order with certain property in his possession or under his management, under certain circumstances. But, in this case, the Assistant Magistrate has ordered the owner of the tank, in effect, to destroy his tank. At the same time, in his decision, after hearing the evidence in the case, he finds that this tank, in its present state, has been in existence for more than six years. We are of opinion, under such circumstances, that s. 62 of the Criminal Procedure Act does not authorize a Magistrate to pass the summary orders which the Assistant Magistrate of Kooshtea has passed; and we therefore reverse those orders, and direct that the injunction issued by him be withdrawn.—Per *E. Jackson and Hobhouse, JJ.*, *Queen v. Sheikh Golam Darbesh*, Reference from the Sessions Judge of Nuddea.<sup>1</sup> 10th September 1868.

<sup>1</sup> [This case is referred to in *Gopi Mohun Moulik v. Taramoni Chowdhurani* (4 C. L. R. 309; 1 L. R., 5 Cal. 7); and followed in *Queen v. Ram Chandra Mookerjee* (5 B. L. R. 181; 13 W. R. 72).—ED.]



# The High Court of Judicature, AT FORT WILLIAM IN BENGAL.

## FULL BENCH RULINGS.

*Before Sir Barnes Peacock, Kt., Chief Justice, Mr. Justice Bayley, Mr. Justice L. S. Jackson, Mr. Justice Macpherson, and Mr. Justice Glover.*

### THE QUEEN v. BHAGAI DAFADAR.<sup>1</sup>

*Resistance of Civil Process—Penal Code (Act XLV. of 1860), s. 186—Jurisdiction of Criminal Courts—Criminal Procedure Code (Act XXV. of 1861).*

1868.  
Sept. 2.

2 B. L. R.  
F. B. 21.

The resistance of process of a Civil Court is punishable, under the Code of Criminal Procedure, by a Court of Criminal Jurisdiction. [10 W. R. 43.]

BHAGAI DAFADAR and Fatik Gazi were sent for trial to the Officiating Joint-Magistrate of Jessore, by the Judge of the Small Cause Court of that district, on a charge of having resisted the process of his Court. The Joint-Magistrate declined to try the case, being of opinion, on the authority of *Chandra Kant Chuckerbutty*,<sup>2</sup> that the Small Cause Court alone had power to deal with it. The Judge of that Court, therefore, asked the opinion of the High Court on the question whether a Small Cause Court is empowered to punish resistance of its process without reference to the Magistrate. He said: In the case of *Chandra Kant Chuckerbutty*,<sup>2</sup> it was held by Loch and Glover, JJ., that a Civil Court cannot make over a case of simple resistance of its process to a Magistrate for trial, s. 25 of Reg. IV. of 1793 being still in force; but this decision is, I find, opposed to Circular Order No. 121, dated the 13th January 1863, which says that any offence that may be construed to be an offence provided for by the Penal Code must, under s. 2 of that Code, be punishable under its provision. Assuming that the decision in question will apply, a further question arises, whether the provisions of the Regulation referred to in that decision have been made applicable to Small Cause Courts in the Mofussil or not? They certainly have not been made applicable by Act XI. of 1865 or any other Act; and it, therefore, appears to me that I have no power to punish resistance of a process of my Court without reference to the Magistrate."

The case was submitted for the opinion of a Full Bench, under the following order by PEACOCK, C.J., and BAYLEY, J.: "The decision of the Officiating Joint-Magistrate may be referred to a Full Bench."

The opinion of the Full Bench was as follows:

PEACOCK, C.J.—The question is, whether the resistance of process of a Civil Court is punishable under the Code of Criminal Procedure by the Courts of Criminal Jurisdiction. It is unnecessary to determine whether the offence is punishable by a Civil Court, if it chose to take cognizance of it.

<sup>1</sup> Reference by the Judge of the Small Cause Court of Jessore.

[This case overrules *Chunder Kant Chuckerbutty* (9 W. R. 63); and is referred to in the two following cases: *Queen v. Nyan Singh* (2 N. W. P. 117); *Reg. v. John Cannon* (6 Bom. H. C. R. 16).—Ed.]

<sup>2</sup> 9 W. R., Cr., 63.

1886.

QUEEN

v.

BHAGAI

DAFADAR,

2 B. L. R.

F. B. 21.

[10 W. R. 43.]

By s. 186 of the Penal Code, it is an offence to obstruct any public servant in the discharge of his public functions, and by s. 21, every officer of a Court of Justice, whose duty it is to execute any judicial process, is a public officer. The offence, therefore, is punishable under the Penal Code. Offences punishable under s. 186 of the Penal Code are, by the Code of Criminal Procedure, made punishable by the Courts mentioned in column 7 of the schedule to that Act.

BAYLEY, MACPHERSON, and GLOVER, JJ., concurred.

JACKSON, J.—I only wish to add that it appears to me that there has been a misapprehension in regard to the applicability of the provisions of ss. 22 to 25 of Reg. IV. of 1793 to the subordinate Civil Courts. These provisions, as originally enacted, applied only to the Courts of the Zilla Judges. It was held in *Illah Buksh Chowdry*, petitioner,<sup>1</sup> that by the provisions of Act VI. of 1843, the power of punishing resistance of process, being part of, as being included among the rules for, the trial and decision of all original suits, had been extended to the Courts of the Principal Sudder Ameens; and the Sudder Court would, doubtless, have held that, by the parity of reasoning, the power had been subsequently conferred by Act XXVI. of 1852 on the Sudder Ameens and Moonsiffs. Whether that view was correct or no, those Acts have been since wholly repealed by Act X. of 1861; consequently, the provisions of s. 24, Reg. IV. of 1793, if they are still in force, now stand as they originally did, applicable only to the Courts of the Zilla Judges. It, therefore, seems to me that there is no ground for holding that resistance of process of the subordinate Civil Courts can be dealt with by those Courts under the Regulation of 1793. It also appears to me more than doubtful whether the provisions of the section are not superseded by s. 2 of the Indian Penal Code, in so far as any case of resistance of process falls within the provisions of the Code.

*Before Sir Barnes Peacock, Kt., Chief Justice, Mr. Justice Bayley, Mr. Justice L. S. Jackson, Mr. Justice Macpherson, and Mr. Justice Glover.*

1868.

Sept. 2.

THE QUEEN v. SRIKANT CHARAL.<sup>2</sup>

2 B. L. R.

F. B. 28.

[10 W. R. 43.]

*Criminal Procedure Code (Act XXV. of 1861), ss. 362 and 363—Pleading Guilty—Assessors.*

A conviction of a prisoner on a plea of guilty before a Court of Session is valid, although there were no assessors.

One Srikant Charal pleaded guilty to the charge of voluntarily giving false evidence in a stage of judicial proceeding. He was sentenced by the Sessions Judge of Dinagore, who did not employ any assessors for the trial of the case.

The case came up before L. S. Jackson, J., on review of Jail Delivery Statement; and he referred it to a Full Bench, with the following remarks:

"A letter<sup>3</sup> of the Registrar of this Court, dated 28th February 1866, para. 2, states that, where the prisoner pleads guilty, the opinion of the assessors is unnecessary. This letter, or the extract containing this opinion,

<sup>1</sup> S. D. R. (1852), 71.

<sup>2</sup> Referred on review of Jail Delivery Statement by the Judge of Dinagore.

<sup>3</sup> No. 157, to the officiating Sessions Judge of Cuttack.

having been printed in the Weekly Reporter, is doubtless accepted as authority, and the Judge in this case improves upon the ruling by not employing assessors at all. I think the opinion expressed in the letter is incorrect, and the course taken by the Judge in this case unwarranted by law. It appears to me that, by the terms of s. 324 of the Criminal Procedure Code, where trials are not by jury, the Court of Session is not duly constituted without assessors who are members of it; that with a view to the "commencement of the trial," as provided in s. 362, the accused must be brought before a Court so constituted; and if he plead guilty, the assessors, as members of the Court, ought to give their opinion whether or not he should be convicted on his plea, this being a matter in the discretion of the Court, though of course the decision on this, as on other points, is vested exclusively in the Judge. It may be objected, with reference to the part of the language of ss. 362 and 363, that in such cases there is no trial, inasmuch as the accused has pleaded guilty instead of "claiming to be tried," and that assessors are only needed with a view to "trial" (324). But I think it clear that the word "trial" is used in many sections of the Code to indicate a judicial proceeding, in which an accused person has been convicted or acquitted, and not particularly a proceeding in which the issue has been tried by the Court or jury, *e. g.* ss. 381 and 408 (for I presume that a man who has been convicted on his own plea of guilty may yet appeal, as for instance, against the legality of the sentence). But if there has been no trial, in cases where the accused pleads guilty, then the Code has provided neither procedure for passing sentence, nor right of appeal in such cases.

I think the matter should be laid before a Full Bench, with a view to determine the law on this point, and to get rid of the letter above quoted."

The opinion of the Full Bench was delivered by—

Peacock, C.J.—We are of opinion that in the case of a prisoner's pleading guilty before a Court of Session, the conviction upon that plea is valid, although there are no assessors. See ss. 362 and 363 of the Code of Criminal Procedure. If the accused refuse to plead, or claim to be tried, the Court must proceed to try the case; and in that case, where the trial is not by jury, it must, according to s. 324, be conducted with the aid of two or more assessors as members of the Court.

*Before Sir Barnes Peacock, Kt., Chief Justice, Mr. Justice Bayley, Mr. Justice L. S. Jackson, Mr. Justice Macpherson, and Mr. Justice Glover.*

### THE QUEEN v. KAZIM THAKOOR.<sup>1</sup>

*Letters Patent, 1865, s. 36—Criminal Procedure Code (Act XXV. of 1861), s. 420—Criminal Appeals.*

When a criminal appeal is heard by two Judges, sitting as a Division Court, and they differ in opinion, the opinion of the senior Judge must prevail under s. 36 of the Letters Patent of the High Court, notwithstanding s. 420 of the Criminal Procedure Code.

One Phila was charged with having married one Bishay, during the lifetime of her husband Dhunulai. Kazim Thakoor and Magu Thakoor, the brother and the uncle of Phila, were charged with having abetted the said marriage of Phila.

The prisoners pleaded not guilty, and alleged that Dhunulai, the former husband of Phila, had divorced the girl.

1868.

QUEEN  
v.  
SRIKANT  
CHARAL,  
2 B. L. R.  
F. B. 28.

[10 W. R. 43.]

1868.

Sept. 2.

2 B. L. R.  
F. B. 25.

[10 W. R. 45]

<sup>1</sup> Criminal Appeal from Dacca.

1868.

QUEEN  
v.  
KAZIM  
THAKOOR,  
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The Sessions Judge, concurring with the assessors, found all the prisoners guilty of having committed an offence punishable under s. 494 of the Penal Code. But he discharged the prisoner, Phili, considering her youth and the influence which her brother and uncle might have exercised over her; and sentenced Kazim and Magu to one year's rigorous imprisonment.

Kazim and Magu Thakoor appealed; and the appeal came on for hearing before E. Jackson and Glover, J.J., who were divided in opinion. Jackson, J., considered that the prisoners ought to be acquitted, on the ground that it was not on them to prove their innocence, but the prosecutor ought to have proved their guilt. Glover, J., considered that the case ought to be remanded for a new trial. The question then arose whether, having regard to s. 420 of the Criminal Procedure Code,<sup>1</sup> the opinion of the senior Judge ought to prevail under s. 36 of the Letters Patent.<sup>2</sup>

The opinion of the Full Bench was delivered by

Peacock, C.J.—The question is, “When two Judges, sitting as a Division Bench of the High Court, in appeal, in a criminal case, are divided in opinion, is it necessary, with advertence to s. 420 of the Code of Criminal Procedure, that reference should be made to a third Judge; or is it sufficient, with advertence to s. 36 of the Letters Patent, that an order should issue according to the opinion of the senior Judge?”

We are of opinion that, notwithstanding s. 420 of the Code of Criminal Procedure, the opinion of the senior Judge must prevail according to s. 36 of the Letters Patent; and that it is sufficient if the sentence or order in accordance with that opinion be signed by the senior Judge. In such case it ought to appear, on the face of the order, why it is signed only by one Judge.

S. 420 of the Code of Criminal Procedure speaks merely of the Sudder Court and of Judges of such Sudder Court. The Act itself was passed on the 5th of September 1861. The High Court was established under the 24 and 25 Vic., c. 104, which received the royal assent on the 6th of August 1861. The Letters Patent, under which the High Court now sits, was passed on the 28th of December 1865.

S. 11 of the 24 and 25 Vic. enacted that all Acts of the Legislature of India, which at the time of the establishment of the High Court were applicable to the Supreme Court at Fort William in Bengal, or to the Judges of that Court, shall be taken to be applicable to the said High Court and to the Judges thereof, respectively, so far as they might be consistent with the provisions of the said Act and the Letters Patent to be issued in pursuance thereof and subject to the legislative powers, in relation to the matters aforesaid, of the Governor-General of India in Council. This section, however,

<sup>1</sup> *Act XXV. of 1861, s. 420.*—“The sentence or order of the Sudder Court, modifying, amending, or reversing the sentence or order of a lower Court on appeal or revision, shall be signed by at least two Judges of such Court.”

<sup>2</sup> *Letters Patent of 1865, s. 36.*—“And we do hereby declare that any function which is hereby directed to be performed by the said High Court of Judicature at Fort William in Bengal, in the exercise of its original or its appellate jurisdiction, may be performed by any Judge, or by any Division Bench thereof appointed or constituted for such purpose, under the provisions of the thirteenth section of the aforesaid Act of the twenty-fourth and twenty-fifth years of our reign; and if such Division Court is composed of more than two Judges, and the Judges are divided in opinion as to the decision to be given on any such point, shall be decided according to the opinion of the majority of the Judges, if there shall be a majority, but if the Judges should be equally divided, then the opinion of the senior Judge shall prevail.”

did not extend to the High Court ; the provisions of s. 420 of the Code of Criminal Procedure applied only to the Judges of the Sudder Court.

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S. 13 of the said Act enacted that, subject to any laws or regulations which might be made by the Governor-General in Council, the High Court might, by its own rules, provide for the exercise, by one or more Judges, or by Division Courts constituted by two or more Judges of the High Court, of the original and appellate jurisdiction vested in such Court, in such manner as might appear to the Court to be convenient for the due administration of justice.

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By s. 15 of the Rules of the High Court, it was declared that all powers and functions which were vested in the Court by the Letters Patent constituting the Court, and which were not otherwise expressly provided for by the rules of the Court, might be exercised by a single Judge or by a Division Court consisting of two or more Judges ; and by rule 26 it was provided that a Division Bench for the hearing of criminal appeals may consist of two or more Judges.

These rules, coupled with s. 13, provided that a Division Court may consist of two Judges, and a Court so constituted is subject to the provisions of s. 36 of the Letters Patent.



# CASES DETERMINED BY

## The High Court of Judicature

### AT FORT WILLIAM IN BENGAL

### IN ITS APPELLATE JURISDICTION.

#### APPELLATE CRIMINAL

*Before Mr. Justice Loch, Mr. Justice Phear, and Mr. Justice Glover.*

IN RE HARAN MANDAL<sup>1</sup>

1868.  
Aug. 10.

2 B. L. R.  
A. Cr. 1.

[10 W. R. 31.]

*ss. 191 & 192, Penal Code (Act XLV. of 1860)—False Evidence—Verification—Act XI. of 1865, s. 21 (Mofussil Small Cause Courts Act).*

A made an application for a new trial under s. 21 of Act XI. of 1865. He filed a memorandum of his grounds verified as a plaint, and therein knowingly made a false statement. *Held* (Glover, J., dissenting) that he had not thereby committed an offence under s. 191 or 192 of the Penal Code.

A suit was instituted against the accused, Haran Mandal and Mahesh Mandal, in the Small Cause Court at Narail. They went to Narail, and executed a vakalutnama, instructing a vakil to defend the case, which was ultimately, however, decreed against them.

Some four or five months after, they again went to Narail, and gave a vakalutnama to another vakil, instructing him to apply for a new trial under s. 21 of Act XI. of 1865. The vakil, under their instructions, wrote a memorandum of the grounds for the application, and a verification-clause at the foot, which the prisoners signed. This memorandum set forth that they knew nothing whatever of the suit until execution was taken out against them. The memorandum was filed before the Small Cause Court Judge, when the fact that the prisoners had had the case defended originally came to light. They were then criminally charged with having fabricated false evidence for the purpose of its being used in a stage of a judicial proceeding—s. 193, Indian Penal Code; and the Judge, looking to ss. 24 and 123 of Act VIII. of 1859, concurring with the assessors, convicted and sentenced them.

The learned Judges, having differed in opinion, delivered the following judgments :

GLOVER, J.—This case is not without difficulty ; but after the best consideration I have been able to give to it, it appears to me that the conviction ought to be allowed to stand.

I have considerable doubt, in the first place, whether the prisoner does not substantially come under the provisions of s. 191 of the Penal Code, because although his application to the Small Cause Court, for a re-hearing, under s. 21, Act XI. of 1865, was not one which the law requires to be verified, and the prisoner was not, therefore, in the first instance, bound by any

<sup>1</sup> [This case is referred to in *Queen-Empress v. Bāpuji Dayāram* (I. L. R., 10 Bom 288) and *Reg. v. Gulabdas* (11 Bom. H. C. R. 9).—ED.]

<sup>1</sup> Revision of proceedings by the Sessions Judge of Jessore on a charge of giving false evidence.

express provision of law to make that verification, still he did make it, and by so doing "legally bound himself;" and a false statement, made under such circumstances, would, it appears to me, be "false evidence" under that section, and would bind the person making it.

It has been found, as a fact, by the Sessions Judge and assessors (and the prisoner has not appealed), that the memorandum in the petition for re-hearing contained a false statement, and that the prisoner made it, knowing it to be false, and intending it to cause the Judge of the Small Cause Court to form an erroneous opinion upon the evidence.

Mr. Justice Loch thinks that the memorandum filed by Haran Mandal could not have been used as evidence in the case, and that s. 192, Penal Code, therefore, would not apply.

It appears to me that, under the circumstances, it might have been so used. It would have had the same effect as a deposition on oath, and would have been *prima facie* evidence of the truth of the statements therein contained. Indeed, if the Court had chosen to believe it, it would have been legally sufficient evidence by itself to prove the non-service of summons or any of the "sufficient causes" which had prevented the petitioner from appearing before the Small Cause Court when his case was first heard. But, even if it were not "evidence" properly so called, it is quite clear that Haran Mandal "intended" it to appear in evidence, so that in any case the prisoner has, in my judgment, made himself liable.

The prisoner has not appealed, and the proceedings are before us, as a Court of revision only. For the reasons above given, I do not think any interference necessary.

LOCH, J.—The prisoner has clearly made a false statement which he has verified, though not required to do so by law. He has, as described in s. 192 of the Penal Code, made a document containing a false statement, and the document was intended to appear in a judicial proceeding that it might cause the Judge of the Small Cause Court to entertain an erroneous opinion touching a point material to the result of such proceeding. But all this does not quite make up the offence defined in s. 192 of the Penal Code. That offence requires that the document containing the false statement should be made with the intention that it may appear in evidence in a judicial proceeding. A plaint or written statement filed in a suit cannot properly be called evidence, though any statements contained therein may be used as evidence against the party making them; but till the Code of Procedure required the plaint and written statement to be verified, the person filing them could not be punished criminally for any falsehoods they might contain. S. 24 of Act VIII. of 1859 declares that, if a plaint, written statement, or declaration in writing required by that Act to be verified, shall contain any averment which the party making the verification knows or believes to be false, &c., such person shall be liable to the punishment provided for the offence of giving or fabricating false evidence.

It appears to me that this is a case which does not come under the provisions of s. 192 of the Penal Code, and that the prisoner has not committed the offence specified in that section, unless it can be said that the false statement which he made was intended to be used in evidence in the case. It was made with the intention of getting the case reheard, but not to be used in evidence in the suit. It was intended to mislead the person who had to form an opinion upon the evidence in that suit; but it was not offered as evidence as regards the question at issue in that suit.

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If the case does not come up to the offence defined in s. 192 of the Penal Code, has an offence been committed under s. 24, Act VIII. of 1859, which will render the prisoner liable to punishment, as if he had committed the offence described in s. 192 of the Penal Code? The prisoner put in an application before the Judge of the Small Cause Court, praying for a re-hearing of his case, alleging that he was not aware that a suit had been instituted, or a decree given against him, though he had given a vakalutnama to a pleader of the Court to defend the suit. By s. 47, Act XI. of 1865, the provisions of the Code of Civil Procedure were, as far as applicable, extended to all suits and proceedings in the Small Cause Courts; and consequently all plaints and written statements for suits tried in the Small Cause Court are required to be verified, and if any plaint or written statement contain an averment which the party making the verification knows or believes to be false, such party would, under the provisions of s. 24, Act VIII. of 1859, be liable to the punishment prescribed for giving or fabricating false evidence.

The offence, however, is only committed when the written statement, of whatever kind it be, is required by the Act to be verified. Now, applications for a re-hearing made under s. 119, Act VIII. of 1859, are not required by the Act to be verified; and consequently applications of a similar nature presented to the Judge of the Small Cause Court do not require verification. If, therefore, a party has made a verification, when it is not required by law, he cannot be said to have committed the offence defined in s. 24 of the Civil Procedure Code. That the prisoner has committed gross perjury, I have no doubt of; but it does not appear that he can be legally convicted under the provisions of the Penal Code, and must be released.

PHEAR, J.—The record of this case is not before me, and I take the facts solely from the abstract statement of the Officiating Judge. From this I gather that the alleged false document, which is the foundation of the charge against the prisoners, is a memorandum of the grounds upon which they, the prisoners, made an application to the Small Cause Court for a new trial of a certain suit. At the foot of this memorandum was a so-called verification signed by the prisoners. In the absence of the original or any copy, I suppose this was merely a clause declaring that the statements of fact in the memorandum were true to the best of the signers' knowledge and belief.

A declaration of this kind, unless special significance or importance be attached to it by the legislature, merely pledges the declarant's word to the truth of the statements which precede it, and a simple signature, without the express words of the declaration, would have the same effect. Whoever signs any document thereby impliedly says and means to convey that he believes the statements therein made to be true: no other meaning can be given to the act of signing. Therefore, in my judgment, except in cases where the legislature has otherwise provided, falsehood in respect of statements made in a signed document is of the same character, and is in precisely the same predicament as regards any penal consequences to the signer, whether the document contains a clause of verification or not. If the signer would not be "bound by express provision of law" in the one case to state the truth within the provisions of s. 191 of the Penal Code, neither would he be so in the other.

But it is conceded that a memorandum of grounds urged in support of an application for a new trial in the Small Cause Court is not a document lying under any special legislative sanction. The legislature has not directed it to be verified in any manner, or declared that the statements of fact made in it, whether verified or not, are made under any express provision of law

that the truth should be stated. It is also clear that the memorandum is not a deposition made upon oath. Nor is it a declaration which the prisoners were bound by law to make. I conclude, then, that the prisoners, by causing the memorandum containing false statements signed by them to be presented in Court, did not make a false statement under any of the three sets of circumstances mentioned in s. 191 of the Penal Code; and consequently are not liable to the penal consequences which rest thereon.

It remains only to consider whether the prisoners, in signing the memorandum, made a document containing a false statement, intending that such false statement should appear in evidence in a judicial proceeding, and that such false statement, so appearing in evidence, should cause the person who, in such proceeding, is to form an opinion on the evidence, to entertain an erroneous opinion touching any point material to the result of such proceeding, within the terms of s. 192 of the Penal Code. And as to this, I think it clear that the act of the prisoner does not fall within these words. The memorandum of the grounds on which a new trial was sought was in no sense evidence, and the Court of Small Causes would, in my opinion, have erred, if it had formed any judicial opinion upon it, excepting an opinion as to the sufficiency of the grounds, assuming them to be true in fact, as affording reasons for granting a new trial. So far as the memorandum contained a statement of fact, it operated not as evidence, but merely as a statement of that which the applicant was prepared to prove by evidence. I must assume that the prisoners put in this memorandum for its normal purpose; therefore it seems to me that although the memorandum contained the false statements made by the prisoners, they did not, by so putting the memorandum before the Court, offend against s. 192.

On the whole, I think that the facts disclosed by the abstract statement of the Officiating Judge do not justify the conviction of the prisoners which the Court has made.

Consequently, I would send for the record, and if, on production thereof, it appears that the abstract statement of the Officiating Judge is borne out, I would quash the conviction as having been illegally made without evidence, and order the discharge of the prisoners.

*Before Mr. Justice Loch and Mr. Justice Glover.*

MAGHAN MISRA v. CHAMMAN TELI.<sup>1</sup>

*Security to keep Peace—S. 282 of the Criminal Procedure Code (Act XXV. of 1861).*

Before making an absolute order directing a person to enter into a bond to keep the peace, the Magistrate must take the evidence on which he bases the order in the presence of the accused or his agent.—*Per Loch, J. Glover, J., dissenting.*

The following reference was made by the Sessions Judge of Gya :

“Under the provisions of s. 434 of the Code of Criminal Procedure, Maghan Misra v. Chamman Teli. I have the honor to submit the record of the case noted in the margin, and to recommend that the

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A. Cr. 7.

[10 W. R. 46.]

<sup>1</sup> Reference under s. 434 of the Code of Criminal Procedure.

<sup>1</sup> [This case is referred to in *Dunne v. Hem Chunder Chowdhry* (12 W. R. 60; 4 B. L. R. F. B. 46); *Queen v. Shunker* (2 N. W. P. 406); and *Queen v. Nuseer-ood-deen* (2 N. W. P. 461); and upholds *Dewan Elahee Newaz Khan and Aftabonissa v. Suburunnissa* (5 W. R. 14); *Amrithnath Jha v. Ahmed Reza* (6 W. R. 61); and *In the Case of Nursing Narayan* (2 B. L. R. A. Cr. 74; 10 W. R. 1).—Ed.]

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order of the Officiating Joint-Magistrate requiring security to keep the peace from Maghan Misra be quashed as illegal and not having been duly made.

2. "In the case of *Narsing Narayan*<sup>1</sup> it was held that the order directing the defendant to enter into a bond to keep the peace could not be made until the Magistrate had taken fresh evidence properly given on the appearance of the accused, or of his agent, before him; and before he had adjudicated judicially on such evidence that it was necessary for the preservation of the peace that a bond should be taken. In the case now under consideration, it appears from the record that a petition was presented by certain parties complaining of threatened violence on the part of certain persons therein mentioned. Thereupon some of those persons were summoned, but the defendant, Maghan Misra, does not appear to have been then called upon; subsequently the evidence of some witnesses was taken, and after it had been recorded, the defendant, Maghan Misra, was directed to show cause why security should not be demanded from him. This order was passed on 20th June. On the 23rd *idem*, the defendant appeared, and gave in a written statement showing cause as required. Upon this statement being filed, an order was passed, directing Maghan Misra to give two sureties in 100 rupees each, and to enter into his own recognizances to the amount of 200 rupees to keep the peace for the space of one year.

3. "The proceedings in this case were not in accordance with the ruling above cited; no evidence appears to have been taken on the appearance of the accused, that which is with the record was taken before he was required

<sup>1</sup> This was a reference, under s. 434 of the Criminal Procedure Code, from the Sessions Judge of Tirhoot. It came before *Phear* and *Hobhouse, JJ.*, on the 2nd of June 1868, and the following opinion was delivered by

PHEAR, J.—This is a reference made to this Court by the Sessions Judge of Tirhoot under s. 434 of the Criminal Procedure Code, in which he says that he transmits to this Court the record of the case of Government against Baboo Narsing Narayan, with the recommendation that the final order upon the defendant in that case to give recognizance to the extent of 5,000 rupees should be quashed. The Judge thus states the case: "Upon a memorial of the Assistant Magistrate of Tajpore, dated the 18th of October 1867, stating that though the charge of illegal assembly brought against Baboo Narsing Narayan possibly had broken down, and he had had to acquit the defendant, he was of opinion that Baboo Narsing Narayan ought to be bound down to keep the peace. Accordingly, a summons was issued on the Baboo under s. 282 of the Criminal Procedure Code, and he was eventually bound down to keep the peace." The Judge further says: "I find that the summons served upon Baboo Narsing, under s. 282 of the Criminal Procedure Code, sets forth as the credible information received by the Magistrate, &c., &c., the record of a case of complaint of one Mul Chand Pande in the Court of the Assistant Magistrate of Tajpore against Baboo Narsing Narayan, and also the Assistant Magistrate's opinion that the Baboo should be bound down. But upon this, I observe that Mul Chand's case has been dismissed as not proved. Therefore, this would be no ground for calling upon the Baboo to enter into a recognizance either under s. 280 or 282, and obviously the Assistant Magistrate's opinion cannot be called credible information. I consider, therefore, that the Baboo ought to be released from his recognizance."

We think that the Judge is in error in thinking that the record in the case of Mul Chand Pande v. Baboo Narsing Narayan does not afford credible information, within the meaning of the Legislature, quite sufficient to justify the Magistrate in issuing a summons under s. 283. That record contains the depositions on oath of several witnesses in the case, who appear to state, as facts, matters which would certainly, if credible, lead to a conclusion that a breach of the peace might be likely, and we think that information so conveyed to the Magistrate is credible information. Consequently, we are of opinion that the recognizances are not void for the reasons which the Judge suggests in his reference. However, it has been brought to our notice by the Advocate who has argued the case before us on behalf of the accused, that after the issuing of the summons, and on the appearance of Narsing Narayan in answer to the summons, there was no further evidence taken bearing upon the subject of the summons. Now, although s. 282 of the Criminal Procedure Act authorizes the Magistrate to issue a summons, that is, to call the party

to appear ; and therefore, under the ruling referred to, cannot be considered to have been properly given. For these reasons, I consider the Joint-Magistrate's order is illegal, and recommend that it be quashed."

GLOVER, J.—I can find nothing in the Criminal Procedure Code which makes it necessary to take evidence as to the likelihood of a breach of the peace, after the accused has been summoned and is present either in person or by agent. S. 282 gives a Magistrate power, on receiving "credible information," that such and such a person is likely to commit a breach of the peace, to call upon that person to show cause why he should not be required to enter into a bond to keep the peace. An order of this description cannot be issued until the Magistrate has satisfied himself in the way laid down in the Procedure Code of the necessity for issuing it, but being issued, and the accused appearing to show cause against it, there would be no necessity, it seems to me, for recording, *de novo*, the evidence of any witnesses, merely because their depositions had not been taken in the presence of the accused. The law supposes that the Magistrate has acted prudently, and with due consideration, and has received information upon which he believes that it is necessary to prevent a breach of the peace by calling for a security-bond. The words of s. 282 appear to me to suppose that a good *prima facie* case has already been established against the party accused, which case he is called upon to rebut, if he would escape the necessity of having to give security, and I cannot find either in s. 282, 287, or 288 anything which makes it incumbent on a Magistrate to adjudicate judicially as to the necessity for taking security in evidence given before him, on the appearance of the person summoned. It appears to me that if a Magistrate is once satisfied, on what

before him upon the foundation of any information that can be called credible information, still he cannot make the order that the defendant should enter into a bond to keep the peace, until he has adjudicated judicially that he is satisfied that it is necessary for the preservation of the peace to take such a bond from the defendant. This is provided by s. 288, and taking that section in connection with the one immediately preceding 287, it is perfectly clear that this adjudication must be come to, upon evidence properly given on the appearance before the Magistrate of the person who has been summoned, or of his agent in the case, where he is permitted to appear by agent. Two or three decisions upon the analogous enactment, s. 318, namely, *Deewan Elahi Newaz v. Sararannisa*<sup>1</sup> and *Amrit Nath Jha v. Ahmed Reza*<sup>2</sup> and others, have laid down that an adjudication by a Magistrate of his being satisfied that a breach of the peace is likely to occur must be based upon legal evidence, and be duly recorded. I may say that it is obvious, and unless this be so, the result of the provisions of s. 282 and s. 288 would be that the Magistrate might really inflict a very heavy fine, and commit to prison for default of payment thereof, without the observance of the ordinary procedure, and the taking of evidence, in the manner which is considered by the Legislature to be necessary, and is therefore strictly provided for all other cases, where an accused person is made liable to a penalty, and without there being even the security afforded by the opportunity of appeal.

On the whole, I think, there cannot be any doubt, even though the words of this section, with those of the one I have last referred to, do not expressly so provide, that the adjudication of a breach of the peace being likely to occur, which must be made by the Magistrate under s. 288 of the Criminal Procedure Act, before he can take a bond from the person accused, must be based upon legal evidence, and must be distinctly stated as a judicial finding of the Magistrate as in all other criminal cases. I have already said that the learned Advocate has pointed out to us that there does not appear in the papers before us any trace of evidence having been given when the accused appeared before the Magistrate in obedience to the summons. Nor is there evidence in the *quasi* record sent up to us, which can be properly said to be the taking place of an adjudication by the Magistrate that he was satisfied upon the evidence that a breach of the peace was likely to occur. This being so, I think that the order directing the accused, Baboo Narsing Narayan, to enter into a bond to keep the peace, was illegal, as not having been duly made; and, therefore, that it ought to be quashed, and the accused released from his recognizances, if he has entered into them, or discharged from custody, if he has been put into prison.

<sup>1</sup> 5 W. R., Crim., 14.

<sup>2</sup> 6 W. R., Crim., 61.

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he considers to be credible information, that it is necessary to take security for the preservation of the peace, he has full authority to call upon the party charged, and to take such security from him, without recording in his presence the evidence or information on which he himself acted.

This case has been referred to the High Court by the Judge of Gya, under s. 434, Code of Criminal Procedure, with an opinion that as a certain party against whom proceedings had been taken under s. 282 had not had the opportunity of hearing the evidence, on which the Magistrate acted, in calling upon him to show cause, the order for security was illegal, in accordance with the ruling of a Divisional Bench of this Court, in the case of *Narsing Narayan*.<sup>1</sup> With great deference to the learned Judges who passed that decision, I think, for the reasons above given, that the Magistrate's order in this case was not illegal, and that there was no necessity for taking the evidence of witnesses in the accused's presence.

The point is an important one, and I should wish it referred to a Full Bench.

LOCH, J.—I think that the course laid down in the ruling of the Court referred to should be followed, though the law does not distinctly prescribe what is to be done after the accused appears. He is, however, in the position of a person charged with an offence, against whom evidence has been taken, and he has been summoned to answer to the charge. Now, in ordinary cases, though witnesses in support of the charge have been examined before the accused appear, yet when he appears, they are required to attend to be again examined before the accused, and to give him an opportunity of cross-examining them. This appears to me the course which should be taken in cases of the kind which has been referred to. A criminal charge is preferred, and the accused should have the opportunity, as in other cases, of showing, by the cross-examination of the witnesses for the prosecution, that no charge is made out against him. I would, therefore, set aside the order of the Magistrate, as recommended by the Sessions Judge.

*Before Mr. Justice Loch and Mr. Justice Glover.*

### THE QUEEN v. SHAM SUNDAR CHOWDHRY.<sup>2</sup>

1868.  
Dec. 11.2 B. L. R.  
A. Cr. 11.

*Recognizance to keep the Peace—Jurisdiction—Criminal Procedure Code (Act XXV. of 1861), s. 293.*

A executee in District T a recognizance to keep the peace towards B. A was afterwards convicted in District S of having assaulted B in that district. *Held*, A had forfeited his recognizance, and the Magistrate in District T could proceed against him under s. 293 of the Criminal Procedure Code.

DEPENDANT executed, at the order of the Magistrate of Tipperah, a recognizance, that he would keep the peace towards one Radhagobind Shaha. Subsequently he was convicted by the Magistrate of Sylhet of having assaulted Radhagobind within the District of Sylhet. The latter thereupon applied to the Deputy Magistrate of Tipperah for the forfeiture of defendant's recognizance given to the Magistrate of Tipperah. The Deputy Magistrate dismissed the application under s. 272 of the Criminal Procedure Code, on the ground that the conviction which had taken place in Sylhet could not affect the recognizance executed in Tipperah. The Sessions Judge of Tipperah

<sup>1</sup> *Ante*, p. 58, note.

<sup>2</sup> Reference from Sessions Judge of Tipperah, dated 31st August 1868.

referred the case to the High Court, holding "that a person who executes a recognizance in Tipperah to keep the peace is clearly liable to forfeit the sum for which he gave recognizance, if he break the peace, as regards the person towards whom he was bound over to keep it, whether such breach of the peace occur in Tipperah or Sylhet."

The judgment of the Court was delivered by

LOCH, J.—We concur with the Sessions Judge in thinking that the view taken by the Magistrate is erroneous. We think that, if the accused have forfeited his recognizance given to the Magistrate of Tipperah by committing a breach of the peace in Sylhet, of which he has been convicted and punished, the Magistrate of the former district can proceed under the provisions of s. 293 of the Criminal Procedure Code. We, therefore, set aside the order passed by the Magistrate in this case.

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*Before Mr. Justice Loch and Mr. Justice Glover.*

### THE QUEEN v. SHIFAÏT ALI.<sup>1</sup>

*Forgery—Penal Code (Act XLV. of 1860), ss. 5, 29, & 463—False Document.*

To constitute the offence of forgery, the simple making of a false document is sufficient. It is not necessary that the document should be published, or made in the name of a really existing person.

A writing, which is not legal evidence of the matter expressed, may yet be a document within the meaning of s. 29 of the Penal Code, if the parties framing it believed it to be, and intended it to be, evidence of such matter.

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Dec. 14.

2 B. L. R.  
A. Cr. 12.  
[10 W. R. 61.]

The facts of this case are sufficiently explained in the following judgments :

Loch, J.—Shifait Ali, Ilahi Baksh, and Mani Shah, were apprehended in the act of writing the draft of a petition bearing the name of Dilawar Shah, charging Raja Lilanand Singh with the murder of a fakir, with the object, as alleged by the complainant, of extorting money from the Raja. They were committed for trial—Shifait Ali on a charge of forgery under s. 469 of the Indian Penal Code, and the other two on a charge of abetment. The fact of the parties being concerned in concocting and writing the petition appears to be established, and the only question before us is the law-point, whether any offence recognized by the Penal Code has been committed or not. The Sessions Judge holds that no offence has been committed ; 1st, because it did not appear that there is such a person as Dilawar Shah ; 2nd, that the draft in question had never been presented in Court or shown to any person, and consequently no one had been harmed by it ; and he, therefore, acquitted the prisoners without calling upon them for a defence.

An appeal has been preferred by the Raja from this order, and the Court was asked to interfere under the precedent given in *Gora Chand Gope* ;<sup>2</sup> and the record was, accordingly, sent for.

It is necessary, before determining whether an offence has been committed, to refer to certain sections of the Indian Penal Code. The offence of forgery is thus defined in s. 463 : "Whoever makes any false document with intent to cause damage or injury to any person, or to cause any person to part with property, or with intent to commit fraud, commits forgery." A

<sup>1</sup> [This case has been followed in *Bishoo Barik, Reference in the Case of* (16 W. R. 67) ; and upholds *Queen v. Gorachand Gope* (5 W. R. 45 ; B. L. R. Sup. Vol. 443).—ED.]

<sup>2</sup> 5 W. R., Cr., 45.



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v.

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ALI,

2 B. L. R.

A. Cr. 12.

[10 W.B. 61.]

person is said to make a false document who dishonestly or fraudulently makes a document, with the intention of causing it to be believed that such document was made by or by the authority of a person by whom or by whose authority he knows that it was not made; and, in the second explanation to s. 464, it is stated that the making of a false document in the name of a fictitious person, intending it to be believed that the document was made by a real person, or in the name of a deceased person, intending it to be believed that the document was made by the person in his life-time, may amount to forgery.

S. 29 of the Penal Code describes a document in the following terms: "The word 'document' denotes any matter expressed or described upon any substance by means of letters, figures, or marks, or by more than one of those means, intended to be used, or which may be used, as evidence of that matter. "Dishonestly," according to s. 24, is thus defined: "Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another is said to act dishonestly."

Now, it is clear from the definition of forgery in s. 463 that the simple making of a false document constitutes the offence of forgery; and that it is not necessary, as apparently supposed by the Judge, that it should be issued or made known to the injury of a person's reputation before the offence is completed, or the offender liable to punishment. The publication of such a document forms no part of the offence, and the Judge is, therefore, wrong in holding that no offence had been committed, because the petition had not been presented in Court, or shown to any person. He is equally wrong in considering that no offence had been committed, because it was uncertain whether such a person as Dilawar Shah was in existence; for, as shown by the second explanation to s. 464, it is clear that a false document may be made in the name of a fictitious person.

It cannot be questioned that the document has been made dishonestly, *i. e.*, with the intention of causing wrongful gain to the makers by extorting money from the Raja, and wrongful loss to the Raja who was falsely charged with committing murder. And if the draft-petition be a document, as defined in s. 29 of the Penal Code, it is evident that the prisoners were rightly charged with the offence of forgery. Now, the gist of that definition lies in the last few words, "intended to be used, or which may be used, as evidence of that matter." The matter expressed in this paper is the fact of a murder alleged to have been committed by the Raja through his servants. Is this paper evidence of that matter? Could it, as it stands, be used as evidence against him to support the charge of murder which it sets forth? It certainly is not evidence as it stands. The paper is the mere narration of an alleged fact, and there is no one to swear to the truth of its contents. But what was the intention with which the petition was prepared, for that has also to be considered. There can, I think, be little doubt that the person who prepared the petition believed that it might be used as evidence, and prepared it with that intention; and this being the case, the petition does become a document within the meaning of s. 29 of the Penal Code; and as it contains statements injurious to the character of Raja Lilanand Sing, and can have been prepared with no other intent than to cause injury to him, and the statements contained therein are alleged to be false, the parties concerned were rightly committed to the Sessions on a charge of forgery. The Judge has acquitted the prisoners erroneously on a point of law; and, therefore, under the ruling of the Full Bench in the case of *Gora Chand Gope*,<sup>1</sup> I think the order of acquittal

<sup>1</sup> 5 W. B., Cr., 45.

should be set aside, and the Judge required to apprehend the prisoners, and to pass the proper sentence upon them as guilty of the offence of forgery under s. 463 and s. 469.

GLOVER, J.—There can be no doubt, I think, on the admitted facts of this case, that there was an offence committed under s. 469 of the Penal Code, if the written paper found in possession of the accused can be styled a “document” in the sense of s. 29. By that section, a document is any matter expressed by writing, figures, or marks, “intended to be used, or which may be used, as evidence of that matter.” Now, the writing in question could not have been used as evidence of the alleged murder; and, therefore, the case turns on the meaning of the words “intended to be used.”

It appears to me that the accused, in concocting the anonymous petition against the Raja Lilanand Sing, to the address of the Magistrate of the district, intended that petition to be used as evidence, that a certain fakir had been beaten and killed by the Raja’s orders. I do not think that it affects the case, that the petition could not have been so used; it is enough that the accused thought it could, and made their arrangements accordingly. It was not necessary, moreover (see explanation to s. 29), that the evidence was intended to be used in a Court of Justice.

Further, the last illustration to s. 29 describes any authority containing “instruction” to be a document. Now, this petition gave information to the Magistrate of the commission of a murder, and may therefore be said to be an “instruction” on which the Magistrate would most probably have taken action.

On all the other points raised, I concur entirely in the opinion expressed by Mr. Justice Loch. The Sessions Judge’s reasons for discharging the accused are manifestly insufficient.

I think, therefore, that the Judge below should be directed to try the case with reference the words of the section above quoted.

*Before Mr. Justice Loch and Mr. Justice Glover.*

QUEEN *v.* TULSI SING AND OTHERS.<sup>1</sup>

*Right of Private Defence.*

A party in possession of land is legally entitled to defend his possession against another party seeking to eject him by force.

In this case, the Deputy Magistrate of Patna convicted Tulsi Sing, Thakur Sing, and two others, of rioting, under s. 147 of the Penal Code, and fined them Rs. 50 each. It appeared that Tulsi Sing and Thakur Sing had each laid claim to the same piece of land, and when the police arrived on the spot, they found Thakur Sing’s men ploughing the land, and Tulsi Sing’s party preparing to expel them. Thakur Sing’s party were also ready to resist by force. The Deputy Magistrate punished both parties equally. At the same time, however, in a separate proceeding, under Chap. 22 of the Criminal Procedure Code, he found that Thakur Sing was in possession of the disputed land. Thakur Sing, upon this, applied to have the conviction passed upon him in the riot-case quashed, contending that he was legally justified in defending his property. The Judge referred the case to the High Court, with the statement of the above facts, observing:

<sup>1</sup> Reference by the Sessions Judge of Patna.

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*v.*

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ALI,  
2 B. L. R.  
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[10 W.E. 61.]

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[10 W.E. 64.]

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QUEEN  
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TULSI SING,  
2 B. L. R.  
A. Cr 16.  
[10 W. R. 64.]

"It appears to me that, under s. 104 of the Penal Code, they were fully justified in all that was actually done. I would, therefore, quash the convictions; but as the order is one from which no appeal lies to this Court, I am obliged to refer it to the High Court."

LOCH, J.—We concur in the opinion expressed by the Judge, and direct that the fine imposed upon Thakur Sing and his party be remitted.

*Before Sir Barnes Peacock, Kt., Chief Justice, and Mr. Justice Miller.*

IN THE MATTER OF BANKA BIHARI GHOSE.<sup>1</sup>

*Tolls—Arrears of Rent—Illegal Arrest.*

1869.

June 9.

2 B. L. R.  
A. Cr. 17.

A, the lessee of a toll, was in arrear to Government in respect of the rent. The Magistrate issued a summons to him, whereby it was recited that a plaint had been preferred against him (A) for the offence of not paying the sum of Rs. 262 for arrears of rent, and A was summoned to appear before the Magistrate to answer the charge. A did not appear on the day appointed, but had an application presented for postponement of the demand for arrears of rent, on the grounds therein stated. On the following day, the Magistrate passed the following order: "Whereas the debtor, defendant, has not appeared in person, the summons has been disobeyed; therefore, it is ordered that a warrant be issued for the arrest of the defendant." Proceedings were afterwards taken upon the warrant. *Held*, that all the proceedings taken by the Magistrate were irregular, and must be set aside.

On the 5th December 1868, Banka Bihari Ghose petitioned the High Court, alleging as follows:—

"That, on the 30th March 1868, your petitioner got an ijara of the Bakrahat toll bar from the Magistrate of Zilla 24-Pergunnas.

"That, during the last heavy showers of rain, a greater portion of the road being broken, your petitioner applied to the Magistrate of 24-Pergunnas, on the 25th June 1868, for repairing the road, and giving a remission of the rent payable by your petitioner.

"That, subsequently, a charge for not paying 262 rupees on account of arrears of rent having been instituted against your petitioner, on the 8th July 1868, a notice was issued, directing your petitioner to appear before the Magistrate of 24-Pergunnas, on the 15th idem.

"That, on the said 15th July, your petitioner presented an application to the Magistrate, requesting him, on the grounds stated therein, to postpone for a while the demand for arrears of rent.

"That, on the 16th July 1868, the Magistrate of 24-Pergunnas passed the following order: 'Whereas the debtor, defendant, has not appeared in person, the summons has been disobeyed. Therefore, it is ordered that a warrant be issued for the arrest of the defendant.'

"That, subsequently, on the 5th August, your petitioner appeared personally, and applied to the Magistrate for deducting from the amount which had been deposited by him, the amount of rateable arrears, and refunding to him the remainder of the deposit money, and for withdrawing the illegal warrant which had been directed to be issued for the arrest of your petitioner.

"That, notwithstanding these applications, on the 13th Ahgran last, some constables went into the house of your petitioner at Arbellia, and entered into his zenana.

"That your petitioner submits that, under the circumstances of the case, the Magistrate had no jurisdiction to issue the warrant complained of by your petitioner.

<sup>1</sup> Criminal revisional jurisdiction.

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"That, therefore, your petitioner prays that your Lordships may be pleased to direct the Magistrate of 24-Pergunnas to show cause, under what law, and for what offence, he issued the warrant for the arrest of your petitioner. And your petitioner further prays that your Lordships may be pleased to set aside the order of the Magistrate of Zilla 24-Pergunnas, whereby he directed a warrant to be issued for the arrest of your petitioner."

Upon this the Court (PEACOCK, C.J., and MITTER, J.) ordered the Magistrate of the 24-Pergunnas to suspend further proceedings, and to send up the papers to the Court, permitting him at the same time, if he were so minded, to show cause why his order should not be set aside.

On the 23rd December, the Magistrate by letter showed cause as follows :—

"With reference to the Court's resolution on the petition of Banka Bi-hari Ghose, farmer of the Bakrahat toll bar, execution of the warrant has been stayed pending the further orders of the Court.

"2. I beg to forward herewith the record, and to show cause as follows, why the order should not be set aside.

"3. The petitioner is the farmer of a toll-gate under Act VIII. of 1851, and is, under cl. 2 of the Act, liable to the same responsibilities, as he would be, if similarly employed in the collection of land-revenue.

"4. His position is very much analogous to that of the farmer of a ferry under Reg. VI. of 1819. The law has, in their case, provided (s. 10, Reg. VI. of 1819) for recovery of arrears in the mode prescribed for the recovery of money embezzled by native ministerial officers, that is, in accordance with s. 7, Reg. XVIII. of 1817.

"5. There is no specific mode of recovery of arrears from defaulting toll-farmers prescribed in the law quoted, but by the provision that persons employed in the management and collection of the tolls are liable to the same responsibilities as would belong to them, if employed in the collection of the land-revenue, I infer that they may be proceeded against on default as persons similarly employed in the collection of the land-revenue may be.

"6. The liability of a farmer of land-revenue to arrest on default under s. 23, Reg. VII. of 1799, has not, so far as I am aware, been ever questioned, and consequently, in my opinion, a farmer of the toll-revenue is similarly liable.

"7. It is perhaps scarcely necessary to call attention to the fact that the process under question bears date anterior to the 10th August last, on which day the section of the Regulation under which it was issued ceased to be law by the enactment of Act VII. (B.C.) of 1868."

The judgment of the Court was delivered by

PEACOCK, C.J.—We think that the order of the Magistrate dated the 16th of July 1868, and the warrant issued thereon, ought to be set aside.

The petitioner, against whom the warrant was issued, was the lessee of the tolls to be collected at a certain toll-gate. Certain arrears of rent payable under the lease being unpaid, the Magistrate issued a summons for the appearance of the petitioner. It does not appear, on the face of the summons, under what law the Magistrate was proceeding; but the summons recites that a complaint having been preferred against the petitioner for the offence of not paying the sum of Rs. 262 for arrears of rent, the petitioner was summoned to appear before the Magistrate to answer the charge. From the use of the word "offence," it would seem that the Magistrate was treating the case as one of a criminal, and not of a civil nature. The petitioner did not appear in pursuance of the summons; but he sent a kaifat to the effect that the road having been out of repair, and carriages and passengers having been unable to pass along it, he had been unable to collect the tolls in

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respect of which the rent was payable. Upon that the Magistrate made the order in question. The order is in these words: "Since the debtor has not appeared in person, he has thereby disobeyed the order of the Court; therefore, it is ordered that a warrant be issued to arrest the defendant;" and a warrant was issued accordingly.

It does not appear, on the face of the order, under what provisions of law the Magistrate was acting in ordering a warrant to be issued for default of appearance according to the terms of the summons. The only law of which I am aware which could give any color of justification for the issue of the warrant is s. 73 of the Code of Criminal Procedure, which authorizes a Magistrate, after default made to a summons, to issue a warrant of arrest against the person summoned.

If the order was made and the warrant issued under the provisions of the Code of Criminal Procedure, this Court, under the power of revision vested in it by s. 404, may set aside the proceedings for an error in law.

If the Magistrate considered that the non-payment of the rent due under the lease was a criminal offence, it appears to me that he was wrong in point of law; and that he had no power under the Code of Criminal Procedure to arrest the prisoner for not appearing to the summons, and the Court in that case would have no difficulty in quashing the order and warrant and all proceedings taken under them.

When the rule for setting aside the order was made by this Court, the Magistrate was authorized to show any cause he might think fit why the order should not be quashed, and the Magistrate, in his letter of the 23rd December 1868, has stated his reasons.

He contends, first, that the petitioner, as farmer of a toll-gate under Act VIII. of 1851, is, under cl. 2 of that Act, subject to the same responsibilities as he would have been if similarly employed in the collection of land-revenue; and that he was, consequently, liable to be dealt with under s. 23, Reg. VII. of 1799.

That Act authorizes the local Government to fix the rates of tolls to be levied upon any road made or repaired at the expense of the Government, and to place the collection of such tolls under the management of such persons as may appear to them proper; and it is enacted by the section to which the Magistrate refers, that all persons employed in the management and collection of such tolls shall be liable to the same responsibilities as would belong to them if employed in the collection of the land-revenue.

It is unnecessary to consider under what provision of the law the tolls were leased to the petitioner by the Magistrate, for it appears to me that the lessee of tolls is not a person employed in the management and collection of the tolls within the meaning of Act VIII. of 1851. If he was a manager and collector of tolls, he would be liable to pay over the tolls when collected, and to be punished for embezzlement if he should appropriate them to his own use. But a farmer or lessee of tolls collects them for his own use, and pays the rent in consideration of which the tolls are made over to him for the term of the lease. It appears that the warrant was issued on the same day on which Reg. VII. of 1799 was repealed by Act VII. of 1868. I will not stop now to enquire whether a warrant issued on the very day on which the Regulation was repealed could be justified by the Regulation, because I am of opinion that, if the warrant had been issued whilst the Regulation was in full force, it would not have been justified by the Regulation.

S. 23, cl. 2, authorized proceedings to be taken in the event of any arrear of revenue being undischarged on the 1st day of the month succeeding that for which the arrear should have become due. The section extended not

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only to arrears of revenue properly so called, but to arrears of revenue as described in s. 2, Reg. XIV. of 1793. It applied, therefore, to arrears of rent due from a farmer of land. The procedure thereby pointed out, was to require payment of the arrear due with interest, and, if not paid, it authorized the attachment of the estate of the proprietor from whom the arrear should be due, or, in the case of a farmer, both the attachment of his farm and the arrest of his person. The arrest was to be made by the Collector as a fiscal, not as a criminal officer, in the mode prescribed by s. 5, Reg. XIV. of 1793. The procedure pointed out by that section was very different from that adopted in the present case. In particular, the amount of the arrear due from the defaulter was to be specified in the warrant. In this case the order for the arrest of the petitioner was not for non-payment of the arrear, but for disobeying the order of the Court in not appearing personally, according to the tenor of the summons; and the order was made, not in the character of Collector, but in the character of Magistrate.

Further, the Collector contends that the position of the petitioner was very analogous to that of the farmer of a ferry under Reg. VI. of 1819, by s. 10 of which recovery of arrears may be made in the mode prescribed for the recovery of money embezzled by native ministerial officers in accordance with s. 7, Reg. XVIII. of 1817. It is unnecessary to refer to this contention of the Magistrate further than to say that, however analogous the position of a farmer of tolls and the farmer of a ferry may be, the law which is applicable to the farmer of a ferry has not been extended to the farmer of the tolls of a road.

The lease of the tolls did certainly stipulate that, if the rent should not be paid, it might be recovered in the mode prescribed for the recovery of money embezzled by native ministerial officers; but I apprehend it is perfectly clear that such a stipulation could not legally be made, and that the Magistrate as lessor of the tolls had no right to reserve a remedy other than that which the law provided.

If a zemindar should stipulate upon the grant of a talook that, if the rent should not be paid, the lessee may be dealt with in the same manner as a native ministerial officer who embezzles money, and that it should not be necessary for him to proceed under Act X. of 1859, such a stipulation would not be binding. The Magistrate could no more stipulate that any particular law should be applicable to the rent reserved in the lease in question than a zemindar could make a binding stipulation to the effect to which I have referred.

In this case, the Magistrate was proceeding in his character of Magistrate, and not in his character of Collector; and it appears to me that he had no authority whatever to issue the warrant, and that this Court has the power under the Code of Criminal Procedure to quash it upon revision; and further, it appears to me that if the case did not fall within the Code of Criminal Procedure, this Court, under its general power of superintendence, would have power to quash an order made by a Magistrate for the issue of a warrant in a case in which he had no jurisdiction whatever so to proceed. We are of opinion, therefore, that the order must be quashed, and all subsequent proceedings thereon, including the warrant, set aside, the petitioner having undertaken not to take any legal proceedings for anything done under the warrant or order. This undertaking, of course, does not extend to any proceedings which the Magistrate or Collector may have instituted or may institute with reference to the conduct of the mofussil officers in executing the warrant, pending the rule, contrary to the orders of the Magistrate and of this Court.

*Before Sir Barnes Peacock, Kt., Chief Justice, and Mr. Justice Mitter.*

THE QUEEN *v.* KABIL MANJI AND OTHERS.<sup>1</sup>

*Obstructing Navigation—Act V. (B. C.) of 1864.*

1869.  
March 5.

2 B. L. R.  
A. Cr. 23.  
[11 W. R. 18.]

To render a person liable to punishment under s. 16, Act V. (B. C.) of 1864, for obstructing the line of navigation of a Government canal, it must be shown that he wilfully obstructed the navigation.

Baboo *Srikant Mullik* for the petitioner.

THE judgment of the Court was delivered by

PEACOCK, C.J.—In this case, Mr. Beaufort, the Judge of the 24-Pergunnas, has sent up a conviction of three manjis, for having obstructed the line of navigation in the new canal, opposite Sura bazar. The conviction was under s. 16 of Act V. of 1864 of the Bengal Council. That section enacts that any person who shall wilfully cause, or shall aid in causing, any obstruction to any line of navigation, or who shall wilfully omit to remove such obstruction after being requested so to do, shall be punished, on conviction before a Magistrate, with simple imprisonment, which may extend to one month, and shall also be liable to fine, &c.

Mr. Beaufort, upon a petition being presented to him, called for the record of the proceedings, and has sent up that record to this Court, in order that it may be revised; and the Court, therefore, has revised it under the provisions of s. 404 of the Code of Criminal Procedure.

There does not appear to have been any summons to these persons, nor any warrant for their arrest; nor is there a record of any charge having been drawn up; but the manjis were arrested without warrant, and brought before Mr. Galiffe. If there had been a summons, it must, according to the form annexed to the schedule to the Code of Criminal Procedure, have stated shortly the offence charged, and the party would have been summoned to answer it. If the parties had been arrested under a warrant, the warrant would, in like manner, have stated the offence. It is not necessary here to enquire under what authority of law these parties were arrested without warrant. I merely refer to the absence of a summons or warrant to show that there was no charge in writing which the manjis were called on to answer.

The record commences with the evidence of Mr. Milwrick, who says that, on the 25th, at 3 P.M., whilst on rounds at Ohingrighatta, he found three boats laden with wood tied to trees on the east side of the new canal, opposite Sura bazar, and thus obstructing and endangering the navigation of the canal. It was flood tide, and the traffic was very great. These boats were tied by one rope by their heads to trees, the stern across stream; that he had these boats removed to Raja's Khal, and arrested the three manjis named.

There is nothing in that evidence to show that the manjis were wilfully obstructing the navigation, and nothing to show that they were required to remove the boats, or that they continued the obstruction after they were required to remove them.

The record proceeds: "Kabil admits the charge: Jailar, ditto; Sukea, ditto; but states that his boat was not tied to a tree, but to a lagi driven into the bank."

The admission of the charge does not amount to anything, unless we know what the charge was. The evidence does not show that the parties

<sup>1</sup> Reference by the Sessions Judge of the 24-Pergunnas.

were wilfully obstructing, and the admission of the charge might be, and probably was, merely that they tied their boats to the bank, and not that they wilfully interrupted the navigation.

The finding was that the defendants "are convicted of obstructing the navigation of the Calcutta Canal," and they are then sentenced to 15 days' jail each, under Act V. of 1864, s. 16. The finding does not state that the accused wilfully obstructed the navigation. There is, therefore, no charge; there is nothing in the evidence, or in the admission of the prisoners, or in the finding, to show or lead us to suppose that the prisoners wilfully obstructed the navigation. Mr. Galiffe appears to have considered that an obstruction, whether wilful or not, was sufficient to render the prisoners liable to imprisonment.

It is not for me to say that 15 days' imprisonment would have been too much for the offence of wilfully obstructing the navigation, or of wilfully continuing an obstruction after a request to remove it, if such an offence had been proved by the evidence; but it appears to me that there is nothing whatever to show that the prisoners acted wilfully. The accused have already suffered six days' imprisonment, and it appears to me that the order of the Deputy Magistrate ought to be quashed. It is, accordingly, quashed, and the prisoners are to be forthwith released.

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A. Cr. 23.

[11 W. R. 18.]

*Before Mr. Justice Norman and Mr. Justice E. Jackson.*

### THE QUEEN v. LUTHI BEWA AND OTHERS.<sup>1</sup>

*False Personation—Registration Act.*

1869.

March 31.

2 B. L. R.  
A. Cr. 25.

[11 W. R. 24.]

A vendor proceeded, in company with three persons, to Dacca to register her deed of sale. Falling ill on the way, the three companions went to the Registrar's office; one of them there personated the vendor, and got registry of the deed. She was convicted of cheating by false personation, and the other two of abetting that offence.

*Held*, on revision, that, as there was no intention apparent on the part of the accused to injure or defraud any one, the convictions should have been under ss. 93 and 94 of Act XX. of 1866, and not under s. 419 of the Penal Code.

THE facts are fully set out in the judgment of the Court, which was delivered by

NORMAN, J.—The prisoner, Luthi Bewa, has been convicted, under s. 419 of the Indian Penal Code, of the offence of cheating by false personation, and sentenced to one year's rigorous imprisonment; and the prisoners, Anand Mohan and Becharam, have been convicted of abetting the offence, and sentenced to 18 months' rigorous imprisonment. On the application of the vakeel for the prisoners, the record of the case was sent for under s. 404 of the Criminal Procedure Code.

The prisoners were tried by the Joint-Magistrate of Dacca, and the conviction of the Joint-Magistrate was upheld on appeal by the Judge. We, therefore, taking up the case as a Court of revision, must take the facts as found by the lower Court.

It appears that one Kumari, having agreed to sell a small piece of land, started with three persons in a boat for Dacca for the purpose of registering the deed of conveyance. According to the finding of the lower Courts, on arriving at Dacca, Kumari was too ill to leave the boat; and Luthi, who accompanied her to Dacca in the boat, went with the other two prisoners to the office of the Registrar, and there personated her, and had the deed registered in her name.

<sup>1</sup> Revision of proceedings under ss. 404 and 405 of the Code of Criminal Procedure.



1869.

QUEEN  
v.  
LUTHI  
BEWA,

2 B. L. R.  
A. Cr. 25.

[11 W. R. 24.]

We think there is nothing to show that the prisoners intended to defraud or injure anybody in putting forward Luthi to personate Kumari, and do an act which, doubtless, Kumari would have done, had she not been prevented by illness from going to the office of the Registrar in person.

We think, therefore, that the prisoners should not have been convicted of *cheating* by false personation under s. 419 of the Indian Penal Code. The offence which they committed was an offence under s. 93 of Act XX. of 1866. We, therefore, quashing the conviction, as a conviction under s. 419, substitute a conviction under s. 93 of Act XX. of 1866 against the prisoner Luthi for falsely personating Kumari, and a conviction under s. 94 against Anand and Becharam for abetting the offence. Under all the circumstances of the case, we think a slight sentence only is called for, and, therefore, direct the prisoner Luthi to be imprisoned for four calendar months, and the prisoners, Anand and Becharam, for six calendar months, to be reckoned from the day of the Joint-Magistrate's order, viz., the 15th of December last.

Before Mr. Justice Norman and Mr. Justice E. Jackson.

MAHANT DHANRAJ GIRI GOSWAMI v. SRIPATI GIRI  
GOSWAMI.<sup>1</sup>

1869.  
March 25.

2 B. L. R.  
A. Cr. 27.

[11 W. R. 23.]

*Possession—Certificate—Act XXVII. of 1860—Criminal Procedure Code, s. 318.*

A and B had a dispute about possession of a certain muth. A was declared by the Magistrate, under s. 318 of the Criminal Procedure Code, to be in possession. Subsequently, B got a certificate under Act XXVII. of 1860, and applied to the Magistrate for possession, which was given to him.

*Held*, that the Magistrate's order giving possession to B was irregular, and must be set aside.

THIS case was brought before the High Court by the Judge of Cuttack in the following letter of *Reference* :—

Under s. 434, Act XXV. of 1861, and Circular Order of the High Court, dated 15th July 1863, No. 18, I herewith transmit the record of the case, noted in the margin, to be laid before the High Court, with the following report :—

Case No. 32 of 1868.  
Mahant Dhanraj Giri Goswami v. Sripati Giri Goswami.

There was a dispute between two parties, Dhanraj Giri and Sripati Giri, about possession of a certain muth and its appurtenances. Dhanraj Giri was found to be in possession by the Joint-Magistrate Mr. Barton, and was ordered to retain the property under s. 318, Code of Criminal Procedure. Subsequently, on the other claimant, Sripati, obtaining a certificate under Act XXVII. of 1860, the Officiating Joint-Magistrate, Mr. Boxwell, made over possession of the property to him; and against this order Dhanraj Giri appeals.

The order passed by the Officiating Joint-Magistrate appears to me to be illegal for the following reasons :—The possession of the property in question was found by the late Joint-Magistrate to be with Dhanraj Giri; and under s. 318 of Act XXV. of 1861, he was kept in possession. The present Joint-Magistrate would not legally interfere with that possession, and nothing, except a decree of the Civil Court, can oust the party put in possession under

<sup>1</sup> Reference to the High Court, under s. 434 of the Code of Criminal Procedure, from the Sessions Judge of Cuttack.

the former order. I am clearly of opinion that a certificate under Act XXVII. of 1860 does not amount to a decree, and is not sufficient to warrant possession of property being made over, under such circumstances as appears in this case. As I think that the order passed is illegal, I beg to refer the case for the consideration of the Court.

*Judgment of the High Court.*—The order of Mr. Boxwell appears irregular. In the first place, the grant of the certificate under Act XXVII. of 1860 does not decide the title to the land; and, if it did, an order of the Civil Court must be executed by that Court, and not by the Magistrate.

Mr. Boxwell appears to have been misled by Mr. Barton's order, which was also irregular. Mr. Barton should have declined to interfere, except to keep the peace, and left the parties to apply to the Judge under the provisions of Act XIX. of 1841 to appoint a curator, or make some order with regard to the property, till the right of succession should be determined. The question, which was not of a disputed possession, but of a right of succession, could not be properly dealt with under s. 318 of the Code of Criminal Procedure. We quash Mr. Boxwell's order.

1869.

MAHANT  
DHANRAJ  
GIRI  
GOSWAMI

v.  
SRIPATI  
GIRI  
GOSWAMI,

2 B. L. R.  
A. Cr. 27.

[11 W. R. 28.]

## Short Notes of Cases.

1868.

REFERENCE  
BY THE  
OFFICIATING  
ADDITIONAL  
SESSIONS  
JUDGE OF  
24-PERGUN-  
NAS,  
2 B. L. R.  
S. N. 2.

**CRIMINAL PROCEDURE CODE (ACT XXV. OF 1861), ss. 427 & 435.—DIREC-  
TION TO COMMIT—PROCEDURE.**—One Guhini Mussulmani charged Hakim Sir-  
dar and Esab Sirdar with breaking into her house at night, and committing  
a rape upon her person. The Deputy Magistrate of Satkhira convicted both  
the accused, under s. 457 of the Indian Penal Code, of the offence of com-  
mitting house-breaking by night in order to the committing of an offence  
punishable with imprisonment (*viz.* rape), and sentenced them each to be  
rigorously imprisoned for six months, and to pay fines of Rs. 6 each, and in  
default of payment to be further imprisoned for ten days. The accused ap-  
pealed to the Sessions Judge, who, on June 13th, 1868, set aside the order  
of the Deputy Magistrate, and directed that the accused should “be com-  
mitted to the Sessions on a charge of rape.” The Deputy Magistrate, accord-  
ingly, committed the accused Hakim Sirdar, on charges of rape, under s. 376 ;  
attempt to commit rape, under ss. 511 and 376 ; and house-breaking by night  
with intent to commit an offence punishable with imprisonment, under s. 457  
of the Penal Code ; and the accused, Esab Sirdar, on charges of abetment of  
the first two of the above charges, and of committing an offence under s. 457  
of the Penal Code.

On a reference by the Sessions Judge to the High Court, *held*, “the case  
of the *Queen v. Ramtahal Sing and others*<sup>1</sup> is exactly similar to that now  
referred to us by the Sessions Judge, and should, in our opinion, govern it.  
The offence of which the accused were convicted by the Deputy Magistrate,  
namely, lurking house-trespass by night, &c., s. 457, Penal Code, was one tri-  
able by that officer ; and, therefore, ss. 427 and 435 of the Criminal Proce-  
dure Code did not apply, and the Sessions Judge was wrong in directing the  
men to be committed to the Sessions. The order of the Sessions Judge direct-  
ing commitment must be set aside, and the order of the Deputy Magistrate  
restored.”—*Per Loch and Glover, JJ.*, Reference by the Officiating Additional  
Sessions Judge of 24-Pergunnas. 9th September 1868.

1868.

GAUR  
CHANDRA  
CHUCKER-  
BUTTY  
v.  
KRISHNA  
MOHAN  
SING,  
2 B. L. R.  
S. N. 4.

**PENAL CODE, s. 206—ACT X. OF 1859, s. 145.**—A Deputy Magistrate  
convicted and sentenced, under s. 206 of the Indian Penal Code, certain per-  
sons for having fraudulently removed property to prevent its being taken in  
execution of an Act X. decree.

The Judge was of opinion that the Deputy Magistrate's order was illegal,  
and sent the case up to the High Court that the Deputy Magistrate's orders  
might be quashed, on the ground that, as s. 145 of Act X. of 1859 provides  
for the punishment of persons who remove property distrained under that  
Act, the Deputy Magistrate was not empowered to try this case as one punish-  
able under s. 206 of the Indian Penal Code.

[10 W. R. 46.]

On reference to the High Court, *held*, “it appears to us that the offence  
is punishable under s. 206 of the Indian Penal Code, and not under s. 145 of  
Act X. of 1859, which relates to property under restraint, and not that taken  
in execution of a decree.

“The Collector trying a case under Act X. of 1859 is a Judge—illustra-  
tion to s. 19, Penal Code ; and the words “Court of Justice” denote a Judge  
empowered by law to act judicially alone—s. 20, Penal Code ; and a suit for

<sup>1</sup> 5 W. R., Crim., 12.

rent is certainly a civil suit so that if a person fraudulently removes property, intending thereby to prevent that property from being taken in execution of a decree or order which has been made by a Collector, who is a Court of Justice in a civil suit, i.e., a suit for rents, he commits the offence described in s. 206, Penal Code. We think that there are no grounds for the interference of this Court." *Per Loch and Glover, JJ.*, Gaurchandra Chuckerbutty v. Krishnā Mohan Sing, Reference by the Sessions Judge of Tipperah. 11th September 1868.

1868.  
2 B. L. R.  
S. N. 4.  
[10 W. R. 46.]

CHAP. XIV., CRIMINAL PROCEDURE CODE (ACT XXV. OF 1861)—POLICE ENQUIRY.—Foktu Shah laid before the Magistrate a complaint under s. 380 of the Penal Code. The Magistrate ordered a police-inquiry, and, on the report made by the police, dismissed the complaint. The Sessions Judge referred the case to the High Court, on the ground that, in cases under Chap. XIV. of the Criminal Procedure Code, the Magistrate could not order a police-inquiry—*Harachand Nowlaka's case*<sup>1</sup>—and ought not, therefore, to have acted on the result of such inquiry.

1868.  
FOKTU  
SHAH,  
REVISION OF  
PROCEEDINGS  
IN THE CASE  
OF,  
2 B. L. R.  
S. N. 6.  
[10 W. R. 49.]

*PER GLOVER, J.* (dissenting from *Harachand Nowlaka's case*).—Under s. 133, a Magistrate may order a police-inquiry "into any offence punishable under the Penal Code."

*PER LOCH, J.*—The Magistrate had no authority to order an inquiry into this case by the police. It is a case which comes under the provisions of Chap. XIV. of the Code of Criminal Procedure, and though some of the provisions of Chap. XII. have been extended to complaints coming under Chap. XIV., yet the power to order an inquiry by the police, under s. 180 of the Code, does not appear to be included among the provisions so extended.

(The Magistrate had examined the complainant under s. 66 of the Criminal Procedure Code, and dismissed the complaint under s. 67. *Held*, therefore, that the Court could not interfere in the case.) *Per Loch and Glover, JJ.*, Revision of Proceedings in the Case of Foktu Shah. 12th November 1868.

PROCEDURE—CRIMINAL PROCEDURE CODE, s. 270—DISMISSAL OF COMPLAINT.—Prosecutor complained before the Magistrate of Rungpore that three persons named had reaped his crop, and assaulted him when he interfered. Summons issued to the defendants. On the day of hearing, prosecutor appeared with his witnesses, and defendants also were present. One of the defendants turning out to be a child of 8 years of age, the Magistrate forthwith dismissed the case, without examining complainant or his witnesses, and ordered the former to pay compensation to defendants, under s. 270, Criminal Procedure Code. The Judge, being of opinion that the Magistrate's proceedings were illegal, referred the case to the High Court, who ordered the Magistrate to explain his action. The Magistrate submitted that, had the fact of one of the defendants being a boy of 8 years of age been known to him, he

1868.  
BILASH  
v.  
MAKROO,  
2 B. L. R.  
S. N. 15.  
[10 W. R. 61.]

<sup>1</sup> 8 W. R., Crim., 12.

[This case refers to *Queen v. Harrak Chand Nowlaka* (8 W. R. 12), and is itself referred to in *In re Jagabandhu Myti v. Gobardhan Bera* (4 B. L. R. A. Cr. 1).—ED.]

[This case is referred to in *Empress v. Shibo Behara* (8 C. L. R. 265).—ED.]

1868.

BILASH  
v.

MAKROO,

2 B. L. R.

S. N. 15.

[10 W. B. 6L.]

would have summarily dismissed the complaint originally without issue of process, and he thought that he was at liberty to do the same on the day of hearing. He further urged that in any case the order for compensation would hold good, as s. 270 admitted of an order for compensation being made in every instance of a vexatious prosecution under Chap. XV., whether the case had been fully tried or not.

The judgment of the High Court was delivered by

LOCH, J.—It appears to us that the Magistrate's order is erroneous. The complainant charged certain parties with assaulting him, and obtained a summons requiring their attendance before the Magistrate. On their appearing, one of the parties charged was a boy supposed by the Magistrate to be about 8 years old, and he, therefore, without going into the evidence for the complainant, considered the complaint frivolous, discharged the accused, and fined the complainant under the provisions of s. 270, Code of Criminal Procedure. Even if the charge could not be sustained against the boy, it might have been against the other parties. It is quite possible that a boy of 8 or 10 years might, from the love of mischief, or fun, or from the example or directions of his elders, join with them in assaulting a person, but it would be no reason for dismissing a case, or holding the complaint to be frivolous or vexatious, because one of the assailants was a child. We think the order imposing a fine should be set aside.

The Magistrate considers that he was justified in dismissing the case without hearing the evidence, and that, even if there were no trial, he had authority to impose a fine under the provisions of s. 270. A Magistrate has certainly authority to dismiss a complaint under the provisions of s. 67, before issuing a summons for the attendance of the accused; but when the parties charged are in attendance, as well as the complainant and his witnesses, it appears to us that the Magistrate is bound to follow the procedure laid down in ss. 265 and 266, and cannot dismiss the complaint, without hearing the evidence. The Magistrate's order dismissing the complaint should also, I think, be set aside; and the complainant be allowed to prosecute the charge, if so minded. *Per Loch and Glover, JJ.*, Bilash v. Makroo, Reference from the Sessions Judge of Rungpore. 11th December 1868.

# Appendix.

*Before Mr. Justice Norman and Mr. Justice E. Jackson.*

**THE QUEEN v. RASSUL NUSHY AND OTHERS.<sup>1</sup>**

*Obstructing a Road—Act XXV. of 1861, s. 320.*

1869.  
Jan. 25.

2 B. L. R.  
App. 9.  
[11 W. R. 8.]

Where A complained merely to the Magistrate that "a certain road had been obstructed by B and others," *held*, that the Magistrate was not bound to inquire into the matter under s. 320 of Act XXV. of 1861.

DURGA PRASAD DAS complained to the Magistrate of Rungpore that "a certain road had been obstructed by Rassul Nushy and others." The Magistrate merely passed the order: "Let it be filed in the office." The Judge held that the Magistrate was wrong: (1) in not inquiring if the road was public or private; (2) in not recording his opinion in English; (3) in not proceeding under ss. 308 or 320 of the Criminal Procedure Code according as the road was public or private. The Magistrate considered that it was for the person aggrieved to make out his right to the road in the Civil Court. The Judge held that the *onus* lay on the other side to show that they had a right to close the road. It did not appear that there was any fear of a breach of the peace.

JACKSON, J.—It is clear that the interference of the Magistrate in this case was not asked on the ground that the road was a public road. The application made by the petitioner consists of a hurriedly and carelessly written petition of four lines. It does not state when the pathway was dug up by the defendants. Under such circumstances, I am not prepared to say that the Magistrate was obliged to inquire into the dispute. S. 320 certainly gives the Magistrate a discretion in the matter. There is nothing in the petition to show that there was any dispute at the time the defendants dug up the pathway. The Civil Court is the proper tribunal to settle such disputes; and even the Magistrate's orders would be subject to the decision of a Civil Court. There are cases where a Magistrate should interfere to prevent a breach of the peace, but it does not follow that he must interfere in all cases. In the absence of all details as to when the occurrence complained of took place, I think the Magistrate was right in this case in not interfering.

NORMAN, J.—I entirely concur in these remarks. It appears to me that it was for the complainants to make out a case for the summary interference of the Magistrate under s. 320. They wholly failed to do so.

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<sup>1</sup> Reference under s. 434 of the Code of Criminal Procedure.

Before Mr. Justice Norman and Mr. Justice E. Jackson.

THE QUEEN v. CHOWDHRY AND OTHERS.<sup>1</sup>

1869.  
Feb. 22.

2 B. L. R.  
App. 26.

*Criminal Procedure Code (Act XXV. of 1861), s. 283—Recognizance to keep Peace.*

A charge of criminal trespass and mischief was dismissed. Thereupon the Magistrate recorded an order in the presence of both parties, calling on them to show cause, on a day fixed, why they should not enter into recognizances to keep the peace.

*Held*, it was not necessary also to issue a summons to them under s. 283 of the Criminal Procedure Code.

BHIKARI RAI, on behalf of Chowdhry Jagamohun Prasad and two others, complained against Mr. Crowdy, a planter, that he had forcibly uprooted tobacco and other crops belonging to his master's ryots, and forcibly sown indigo on their land. A local inquiry was ordered, and the case heard, when the Joint-Magistrate came to the conclusion that the charge was false and vexatious. He then recorded an order in the presence of both the parties, to the effect that, on a certain day then fixed, they should appear and show cause why they should not enter into security of Rs. 2,000 to keep the peace. On the day fixed, the Joint-Magistrate took up the case, and, without hearing any further evidence, ordered the Chowdhry and other two prosecutors in the first case to give security as above. The Judge, on applications made, held that as no summons had issued under s. 283, Criminal Procedure Code, the order should be set aside. He referred the case to the High Court.

The judgment of the High Court was delivered by—

NORMAN, J.—We see no reason for interference, though no summons was served. An order was passed by the Joint-Magistrate in open Court, in the presence of the parties, that they should appear on a certain day, and show cause why they should not give security to the amount of Rs. 2,000. In pursuance of that order, the parties did appear, and shewed cause. They were fully informed of the grounds of the order by the proceedings which had previously taken place.

Before Mr. Justice Norman and Mr. Justice E. Jackson.

THE QUEEN v. RAMGOBIND CHUCKERBUTTY.

1869.  
March 2.

2 B. L. R.  
App. 40.  
[11 W. R. 18.]

*Certificate Tax—Fine—Neglect.*

The fine imposed under s. 17, Act IX. of 1868, for neglect to take out a certificate, must not be less than twice the amount for which such certificate should be taken out.

The judgment of the Court was delivered by

NORMAN, J.—This was a proceeding under s. 17 of Act IX. of 1868, for penalties to which the defendant was alleged to be liable for not taking out a certificate and paying for the same within seven days after the service upon him of a notice by the Collector requiring him to do so.

The Deputy Magistrate of Mymensingh, Mr. Andrew, says, defendant could have told a servant to pay the assessment. He was guilty of a pardonable neglect for not doing so. Accordingly, he ordered him to pay the assessment, Rs. 16, and a fine of one rupee.

The Collector of License Tax brought the matter to the notice of the Magistrate, Mr. Alexander; and eventually an application was made to this Court on behalf of the Government of Bengal, praying that the record might

<sup>1</sup> Reference under s. 434 of the Code of Criminal Procedure.

be sent for, under s. 404 of the Code of Criminal Procedure, on the ground that the conviction was illegal, inasmuch as the Magistrate had no power to remit any portion of the fine, being bound, under the 17th section, to impose on every offender, on conviction, a fine equal to twice the sum mentioned on such notice. We have sent for the record. We are of opinion that the contention of the Government pleader is correct. We should not have had any hesitation in quashing the conviction, and remitting the case to the Magistrate for a fresh trial, but that Baboo Anukul Chandra Mookerjee, on the part of the Government, states that the Government does not desire to press the case further as against the party convicted.

1869.

QUEEN  
v.

RAMGOBIND

CHUCKER-

BUTTY,

2 B. L. R.

App. 40.

[11 W.R. 13.]





# The High Court of Judicature

## AT FORT WILLIAM IN BENGAL.

### FULL BENCH RULINGS.

*Before Sir Barnes Peacock, Kt., Chief Justice, Mr. Justice Bayley, Mr. Justice L. S. Jackson, Mr. Justice Macpherson, and Mr. Justice Mitter.*

#### THE QUEEN v. GORACHAND GHOSE.<sup>1</sup>

*Power of the High Court as a Court of Revision—Verdict of a Jury.*

1868.  
Aug. 17.

The verdict of a jury cannot be reversed by a Court of Revision, even if it be a verdict of "guilty." The only remedy for the prisoner in such a case is an appeal (which can only be on a question of law), or an application to the Executive Government. Nor can a verdict, pronounced by a jury, of "not guilty," be reversed by the High Court on revision, and it is clear that no appeal lies from such a verdict.

8 B. L. R.  
F. B. 1.  
[11 W. R. 29.]

THE following reference was made to the Full Bench of the High Court, by L. S. Jackson, J., in the case of Gorachand Ghose, tried before the Sessions Judge of Hooghly, on the 30th May 1868, on charges of forgery and using as genuine a forged document, under ss. 466 and 471 of the Indian Penal Code.

The prisoner had been acquitted by the unanimous verdict of the jury, and discharged.

The following was a note by L. S. Jackson, J., dated July 29th, 1868, which contains the order of reference:—

I wish this case to be laid before a Full Bench for the purpose of determining the question whether, in the event of a jury returning a verdict of "guilty" or "not guilty," under the express direction of the Presiding Judge, and such direction being held by this Court to be contrary to law, it is not competent to the High Court, on revision, to set aside such erroneous direction, and thereupon to quash the proceedings and order a new trial. I am at present of opinion that this may be done, but there are decisions to the contrary. *The Queen v. Gorachand Gopee*,<sup>2</sup> *The Queen v. Toyab Sheikh*,<sup>3</sup> *The Queen v. Sheikh Basu*,<sup>4</sup> *The Queen v. Bharut Chunder Christian*,<sup>5</sup> *The Queen v. Sakhaul Sheikh*,<sup>6</sup> *The Queen v. Gunesb Koormee*,<sup>7</sup> *The Queen v.*

<sup>1</sup> [This case refers to *Bharut Chunder Christian, Appellant* (1 W. R. 2); *Queen v. Sakhaul Sheikh* (2 W. R. 13); *Queen v. Gunesb Koormee* (4 W. R. 1); *Queen v. Toyab Sheikh* (5 W. R. 2); *Queen v. Gorachand Gope* (5 W. R. 45; B. L. R. Sup. Vol. 443); *Queen v. Bolake Koormee* (6 W. R. 72); *Queen v. Kalichurn Gangooly* (7 W. R. 2); *Queen v. Chunderkant Chuckerbutty* (10 W. R. 14; 1 B. L. R. A. Cr. 8); *Queen v. Sheikh Basu* (8 W. R. 47; B. L. R. Sup. Vol. 750); *Queen v. Bykunt Nath Banerjee* (10 W. R. 17; 3 B. L. R. F. B. 3n.); and is referred to in *Queen v. Goshto Lall Dutt* (15 W. R. 68) and *Queen v. Hari Prasad Gangooly* (8 B. L. R. 557).—ED.]

<sup>2</sup> 5 W. R., Cr. Rul., 45; B. L. R. Sup. Vol. 443; 1 Ind. Jur. N. S. 177 (F. B.).

<sup>3</sup> 5 W. R., Cr. Rul., 2.

<sup>4</sup> July 27th, 1867; 8 W. R. 47; B. L. R. Sup. Vol. 750 (F. B.).

<sup>5</sup> 1 W. R., Cr. Rul., 2.

<sup>6</sup> 2 W. R., Cr. Rul., 13.

<sup>7</sup> 4 W. R., Cr. Rul., 1.

1868.

QUEEN

v.

GORA  
CHAND  
GHOSH,

3 B. L. R.

F. B. 1.

[11 W. R. 29.]

*Bolakee Koormee*,<sup>1</sup> *The Queen v. Kalichurn Gangooly*,<sup>2</sup> *The Queen v. Chunderkant Chuckerbusty*,<sup>3</sup> *The Queen v. Boiceant Nath Banerjee*.<sup>4</sup>

Jackson, J.—The question which I have felt it my duty to refer, for the opinion of a Full Bench, is: “Whether, in the event of a jury returning a verdict of “guilty” or “not guilty,” under the express direction of the presiding Judge, and such direction being held by this Court to be contrary

<sup>1</sup> 6 W. R., Cr. Rul., 72.

<sup>2</sup> 7 W. R., Cr. Rul., 2.

<sup>3</sup> 1 B. L. R., App. Cr., 8; 10 W. R. 14.

<sup>4</sup> *Before Mr. Justice Phear and Mr. Justice Hobhouse. July 14th, 1869*; 5 W. R. 72.

#### THE QUEEN v. BAIKANTHANATH BANERJEE.\*

Phear, J.—We think that there has been a mis-trial in this case. The whole of the charge against the prisoner depended upon the evidence of the two approvers. It is undoubted that a Judge, in cases where the material supporting the charge against the prisoner is afforded by the evidence of an approver, is bound very carefully to warn the jury of the infirmity which necessarily attaches to that evidence. He is bound also to call to their attention the circumstance, if it be in fact the case, that the approver is speaking under the influence of a conditional pardon, that is, a pardon conditional upon his telling the truth to the satisfaction of the Crown, who is the prosecutor. We think that, in this case, the Judge had a desire to warn the jury of the suspicious character of an approver's evidence, although he possibly was not altogether happy in the language which he used for the purpose. But it is clear that he omitted entirely to point out to them that the two principal witnesses were speaking under the influence of a promise of pardon. He was further bound to tell the jury that, although the testimony of persons so situated as these two men were was legally receivable, and might be believed by them, if on all the facts of the case they, in their judicial discretion, thought fit to do so, yet that they ought not to act solely upon this testimony, unless it was corroborated, that is, corroborated so far as regards the charge against the prisoner at the bar. In this case the Judge has not very distinctly given the jury this warning, though he has more than once told them that the evidence of the approvers was corroborated, but I think it is apparent that he has, in regard to this point, laboured under considerable misapprehension. In one place he said that it was certain that many of the facts spoken to by the approvers were true. This, of course, might well be, and yet their testimony, so far as it affected the prisoner at the bar, might be entirely uncorroborated and valueless. It has often been observed by Judges that, in the nature of things, no one knows so well the actual facts of the case as the approver, who by his own admission has taken a part in them. And as he has confessed his own guilt, there is generally no reason why he should misrepresent them, except so far as it may be possible for him thereby to shift a measure of culpability from his own shoulders to those of some one else, *viz.*, of course, to those of the prisoners against whom he is giving testimony. Hence the question always is in any given case, in the approver speaking the truth, not merely when he details the general facts, but when he says that the prisoner participated in the transaction, and did that which it was necessary that he should have done, in order for him to become criminally liable to the charge made against him? In saying then that, before the evidence of an accomplice can be safely depended upon, so far as it affects the prisoner, it ought to be corroborated, I understand that other evidence from sources, independent of the approver, should be forthcoming relative to facts which implicate the prisoner in the same way as the story of the approver does. Now, if we look at this case by the light of this explanation, it seems that the corroboration of the approver's testimony against the prisoner centres in one single fact. For it is not true, as the Judge said, that Tarak Koer deposed that the notes were unendorsed at the time of Kali Kant's death. It is quite clear, from the evidence of Tarak Koer, that there was a possibility of these notes having been endorsed before Kali Kant died. That witness merely says this, namely, that the notes were not endorsed when he last saw them, but then he says also that he had not seen them since some point of time, two or three months antecedent to Kali Kant's death. It may possibly be immaterial, as a fact in the case, whether the notes were endorsed before or after Kali Kant's death, but it is most important, in considering whether the evidence of the two approvers is corroborated or

\* [This case is followed in *Queen v. Mohesh Biswas* (19 W. R. 16; 10 B. L. R. 455n); approved in *Empress v. Bepin Biswas* (I. L. R., 10 Cal. 970); and upheld in *Queen v. Gorachand Ghose* (11 W. R. 29; 3 B. L. R. F. B. 1).—Ed.]

1868.

QUEEN  
P.  
GORA  
CHAND  
GHOSE,  
3 B. L. R.  
F. B. I.

[11 W. R. 29.]

to law, it is not competent to the High Court, on revision, to set aside such erroneous direction, and thereupon to quash the proceedings and order a new trial." I find, as indeed I had some reason to apprehend, that I have the misfortune to differ from my learned colleagues on this Bench. I need not say that that being the case, I proceed to express my opinion with great diffidence; and where a single Judge differs from four of his colleagues, he ought to act, under the strongest conviction, not only as to the correctness of his own opinion, but also with reference to the importance of the matter at issue, before expressing that opinion. But on this point I have for a long time held a very strong opinion, and I think that the point involved is one

not, that, while they swear the notes were not endorsed until *after* the death, there should be a possibility, on the evidence of the person who is supposed to have corroborated them, that they were endorsed *before* the death.

But even if the Judge's statement to the jury on this head were strictly correct, he would have been mistaken in thinking that Tarak Koer thus afforded any corroboration of the approvers' testimony against the prisoner. Obviously the bare confirmation of the statement, made by the approvers, that the endorsing took place after Kali Kant's death, is no confirmation of their statement as to the person who effected the endorsement.

The only other corroboration which the Judge alludes to in his address to the jury is to be inferred from the fact that a 500 rupees note, accompanied by a slip of paper, covered with copies of the forged endorsement, was found in a pot sunk in the floor of a room, which formed part of the prisoner's house. Probably the corroboration which the Judge sees in the finding of the 500 rupees note under these circumstances is very much less than he supposes. But, no doubt, the corroboration which is traceable to the copy of the endorsement is strong indeed, if only one thing is made out, namely, that the pot and its contents was placed in its position of concealment, either by the prisoner himself, or by some one with his cognizance and by direction. Now, as I read the evidence, the fact that the pot was found in a portion of the prisoner's premises, is the one single link which connects the prisoner, if I may say so, with the contents of this pot. The pointing out of the pot by the wife is, I think, no evidence against the husband. But, certainly, if it is evidence against the husband, it never ought to have been allowed by the Judge to go to the jury, because it is hearsay evidence. And the same observation applies to the remark which the wife is said to have made as to her husband having put something away in the place where the pot was found. Clearly, if the wife could give evidence, which was material to the charge against the prisoner, she should have been called as a witness. It was not proper to allow hearsay evidence afforded by her conduct and her words to get under the attention of the jury. It seems to me that, inasmuch as the corroboration of the approvers, so far as their story makes the prisoner a participator in their crime, depends entirely upon the fact that this pot was found in the prisoner's house, this cardinal point, upon which the whole case hinges, has not been properly singled out and brought before the jury. They ought to have been told that there, in fact, hinged every thing which was in the nature of corroboration of the approvers' evidence. It was for them to say, in view of the evidence which bore upon this particular point, whether they, as judges of fact in the case, considered the 500 rupees note and the copy slip sufficiently brought home to the prisoner to make the story of the approvers credible and trustworthy, and the Judge ought to have aided them to a conclusion by carefully summing up that evidence. If the apparent concealment of the pot, with the enclosed papers in the prisoner's house taken above, told against him, on the other hand, there certainly were facts in evidence which tended to lessen the force of the adverse presumption, and not a little to suggest that the whole affair was a trap laid by the approvers. If so, of course, all shadow of corroboration vanished. The Judge should have taken care that this side of the case did not escape the jury's notice. I think he certainly ought to have called their attention to the circumstance that the place where the pot was found was not a portion of the interior of the living house, so far as can be gathered from the evidence, and also that at least Dinanath, one of the approvers, had access to it. This follows, I think, from the evidence of Tewarri, who says he found Denanath with the wife in another part of the house; that means, I suppose, the inner apartments; and if he could get there, it can hardly be doubted that he could have got to this comparatively public portion of the building. And, indeed, there is nothing in the evidence to show that, considering the unfinished state of the room where the pot was discovered, other persons, as well as Dinanath, might not readily have entered it, or that it is in any

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the importance of which it is impossible to over-estimate. It is one on which, in several of the districts under the Government of Bengal, the successful administration of criminal justice greatly depends.

I think it well to state, in the first instance, that my opinion is chiefly based on what seems to be a most important difference between the system of jury-trial in this country, and that familiar to lawyers in England. The theory of trial by jury in this country is one wholly distinct from that at home. In England I take it that the system of jury-trial rests upon the great constitutional principle that every person is entitled to demand that he be not restrained of his liberty, except *per legal judicium parium suorum vel per legem terre*, so that trial by jury is the rule, except in the particular cases when Parliament has, by Statute, allowed summary convictions. I understand that great principle to underlie the finality of verdicts given by English juries. But trial by jury in this country is, I believe, altogether devoid of that constitutional character. No man here has an inalienable right to be tried by jury. It is simply a mode of trial which the Government, by an order in the *Gazette*, can, at any time, extend to a particular district for particular classes of cases, and the Government may at any time afterwards revoke such order; and, in point of fact, it is only at the present moment, I believe, in seven districts in Bengal, and in respect of offences under a few chapters of the Indian Penal Code, that this mode of trial is at present in use. I consider that the present system of jury-trials in India is based upon s. 1, Reg. VI. of 1832, by which enactment trials by jury, either in civil or

way necessary to infer that anything which was found buried there was buried by the act, or with the knowledge, of the master of the house. Then, again, the evidence as to what led to the discovery should have been reviewed; and, in particular, the absence of the principal witness should have been commented upon. Without going further through all those portions of the evidence, which tend to throw suspicion upon this matter, and to suggest difficulty as to the value properly attributable to the apparent concealment of the pot in the prisoner's house, it seems to me clear that there was so much of importance hanging upon this point, that the Judge was wrong in omitting carefully to bring it under the notice of the jury, and to tell them their duty in regard to coming to a conclusion on the facts which surround it.

Finally, there is no doubt that the Judge was wrong in allowing any matter of prejudice, not being direct evidence of fact relevant to the charge against the prisoner, to go to the jury while they were trying the accused. All evidence of character and previous conduct of the prisoner ought to have been excluded; and if by accident any such had come out in open Court, then the Judge ought most distinctly to have told the jury that they were carefully to guard themselves from being influenced by it. But, unfortunately, the Judge has taken exactly the opposite course. He has not only allowed statements as to the prisoner's character for forgery to be made in Court, but he has founded upon it a portion of his charge to the jury. He has, in effect, told the jury that they would not be right if they allowed their judgment of the value of the evidence before them to be influenced by a consideration of the prisoner's previous character for forgery. And this is the more unfortunate, because this evidence of the prisoner's previous character comes from no one, but from the approvers. For all these reasons I think that the Judge has not conducted the trial in the way in which it ought to have been conducted. He has not directed the jury upon points with regard to which it was essential that they should receive instruction from the Judge in order to their coming to a proper verdict. He has allowed matter to come in as part of the evidence in the case, and has, indeed, pressed it upon their attention, which ought to have been studiously kept away from them altogether, and he has certainly misinformed them with regard to the question of corroboration and the existence of corroborative evidence in this case. I think that the verdict, which has been arrived at under the guidance of a direction like this, must be set aside, and of course the sentence which was passed thereon quashed. The prisoner must be discharged from custody.

We think it desirable to add, although, perhaps, it may be superfluous to do so, that this decision has not the effect of an acquittal, so as to protect the prisoner from being tried again. At the same time we do not think it necessary to order a new trial.—10 W. R. 17.

criminal matters, were first introduced into Bengal, and the system was at that time introduced, not upon the constitutional principle that a native was entitled to the privilege of trial by jury, the fact being notoriously otherwise ; but, in the words of the section, it was considered "desirable to enable the European functionaries, who preside in the Courts for the administration of the civil or criminal justice, to avail themselves of the assistance of respectable natives in the decision of suits, or the conduct of trials which may come before them." By the provisions of that Regulation, the verdict of a jury was no more than a suggestion or advice to the Judge. He was at liberty to act upon it or to disregard it, and the decision, both in civil and criminal matters, was vested exclusively in him, as it is to this day in criminal cases, where trial is conducted with the aid of assessors. The Code of Criminal Procedure, in its provisions in respect of trial by jury, has, no doubt, gone a great deal further than the Regulation of 1832. It has, in much nearer, if not in entire, analogy to our own home system, placed the decision of facts absolutely in the hands of the jury, for it is declared by s. 408 that, if the conviction of any person has been on a trial by jury, the appeal shall be admissible on a matter of law only ; and, further, by s. 406, it is declared "in any case which shall be revised by the Sudder Court, it shall not be competent to the Sudder Court to reverse the verdict of the jury, or, except as provided in this chapter (XXVIII.), to alter or reverse the sentence or order of the Court below."

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The difficulty in my way, therefore, is in the words "it shall not be competent to the Sudder Court to reverse the verdict of the jury."

I wish it to be understood that what I would do, and what, with the greatest deference, I think the Court has power to do, is not to reverse the verdict of the jury, but to set aside the enunciation of erroneous law upon which that verdict of the jury is grounded. I, of course, admit that the words of the law and the intention of the Legislature are too clear to admit of any doubt ; that, where the facts of the case were such that they could be properly, and were, referred to the jury for a verdict, the verdict of the jury, as a finding simply upon those facts, is irrevocable ; and if the jury, in coming to the finding, were unfettered and uninfluenced by any direction of law by the Judge, there could be no ground for the interposition of the Court, and the verdict would remain undisturbed.

This is all that, in my opinion, the Legislature meant by the words of s. 406, viz., "it shall not be competent to the Sudder Court to reverse the verdict of the jury." On the other side, I think I am entitled to refer to the terms of s. 403. That section, which, no doubt, refers immediately to convictions, may, at all events, be cited for the purpose of showing that in this country there is not the difficulty which exists in a certain class of cases in England of setting aside, in favour of the prisoner, the verdict of a jury on the ground of misdirection. The prisoner, therefore, has some sort of remedy in such a case, irrespective of appeal, if the last clause of s. 406 be not in the way.

I think it is not, because I see a distinction, which, whether I can make it manifest to the minds of others or not, is at least clear to my own, between "reversing the verdict of the jury," and setting it and the remainder of the proceedings aside, on account of antecedent error in the direction, which the Judge is bound to give to the jury before they consider their verdict, and which has presumably misled them in coming to that verdict.

I understand reversing the verdict of a jury to mean "coming to an opposite conclusion on the same facts, where the same law has been applied."

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I will give an example of each case, taking up first the side of convictions. Suppose that a man were charged with murder, and three witnesses to the fact appeared, and the Judge, directing the jury, said the witnesses were apparently credible, and there was no obvious reason why they should be disbelieved, and the jury thereon took the same view, and found the prisoner guilty. The Court here, on revision, might think the statements improbable, and the witnesses not entitled to credit; but the question would be purely one of fact, and the Court could not reverse the verdict. Again, suppose that in a similar case there was only one witness for the prosecution, who was an accomplice, and three witnesses for the defence, who were cousins of the prisoner, and the Judge should have refused to allow these witnesses to be examined by reason of their relationship to the prisoner, and should have told the jury that the accomplice-witness was entitled to full credit, and therefore that they ought to convict the prisoner.

If the Court were to say, on revision, this trial is bad, because evidence for the defence has been improperly excluded, and because the jury has not been properly directed as to dealing with the evidence for the prosecution, that, I take it, would be ground, not for reversing the verdict, because the Court would probably, if so directed on the same facts, have come to the same conclusion, but for setting aside the proceedings, and ordering a new trial; and this, I have not the least doubt, ought to be done, whether the prisoner appealed or no.

It is suggested that the record would remain, and that there could be no new trial; why not? It seems to me that, in this country, no record or sentence is in any sense valid, or has any efficacy, which has been declared by a competent Court to be bad in law, and has been, for that reason, set aside. It cannot be said that s. 55, Code of Criminal Procedure, is in the way; because if the words of that section are to be interpreted literally, they would be in conflict with the concluding words of s. 405, which expressly enables the Sudder Court to order a new trial, and with many of the provisions relating to appeal. It seems to me, too, that there is a particular significance in the words of s. 403, which empowers the Sudder Court to call for a report of the Judge's direction to the jury, to review that direction, and thereafter to determine any point of law arising out of the case, and pass such order as it thinks fit. For what other purpose could these words have been used, except for the purpose of enabling the Court to deal with such misdirections, by which the prisoner had been prejudiced, to set them aside, and order a new trial? I think the Court can do this under the express terms of s. 403 in cases of conviction, *non obstante* s. 406. If so, a verdict is not final; and in that case what is to prevent the Court from dealing with a case of acquittal under s. 404?

I am told of the safeguards provided by the system of trial by jury. I confess that I am much more concerned for the public than for the case of individuals, and *interest reipublicæ ne maleficia remaneant impunita*. Suppose, a man were to be tried for a brutal assault, and the Judge were to tell the jury, "One of the witnesses is the brother of the prosecutor, and is not a competent witness; the second has no religious belief, and is therefore infamous; there remains but one witness, and his testimony is by law insufficient;" and the jury thereupon acquitted the prisoner; would it not be better for the public that this man should be re-tried than that he should go free on account of the sacredness of juries' verdicts?

If the High Court be not at liberty to make such order as I have suggested, I confess that I see no remedy for evils of very serious dimensions. The Code of Criminal Procedure is a compact system of law, which the

Legislature passed after long consideration ; and the Government would be naturally unwilling to alter that law as to any of its fundamental principles, and therefore remedy by legislation would be very difficult. I am quite sure, however, that my learned colleagues will agree with me that it is of the last importance that Courts of Justice should interpret that law with due attention to its terms, but not so as to create impediments in the way of administering justice, which are not absolutely forced upon them by its provisions. My own experience teaches me that, unless the Court can apply the remedy which I advocate, failure of justice in the mofussil will be of almost daily occurrence. I think, with great deference, that the Court possess the power for which I have contended, and that it ought to be exercised in the present instance.

PEACOCK, C.J. (concurrent in by MITTER, J.)—I entirely agree with my honorable colleague (Mr. Justice L. S. JACKSON) that the Code of Criminal Procedure ought to be administered with due attention to its terms, and it is for that very reason that I come to an opposite opinion from that at which he has arrived as to the proper answer to be returned to the question which has been propounded. The question is whether, in the event of a jury's returning a verdict of "guilty" or "not guilty" under the express direction of the presiding Judge, and such direction being held by this Court to be contrary to law, it is not competent to the High Court, on revision, to set aside such erroneous direction, and thereupon to quash the proceedings, and order a new trial. If ever there was a point based upon firm ground according to the English constitution, it is that a verdict of not guilty, by a jury in a criminal prosecution, cannot be set aside by a Court. In cases of conviction for misdemeanours, a verdict of guilty may, in some cases, be set aside for misdirection of a Judge, or upon the ground that the verdict was against evidence. I am speaking of convictions in cases which have been removed into the Court of Queen's Bench by *certiorari*, and tried there, or at *nisi prius*. But in the case of felony, even a verdict of guilty cannot be set aside upon the ground of misdirection of the Judge, or upon the ground that the verdict is against the weight of evidence. The only remedy for a prisoner in such a case is to obtain a respite of the execution to enable him to apply for a pardon.

In the case of convictions in this country, in which there is no distinction made by the Penal Code between felonies and misdemeanours, the law is more favourable to a prisoner than the law of England ; for if a prisoner be convicted on a trial by jury, he has a right of appeal upon a point of law. S. 408 of the Code of Criminal Procedure enacts that "any person convicted on a trial, held by a Court of Session, may appeal to the Sudder Court. If the conviction is on a trial held with the aid of assessors, the appeal may be on a matter of fact as well as on a matter of law. If the conviction is on a trial by jury, the appeal is admissible on a matter of law only."

Further, s. 403 enacts that "the Sudder Court, in any case tried before a Court of Session, in which, upon a review of the abstract statement or calendar of prisoners punished without reference, it shall appear that there has been an error in the decision of the Court of Session on a point of law, or that a point of law should be considered by the Sudder Court, may call for the record, on such portion thereof as it may deem necessary, together with a report of the Judge's direction to the jury, if the case have been tried by a jury ; and upon reviewing the depositions of the witnesses, the direction of the Judge, and the conviction, may determine any point of law arising out of the case, and thereupon pass such order as to the Sudder Court shall seem right.

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That section applies only to convictions, and, therefore, does not bear upon the present question so far as it relates to acquittals. But there is a term which is contained in s. 406, which appears to me to be conclusive upon the question propounded. It provides that, in any case which shall be revised by the Sudder Court under chap. 29 of the Code of Criminal Procedure, it shall not be competent to the Sudder Court to reverse the verdict of a jury. No language can be clearer; and whatever our opinions may be as to whether other language might or might not have been more expediently used, we must, I think, follow the strict words of the Act, and hold that a verdict of a jury cannot be reversed by a Court of Revision, even if it be a verdict of guilty. This is no great hardship upon a prisoner; because if there be error in a point of law, he has a right of appeal against the conviction. I should not object to allow a verdict of conviction to be reversed upon revision, as well as upon appeal; but as the Legislature has, in clear and express terms, declared that it is not to be done, I feel bound by the terms of the Act. I would therefore answer the first portion of the question by saying that this Court, upon revision, cannot reverse a verdict of guilty, even though it be caused by misdirection of the Judge, and that the only remedy in such a case is an appeal, or an application to the Executive Government.

But when we come to the other part of the question, whether the Court can, upon revision, reverse a verdict of not guilty on account of a misdirection of the Judge, the case assumes a very different aspect. S. 407 enacts that there shall be no appeal from a verdict of acquittal passed in any Criminal Court. The Government prosecutor cannot appeal from a judgment of acquittal, however erroneous the law may be, which the Judge has laid down for the guidance of the jury. Whether the trial be by jury, or before a Judge with the aid of assessors, it matters not; "there shall be no appeal from a verdict of acquittal." Can we then hold that, upon revision, a verdict of not guilty may be reversed by the Court for misdirection in the teeth of s. 406, which emphatically declares that it shall not be competent to the Court, upon revision, to reverse the verdict of a jury?

We all know how ably and eloquently Mr. Erskine contended for the right of juries at a time when I may say that the rights and liberties of Englishmen were in jeopardy. We all know that a jury is entitled to give a general verdict of not guilty, and that they are not bound to say whether they acquit upon the facts or upon the law. If a Court of Revision could set aside a verdict of acquittal on the ground of misdirection, it must assume that the jury did not intend to acquit upon the facts, and would thereby deprive the prisoner of the benefit of that right which a jury has to pronounce a general verdict.

My honourable colleague has said that trial by jury in this country is very different in principle from trial by jury in England; that it is in the discretion of the Government to allow, or not to allow, trial by jury; that the Government may limit that mode of trial to a particular class of cases, or to a particular district; and that, having ordered trials to be by jury, it may revoke its order at pleasure. Trial by jury in the mofussil in this country is in its infancy; but it is not, because we have not the full constitutional benefit of trial by jury, that this Court, contrary to the express words of the Legislature, are to deprive trial by jury, where it does exist, of those elements of safety which that mode of trial provides. I am thankful to say that we are not living in times in which our liberties depend upon trial by jury, but we are not for that reason, even if we had the power, to deprive the people of that safeguard which in times of danger and of vindictive prosecutions is provided

by the power of a jury to pronounce a general verdict. If, at the time to which I allude, when prosecutions against the press were instituted, which would not be tolerated in the present day, a Judge had correctly told a jury that, in point of law, a particular publication was a libel, and the jury had, notwithstanding, found a general verdict of not guilty, no Court could have set aside that verdict; and if, with reference to the same publication, the Judge had told a jury that it was not a libel, and the jury had found a general verdict of not guilty, the Court would have no greater power to set aside the verdict on the ground of misdirection. Why, then, in the case of misdirection should the verdict be set aside upon revision, when, if a proper direction in point of law had been given, the verdict could not have been set aside? To allow the Court to set aside the verdict in the one case, and not in the other, would strike at the very root of the principle which allows a jury to deliver a general verdict of not guilty. If the view taken by my honorable colleague is correct, the Court, upon revision, might, on the ground of the misdirection of the Judge, set aside the general verdict of the jury in the one case, when they could not in the other. In short, the verdict might be set aside when the Judge and jury agree that the prisoner ought to be acquitted, but not when the jury acquits in opposition to the direction of the Judge.

I do not understand exactly what my honorable colleague means when he says that setting aside a verdict upon the ground of misdirection is not setting aside a verdict within the meaning of the section referred to, s. 406. As I understand him, he would set aside the misdirection of the Judge, and leave the verdict to drop of itself. But in that case there could be no new trial. If in such a case the consequence of setting aside the misdirection would be that the verdict would drop, the act of the Court would substantially amount to a reversal of the verdict. In my opinion, the Court cannot, and ought not, to do indirectly that which it is prohibited by the express words of the Legislature from doing directly. If the Court is expressly prohibited from directly setting aside a verdict of acquittal, it appears to me that it is equally prohibited from resorting to any ingenious device, by which that result would be brought about by other means. But I do not believe that such a mode of proceeding would be successful, because I apprehend that, when once a verdict of "not guilty" has been pronounced by a jury and recorded, nothing that the Court can do can get rid of it. To question or set aside the summing up of the Judge, after a verdict of "not guilty" has been recorded, would not, in my opinion, get rid of the effect of that verdict. If a Judge should say to a jury—"I do not think it necessary to give you any direction in this case: you will say whether the prisoner is guilty or not guilty;" a verdict of "not guilty" could not be set aside in such a case. If so, why should the setting aside of a misdirection get rid of such a verdict? If this Court, upon revision, should go further back, and quash the charge upon which the prisoner was tried, the record must still remain. No order quashing the direction of the Judge, or quashing the charge upon which a prisoner has been tried and acquitted, can get rid of the acquittal. The order might be recorded at the foot of the acquittal, but it would be a mere nullity, and could not authorize a new trial of the prisoner.

If the country is not ripe for trial by jury, it would be better to amend the Code of Criminal Procedure than to have trial by jury shorn of the safeguards which it provides. But when it is being tried experimentally, and the Legislature has declared that a verdict of acquittal is not to be set aside upon appeal, or reversed upon revision, we ought not to put such a construction upon the express words of the Legislature as to deprive that mode of trial of

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one of its most important and essential principles. For the above reasons, I am of opinion as to the second branch of the question that a verdict of "not guilty" pronounced by a jury cannot be reversed by this Court as a Court of Revision; and it is clear that it cannot be reversed on appeal.

BAYLEY, J.—I think that the question, in its two branches, should be answered as proposed by the Chief Justice.

MACPHERSON, J.—I concur in the proposed answer which, on an accurate construction of the several sections of the Criminal Procedure Code which bear on the subject, is, I have no doubt, right.

CASES DETERMINED BY  
**The High Court of Judicature,**  
 AT FORT WILLIAM IN BENGAL,  
 IN ITS APPELLATE JURISDICTION.

APPELLATE CRIMINAL

*Before Mr. Justice Norman and Mr. Justice E. Jackson.*

**THE QUEEN v. KABIL CAZEE AND OTHERS (PRISONERS).**

*Unlawful Assembly—Common Object—Murder.*

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A large body of men belonging to one faction waylaid another body of men belonging to a second faction, and a fight ensued, in the course of which a member of the first-mentioned faction was wounded, and retired to the side of the road, taking no further active part in the affray. After his retirement a member of the second faction was killed.

*Held*, by NORMAN, J. (whose opinion prevailed), that the wounded man had ceased to be a member of the unlawful assembly when he retired wounded, and that he could not, under s. 149 of the Penal Code, be made liable for the subsequent murder.

*Held*, by E. JACKSON, J., that he remained a member of the unlawful assembly.

Mr. Mackenzie and Baboo Ummurnath Bose for the prisoners.

THE facts are stated in the judgment of

NORMAN, J.—The prisoners have been convicted of the murder of Baber Ali Mira, and severally sentenced to transportation for life.

The facts are that, on the 25th of Baisakh last, about seventy or eighty persons belonging to a *dol* or party in Mouzah Bhojpore, called the Miras, were proceeding to a feast, to which they had been invited by the widow of Baboo Jan Shurif and Jijir Jan Shurif. They were in a body, headed by the deceased man Baber Ali Mira. It had been rumoured in the village for some days previously that, if the Miras went to the feast, there would be a disturbance.

At a point where the road divides into two branches, each of which leads to the house to which the Miras were proceeding, they were intercepted by a body of from 100 to 120 men, of the *dol* or faction of the Cazees, of which the prisoner, Kabil Cazees, is a leader. The Cazees came out of an empty homestead, where they had been seen sitting together in a body under a tamarind tree; many of the Cazees were armed with spears and shields; some with *tentas* or three-pronged spears used for taking fish. They refused to allow the Miras to pass. After some altercation, one of the Miras called out, "*Mar salaka*." The two parties then began to throw clods of earth at each other, and fight with *lattees*. Baber Ali Mira, who carried a gun, then stooped down, and fired amongst the Cazees. On his firing, the Cazees retreated a little. The prisoner, Wahid Ali, separated himself from his party, and went a short way, a witness says some 10 or 15 cubits to the south-west, and sat down. He was wounded by the shot in the feet; and blood was flowing from each foot. The parties again commenced fighting; and in the *mêlée*, Baber Ali Mira was stabbed through the heart by a fish-spear; and Baboo Allah wounded Kurban severely with a spear on the hip.

The prisoners appeal. And we have heard Mr. Mackenzie and Baboo Ummurnath Bose on their behalf.

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We have no doubt of the propriety of the conviction of all the prisoners, except Wahid Ali. No aggression could be more wanton or deliberate than the attack on the Miras. In the month of Falgun, the widows had entertained the Cazees and all the other *dols* in the mouzah, except the Miras, who were then excluded, because the cazees said they could not go to the feast if the Miras were invited. The Miras were invited to a separate feast, in order that there might be no opportunity for a quarrel. A considerable number of the Cazees were armed with spears and other deadly weapons, to say nothing of *lattees*, while only two or three of the other party were so armed.

The evidence shews that, on the retreat of the Cazees, and before the renewal of the combat in which Baber Ali Mira was killed, the prisoner Wahid Ali had separated himself from his faction, and sat down apart from them. He probably no longer had the same common object as the members of the unlawful assembly from which he had so separated himself. It does not appear that he continued to urge on the others. He was apparently solely occupied by his own sufferings. He cannot be convicted under s. 149, unless he was a member of the unlawful assembly at the time of the committing the offence. We think the fair inference from the facts is that he had ceased to be so when the fatal wound was inflicted on Baber Ali Mira, and therefore that he cannot be convicted or punished for an act committed by a member of that assembly under s. 149. It is plain that he was no longer co-operating with the others, and he had not the power to prevent or check the violence of the others, as he might have had, if he had continued with them.

We reverse the conviction of murder against Wahid Ali. It is not shewn that Wahid Ali was armed with any deadly weapon. We, therefore, think he should have been convicted of rioting under s. 147. We convict him accordingly, and sentence him to two years' rigorous imprisonment.

JACKSON, J.—I concur in the order my learned colleague would pass in this case, except as regards Wahid Ali. I am inclined to the opinion that he still remained a member of the unlawful assembly, and so far liable for the acts of its members, even when he was sitting down wounded a few paces on one side of those who were actively participating in the fight. In the commencement of the fight, he had been in the thick of it. He was wounded by some shot from a gun; and during the momentary cessation of the fight which followed on the firing of the gun, he managed to leave the rest of the rioters so far as to be out of the actual hand-to-hand fight which recommenced, and in the course of which a man was killed outright. But I think he still remained a member of the illegal assembly.

The opinion of my colleague, as the senior Judge, will however prevail, and the sentence passed on Wahid Ali will be reduced to two years' rigorous imprisonment.

Before Mr. Justice Norman and Mr. Justice E. Jackson.

THE QUEEN v. BHYRO DAYAL SING AND OTHERS.<sup>1</sup>

*Act XXV. of 1861, s. 62—Procedure.*

There is nothing in s. 62, Criminal Procedure Code, to justify a Magistrate in making an order under that section on the mere report of a police-officer.

1869.  
May 3.

3 B. L. R.  
A. Cr. 4.  
[11 W. R. 46.]

The judgment of the Court was delivered by

NORMAN, J.—On the 24th of October 1868, the Sub-Inspector of Bhabooah submitted a report to the Deputy Magistrate of that place, Baboo Jadu Nath Bose, stating that Chowdhry Bhyro Dayal Sing and others, proprietors of Mouza Siktee, had constructed a dam at the river Kookoornah, in order to irrigate their lands to the inconvenience of the public, making it necessary for those wishing to cross the river to use a boat. The Sub-Inspector gave it as his opinion that, if the dam was removed, the river would become fordable, if not perfectly dry.

The Deputy Magistrate called for an explanation from the proprietors of Siktee.

They stated that the dam had existed for upwards of a century; that it had caused no inconvenience to the public, nor dispute; that the necessity of crossing the river in a boat existed in consequence of the breaking down of the Government bridge.

The Deputy Magistrate remarked that, "if, by the act of an individual, the public is put to inconvenience, and that act is against law, the plea of long usage cannot be held legal. No one can be allowed to erect a dam on a river for his own use and benefit." He ordered a notice to issue to the proprietors, directing them to restore the bund as heretofore; and stated that, if they did not do so, they would be amenable to punishment under s. 283 of the Indian Penal Code. He adds: "If there be no bund, persons will be able to ford the river when the water is shallow."

The Judge of Shahabad, on the ground that the order was illegal, and based on mere assumption, transmitted the record of the case to this Court under s. 434 of the Code of Criminal Procedure. This Court called on the Deputy Magistrate to explain under what provision of the law he acted. The Deputy Magistrate, after some delay, and a correspondence which the Judge fairly characterizes as shuffling, has sent in his explanation.

He says, in passing the order for the demolition of the bund, which stands in the bed of a hill-stream, and which, by the consequent accumulation of water on account of the obstruction to natural drainage, had rendered the Bhabooah and Mahoneah road impassable, he acted under the provision of s. 62, Act XXV. of 1861. He says that the road is partially damaged; that a ferry-man is in the habit of plying on the spot; and that inconvenience is caused to the people by the existence of the bund.

Now, the first observation we have to make is, that there is nothing in s. 62 to justify a Magistrate in making an order on the mere report of a police-constable, or on surmises and assumptions based on no evidence. When the defendants appeared on notice, they stated facts showing that they had a legal prescriptive right to maintain the bund as it stands. If there was reason to suppose that what they stated was false, and that the bund was a nuisance, the Deputy Magistrate should have called on the Sub-In-

<sup>1</sup> Reference under s. 434, Code of Criminal Procedure.

<sup>1</sup> [This case is referred to in *Rai Luchmiput Singh, Appellant* (14 W. R. 17; 5 B. L. R. Ap. 81).—Ed.]

1869.

QUEEN  
v.BHYRO  
DAYAL  
SING,3 B. L. R.  
A. Cr. 4.

[11 W. R. 46.]

spector to produce his witnesses, examined them in the presence of the defendants, and heard what the defendants had to say, and any evidence they might wish to adduce in reply before he made any order under s. 62.

There being no evidence to contradict it, the Deputy Magistrate was bound to act on the defendant's statement. There was nothing before the Magistrate to shew that the right of way along the Bhabooah and Mahoneah road was other than a qualified right to proceed along the road as far as the river, to cross the river where the bridge was broken down by fording when the waters are low, or by ferry-boat at other times. There was nothing from which the Deputy Magistrate could legally infer that the public, or in fact any one, was obstructed or impeded in the exercise of any legal rights they ever possessed.

We quash the Deputy Magistrate's order as irregular and illegal.

*Before Mr. Justice Norman and Mr. Justice E. Jackson.*

IN RE THE QUEEN v. GOUR MOHAN SEN AND ANOTHER.<sup>1</sup>

*Procedure—Jurisdiction of Collector under Stamp Act.*

1869.  
May 5.3 B. L. R.  
A. Cr. 6.  
[11 W. R. 48.]

An application was made to a Collector, under s. 50, cl. 2 of Act X. of 1862, to replace a damaged stamp by a new one. As it appeared that the stamp had been tampered with for fraudulent purposes, the Collector made over the parties to the Magistrate for trial.

*Held*, that the document not being given in evidence in any proceeding in Court, the Collector was not bound to proceed under ss. 169, 171 of the Criminal Procedure Code.

THIS case was referred to the High Court, by the Judge of Backergunge, in the following letter :

As directed in Circular No. 7, dated June 2nd, 1864, I have the honor to represent to the High Court, under s. 434, Act XXV. of 1861, the illegality of the proceedings upon which the commitment, *in re The Queen v. Gour Mohan Sen and Dinabandu Chuckerbutty*, by the Officiating Magistrate, is based, and to solicit the High Court to annul the said proceedings, including the commitment.

2. On the 31st July 1868, one Gour Mohan Sen, mooktear, applied, on the part of one Dinabandu Chuckerbutty, to the Officiating Collector for a refund of the money-value of a certain 50-rupee stamp which had been spoilt. The applicant was directed to put in a petition on stamped paper, which he did on the 28th August. On the 31st idem Gour Mohan Sen was called on to produce the letter from Dinabandu Chuckerbutty, under which he stated he was authorized to make the application. This was done ; and on the 13th October, the Officiating Collector summoned Dinabandu Chuckerbutty to appear in his Court on the 31st idem. As, on the day appointed, Dinabandu Chuckerbutty did not appear, the Officiating Collector passed the following order : "Whereas Dinabandu Chuckerbutty has not come before the Court this day, on the date fixed in the summons, it is ordered that, in view to causing his attendance as required by law, and in view to giving a proper order in the matter of this case of cheating, all the papers connected therewith be forwarded to the Magistrate." The case being thus transferred from the Officiating Collector to the Officiating Magistrate, who are one and the same person, the Officiating Magistrate took up the investigation, and, on the 27th February 1869, committed Gour Mohan Sen and Dinabandu Chuckerbutty to take their trial at the Court of Session on the following charges—

<sup>1</sup> Reference under s. 434, Code of Criminal Procedure.

against both prisoners, under ss. 465, 468, and 471, Indian Penal Code ; against Gour Mohan Sen, under ss. 417 and 511, Indian Penal Code, combined ; and against Dinabandu Chuckerbutty, under ss. 417 (and presumably 511) and 109, Indian Penal Code, combined. The accused have this day appeared before my Court, as the Court of Session, to take their trial on the above charges. A preliminary objection is taken by their Counsel as follows : "That the Officiating Magistrate has tried this case, not under the authority vested in him by s. 68, Criminal Procedure Code, nor on complaint direct, nor on the report of a police-officer, but under the order of the Officiating Collector, dated October 31st, 1868, and, therefore, apparently under the provisions of s. 171, Code of Criminal Procedure ; that, according to s. 171, the Officiating Collector was bound, after making a preliminary inquiry, to name the accused, and the particular charge or charges mentioned in ss. 168, 169, or 170, Criminal Procedure Code, on which they were to be tried, and the Officiating Magistrate could only try such accused on such charge or charges and no other ; that by his order of the 31st October 1868, the Officiating Collector has not named Gour Mohan Sen as an accused person, but has only named Dinabandu Chuckerbutty as such, and that he has not recorded the charge or charges on which the accused is to be tried, but has asked the Magistrate to give proper orders in the matter of certain cheating, which is not an offence mentioned in any of the sections named in ss. 168, 169, and 170, Criminal Procedure Code, and that, therefore, the Officiating Magistrate, in committing the two prisoners, Gour Mohan Sen and Dinabandu Chuckerbutty, to take their trial at the Court of Session on charges framed under ss. 465, 468, 471, 417, 511, and 109, Indian Penal Code, has acted without jurisdiction, and his commitment should be quashed."

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3. It appears to me that this contention is good. The Officiating Collector has not obeyed the provisions of s. 171, Code of Criminal Procedure. In sending the case for investigation to the Magistrate, who has power to commit for trial the accused for the offence charged, he has neither specified the accused, nor the charge or charges mentioned in any of the ss. 168, 169, or 170, Criminal Procedure Code, on which they are to be tried. As also the Officiating Magistrate has not noted the indefiniteness of the authority under which he was called upon to act, but has permitted himself to deal with the case as an ordinary one preferred on due complaint, and both determined who are the accused, and framed charges against them at will. I am of opinion that he has acted without jurisdiction, and that his proceedings must, therefore, be annulled, and this commitment quashed.

The judgment of the Court was delivered by

Norman, J.—As we understand this case, the prisoner Gour Mohan Sen, mooktear, applied under s. 50, cl. 2 of Act X. of 1862, to the Collector for a new stamp in lieu of one supposed to have been spoilt within six months previously. It turned out, on inquiry, that the writing on the stamp had been tampered with for fraudulent purposes, and the prisoners were committed, for using a forged document, under s. 471. The Collector, to whom the stamp was tendered, was not sitting as a Court, Civil or Criminal, nor was the document given in evidence in any proceeding in any Court. S. 170 of the Code of Criminal Procedure has no application to the case, and our interference is quite unnecessary. But if s. 170 had applied, the Judge would have done well to see if the Collector would not give the necessary sanction before he commenced the trial of the case, instead of sending up the proceedings to us under s. 434.

The prisoners must be tried.



*Before Mr. Justice Norman and Mr. Justice E. Jackson.*

**THE QUEEN v. NAWAB SING AND OTHERS (APPELLANTS).**

*Forgery of specially Registered Bond—Sanction to Prosecution.*

1869.  
April 2.

3 B. L. R.  
A. Cr. 9.

A specially registered bond was presented before the Small Cause Court Judge, for execution, under s. 53, Act XX. of 1866, and a decree passed upon it in usual form. Subsequently the Registrar sanctioned the prosecution of the decree-holder, on the ground that the bond was a forgery. The Small Cause Court Judge thereupon, on application made, without taking any evidence or making further inquiry, set aside the decree, and sanctioned the prosecution under s. 170 of the Criminal Procedure Code.

*Held*, that he was justified in sanctioning the prosecution, but not in setting aside the decree.

The judgment of the Court contains a statement of the facts, and was delivered by

Norman, J.—The prisoners have been tried and convicted by the Judge of Bhagulpore of the forgery of a bond for Rs. 195, bearing date the 18th of October 1867, alleged to have been executed by Dhotal Mahton, Maharaj Mahton, and Musahib Mahton. They appeal. The bond was specially registered under s. 52 of Act XX. of 1866; and on the 6th of August 1868, upon production of the bond and the record signed by the Registrar, the Judge of the Small Cause Court of Monghyr passed a decree against Dhotal and the others. On the 18th of December, the Judge of the Small Cause Court set aside the decree, and gave his sanction to the prosecution under s. 170 of the Code of Criminal Procedure. On the same day, Mohan Sahu, the alleged obligee of the bond, prayed for a postponement, in order that his witnesses might attend. The Judge of the Small Cause Court, however, without passing any order on his petition, gave the required authority to prosecute, without going into evidence as to the genuineness of the bond.

On the whole, we think, he was justified in doing so. No inquiry had taken place in the Small Cause Court as to the execution of the bond. That was a matter which had been gone into before the Registrar, before whom the bond and agreement recorded by the Registrar were put in, proved, and authenticated. The bond was simply produced before the Small Cause Court Judge with the record of the agreement, and verified by the petitioner. When the Small Cause Court Judge found that a full inquiry had been made by the Sub-Registrar; that the Registrar, to whom the proceedings of the Sub-Registrar had been transmitted for sanction of the prosecution under s. 95 of the Registration Act, had come to the conclusion that the prisoners ought to be prosecuted for the forgery of the bond which had been put in and specially registered by the Sub-Registrar; that the Sub-Registrar had been giving evidence and assisting in the prosecution before the Magistrate: the Small Cause Court Judge, whose function in giving effect to the registered agreement by a decree and execution under s. 53 of Act XX. of 1866 was merely ancillary to that of the Registrar recording the agreement, was fairly justified in sanctioning the prosecution without further inquiry. He was, no doubt, wrong in setting aside the decree in favour of the plaintiff, as he did, without going into evidence. He should have enquired as to any special circumstances which might have justified such an order under s. 55 of Act XX. of 1866, but with that we have now nothing to do.

Before Mr. Justice Norman and Mr. Justice E. Jackson.

IN RE QUEEN v. GOLAK SING AND OTHERS.<sup>1</sup>

*Perjury—Sanction to Prosecution.*

1869.  
May 6.

3 B. L. R.  
A. Cr 10.

Sanction to a prosecution for perjury may be given by the Court before which the perjury was committed, at any time, even after the order for commitment to the Sessions has been made.

THE following is the letter of reference from the Sessions Judge, made, as directed, in Circular No. 7, dated June 2nd, 1864, under s. 434, Act XXV. of 1861 :—

“In a case of theft and abduction tried by me, as Sessions Judge, in September last, Golak Sing, Durgadas Sen, and Dinanath Dutt, police-officers, appeared as witnesses for the prosecution. The trial was a difficult and protracted one, and I was unable to resist the suspicion that the above police-officers had spoken falsely and acted improperly, if not illegally. I brought the matter to the notice of the Magistrate, with a view to the Superintendent of Police making an inquiry on certain points specified. No intimation was given to me of the result of this inquiry ; but on the 23rd February 1869, I was informed by the Assistant Magistrate, through the Officiating Magistrate, that he had committed Golak Sing, Durgadas Sen, and Dinanath Dutt, to take their trial before the Court of Session on a charge, under s. 193, Indian Penal Code, of having given false evidence in a stage of a judicial proceeding. Subsequently, on the 9th instant, the Officiating Joint-Magistrate (late Assistant Magistrate) applied to me to sanction the prosecution of Golak Sing, Durgadas Sen, and Dinanath Dutt, for the offence of giving false evidence in the theft and abduction case noted above ; and that sanction I gave on the 10th idem, under s. 169, Criminal Procedure Code. This day, Golak Sing, Durgadas Sen, and Dinanath Dutt, have been arraigned at the bar of the Court of Session charged with the offence described in s. 193, Indian Penal Code, under the commitment of February 23rd, 1869. The prisoners' counsel at once raised the objection that this Court had no jurisdiction, and could not entertain the charge, inasmuch as the sanction of the Court of Session before which the alleged false evidence was given had not previously been accorded under s. 169, Criminal Procedure Code. It was further argued that the sanction accorded by the Court of Session on the 10th April 1869 cannot apply to this commitment made on the 23rd February 1869, and that the terms of s. 169, Criminal Procedure Code, that “sanction may be given at any time,” have reference to the period of limitation within which a charge of this description may be entertained in a Criminal Court, and cannot be held to neutralize the previous provision of the same section, that no charge of an offence against public justice, described in s. 193, shall be entertained in the Criminal Courts, except with the sanction of the Criminal Court before which the offence was committed. It appears to me that this contention is correct. The 6th para. of my letter, No. 253, dated October 16th, 1868,<sup>2</sup> cannot be considered as conveying the necessary sanction for the entertainment of the charge under s. 193 ; and therefore, as the Assistant Magistrate is a Criminal Court,

<sup>1</sup> Reference under s. 434, Act XXV. of 1861.

<sup>2</sup> *Extract, para. 6, from letter No. 253, dated 16th October 1868, from the Sessions Judge to the Magistrate of Backergunge.*

Durga Das Sen, Dinanath Dutt, Golak Sing, Ram Kissen Misser.

6. THE conduct of the Police, as per margin, concerned in this case, should, I think, be brought to the notice of the Superintendent of Police, and an inquiry held on the following points :—

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 3 B. L. R.  
 A. Cr. 10.

as defined in s. 11, Criminal Procedure Code, lawfully exercising jurisdiction for commitment to the Court of Session, the entire proceedings of the said Assistant Magistrate, commencing December 11th, 1868, and terminating on the 22nd February 1869, with the present commitment, are illegal and void. I, therefore, beg that the Assistant Magistrate's proceedings may be annulled, and this commitment quashed."

JACKSON, J.—I think the Sessions Judge's letter No. 253, para. 6, contains a sufficient sanction.

NORMAN, J.—I cannot appreciate the force of the Judge's scruples. He first directs an inquiry into the charge of perjury. What can that mean, but a regular judicial inquiry properly conducted; and subsequently, when this is supposed to be insufficient, as it certainly would have been, if the Judge had limited his direction to an order that the police should inquire and report to himself with a view to future proceedings, the Judge on the 10th of April sanctioned the commitment by the Deputy Magistrate.

I wholly fail to see why this sanction is not sufficient. I cannot understand why a restricted construction should be put on the plain language of the proviso of s. 169. Such sanction may be given at any time. The prisoners must be tried, and I think that there is no necessity for our interference.

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1st.—Have the Sub-Inspector and Head-Constable perjured themselves in the matter of the arrest of Hur Kumar at Menazudy on the morning of the 2nd April?

2nd.—How did he come to pass that Hur Kumar was in the hands of the Police four days, and was not sent to hajut till the 26th April?

3rd.—Why did Golak Sing take two days to go from Menazudy to Madareepore, and did he hand Hur Kumar over to the Court Inspector on the morning of the 24th; and if he did, what prevented the Court Inspector from at once obtaining the order of the Deputy Magistrate to confine him in hajut?

4th.—As by the Sub-Inspector's own showing, he stopped at Madareepore on the 5th April on his way to Rajnuggur, how was it that he allowed Hur Kumar to remain that day in the thanna guard-house, although he knew, by his own "abijagputra," that Hur Kumar had been despatched on the 22nd?

5th.—Did the Constable, Ram Misser, maltreat the prisoners Wuzir Mohammed and Badorudi?

I fear that there has been some sharp practice, if not unfair dealing, on the part of the police in this case; and that in their efforts to secure a conviction, they have not only spoilt the case, but over-reached themselves.

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Before Mr. Justice Norman and Mr. Justice E. Jackson.

IN THE MATTER OF GOPAL BURNAWAR.<sup>1</sup>

Act XXV. of 1861, s. 318—Act XLV. of 1860, s. 189—Disobedience of Orders.

1869,  
May 10.

8 B. L. R.  
A. Cr. 18.

When an order, under s. 318 of the Criminal Procedure Code, was made between A on the one side, and B and the then tenants of B on the other, declaring that A was in possession of the property in dispute, *held*, that this order was only binding on the actual parties to the case before the Magistrate, and that subsequent tenants of B could not be criminally punished for disobeying the order in question.

THE facts are explained in the judgment of

NORMAN, J.—Gopal Burnawar obtained an order, under s. 318 of the Code of Criminal Procedure, declaring him to be in possession of a wall separating his house from one in the occupation of the tenants of Ghannu Roy. Since that time the house of Ghannu Roy has come into the possession of Sheikh Ganowri, who was no party to the proceeding in 1865, which was against the former tenant. Sheikh Ganowri is now interfering with the enjoyment of the wall by Gopal. Gopal has applied to the Magistrate to interfere, and complained before the Magistrate that Sheikh Ganowri had committed an offence under s. 188 of the Indian Penal Code. The Magistrate thinks that there is no necessity for interference, that there is no danger of breach of the peace, and that the parties should be left to settle their disputes in the Civil Court.

The Judge sends up the case, suggesting that the Magistrate was bound to proceed under s. 188 of the Indian Penal Code, which enacts that "whoever, knowing that by an order promulgated by a public servant lawfully empowered, &c., he is directed to abstain from a certain act, disobeys such direction, shall, if his disobedience tends to cause annoyance, &c., to any person, be punished with simple imprisonment."

He sends up the case under s. 434. We think it clear that the section in question has no application to the present case, and therefore that no interference on our part is called for.

Sheikh Ganowri was no party to the order made in 1865, it was not addressed to him, and therefore he cannot be punished criminally for disobedience of it.

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<sup>1</sup> Reference under s. 434 of the Code of Criminal Procedure, from the Judge of Gya.

Before Mr. Justice Macpherson and Mr. Justice E. Jackson.

1869.  
June 11.

THE QUEEN v. KALISANKAR SANDYAL AND OTHERS.<sup>1</sup>

*Indian Penal Code, ss. 224, 225, 353—Cumulative Sentences.*

3 B. L. R.  
A. Cr. 14.  
[12 W. R. 2.]

Where substantially but one offence has been committed, and the acts, which are the basis of one charge, are the same which form the basis of another charge on which the prisoner has also been convicted, cumulative sentences on each charge should not be passed.

Where prisoners were convicted under ss. 224 for escape, 225 for rescuing from lawful custody, under s. 353 for using criminal force in so doing, and sentenced to separate punishments under each section, *held*, that the prisoners had only done one act, and were guilty of only one offence, and should only have been found guilty under ss. 224 and 225 of "escape" and "rescuing," respectively, and sentenced accordingly.

KALISANKAR SANDYAL was convicted under s. 224 of the Indian Penal Code of escaping from lawful custody, and under s. 353 of using criminal force to deter a public servant from discharging his duty. The other prisoners were convicted under s. 225 for rescuing Kalisankar Sandyal, and under s. 353 for using criminal force. Each prisoner was sentenced to separate and cumulative punishments under each section, for breach of which he was convicted, the Magistrate holding that the offences were distinct and separate.

Mr. Money and Mr. Lingham appeared for the prisoners, and contended that, as only one set of acts had been proved, which could only constitute one offence and not two offences, one punishment only could be awarded under one section only of the Penal Code, according to the principle laid down in *The Queen v. Radakanth Paul*,<sup>2</sup> where it was held that, when substantially but one offence had been committed, and the acts, which are the basis of the conviction on one charge, are the same acts which form the basis of the conviction in another charge, cumulative sentences on each charge should not be passed.

The following cases were also cited :—

*The Queen v. Durzoolah and others* ;<sup>3</sup> *The Queen v. Baboolun Hijrah* ;<sup>4</sup> *The Queen v. Sreemunt Adup* ;<sup>5</sup> *The Queen v. Suroop Napi* ;<sup>6</sup> *The Queen v. Dina Sheikh*.<sup>7</sup>

<sup>1</sup> [This case is distinguished in *Gobind Chunder Roy, Petitioner* (16 W. R. 60).—ED.]

<sup>2</sup> 9 W. R., Cr. R., 12.

<sup>3</sup> 9 W. R., Cr. R., 33.

<sup>4</sup> 5 W. R., Cr. R., 7.

<sup>5</sup> 2 W. R., Cr. R., 63.

<sup>6</sup> 3 W. R., Cr. R., 54.

<sup>7</sup> Before Mr. Justice Phear and Mr. Justice Hobhouse. The 15th December 1868.

THE QUEEN v. DINA SHEIKH AND OTHERS.\*

PHEAR, J.—The two charges upon which the prisoners have been convicted may be stated in the following way: *First*, that they were members of the assembly, the common object of which was to take possession of property by means of criminal force, and

\* Committed by the Magistrate, and tried by the Sessions Judge of Mymensingh, on a charge of rioting, being armed with deadly weapons, &c.

<sup>2</sup> [This case is referred to in *Jabdar Kazi, Appellants* (86 L. R. 390) and *Loke Nath Sarkar v. Queen-Empress* (1. L. R., 11 Cal. 349).—ED.]

The judgment of the Court was delivered by

1869.

**MACPHERSON, J.**—It seems to us that the conviction of the prisoner on the two offences of using force and escaping from custody is wrong. There is no evidence that the prisoner did anything but escape. A body of men are found by the Assistant Magistrate to have rushed in between him and the police, and he took advantage of their act and escaped. That is what has been found upon the facts by the Assistant Magistrate. It is not clear how the Assistant Magistrate finds the prisoner guilty of using force: he does not allude to it in his English judgment. It may be that he means to find that the prisoner used some amount of force in escaping. He could hardly escape without using some force; but in such a case, the use of force would be a part of the offence of escape, and it would be wrong to convict of both offences, and sentence separately for both. We, therefore, set aside the conviction and sentence for the offence of using criminal force.

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SANKAR  
SANDYAL,  
8 B. L. E.  
A. Cr. 14.  
[12 W. E. 2.]

These prisoners have been convicted under s. 353 of using criminal force to certain constables in the execution of their duty; and also under s. 225 of intentionally rescuing one Kalisankar Sandyal from custody; and for each offence they have been sentenced to a month and a half's imprisonment by Mr. Testroy, the Assistant Magistrate of Serajunge. The convictions and sentences were confirmed on appeal by Mr. Humphrey, Magistrate of Pubna. The proceedings were sent for on application to this Court, it appearing upon the face of the decision passed by the Assistant Magistrate that the two

that force actually was used; *secondly*, that they, by the force so used, caused hurt, but to whom the hurt was caused no mention is made. It appears to us that, substantially, these two charges are but two different forms of stating the same criminal act. The substance of both of them obviously is that violence was used, or, in other words, hurt was caused. It is essential to the first that force or violence actually was used; and it is essential to the second that hurt was caused, that is, that violence was used. It would appear, therefore, that the prisoners have been convicted under the second charge of causing hurt, and under the first charge of causing that hurt with the addition of a special motive, namely, that of taking away property in an unlawful manner. In this view of the case, we think that the prisoners ought not to have been convicted of both charges simultaneously. They were, properly speaking, alternative charges, and therefore the prisoners should have been found guilty of the one or the other, according as the evidence satisfied the Court that the one or the other charge was made out.

After perusing the record, and considering the judgment of the Sessions Judge, we are of opinion that the prisoners should be convicted of the first charge, namely, the charge made under the provisions of s. 148, and not of the second; and we are even disposed to the opinion that the second charge is in itself, if not incomplete, at least irregular, for not in some way designating the person upon whom the hurt was inflicted. We have doubts whether we ought, upon the facts of this case, in affirming the conviction upon the first charge, to modify in some degree the sentence which has been passed; but, after full consideration, we think that we cannot make any distinction between the prisoners, and also that the sentence which has been passed is not too severe for the offence of which the prisoners have been convicted.

It has been objected before us that, with regard to the last the prisoners, taking them in the order in which they stand in the charge, the evidence is sufficient to make out the offence of which they have been convicted. It is said that the evidence is essentially the evidence of accomplices without corroboration, and therefore ought not to be believed by the Court. We find that the Sessions Court, which had the witness before it, and therefore possessed greater powers of discriminating than we have in regard to the credibility proper to be attached to their testimony, considered that these persons, even accomplices as they in a certain degree might be termed, were deserving of belief, and we see no reason to come to a different conclusion. Accordingly, we acquit the prisoners of the second charge, namely, the charge under s. 324, and set aside the sentence which has been passed therein. Therefore, so far as that charge is concerned, they are entitled to be discharged. But we think that they are guilty of the first charge, and that the sentence passed in respect of that charge must stand. The appeal, therefore will be dismissed as regards the first charge.—10 W. E. 68.

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separate convictions were based upon the same facts. The record has since been examined, and it seems quite clear that the two convictions, as they stand, are wrong. The facts found against the prisoners are that they formed part of a body of men who interposed between some constables of police and an arrested prisoner, and thereby rescued him.

The act which the prisoners committed was one single act. Their offence was a single offence. They intentionally rescued the prisoner. The act of rescue was accomplished by the use of a certain amount of criminal force. The prisoners, under such circumstances, cannot be convicted of both rescuing the prisoner and using force. The using of force was a part of the offence of causing the rescue. We set aside the convictions of the prisoners for the offence of using force; and as the sentences passed upon them for the offence of rescuing a prisoner have already expired, the prisoners must be at once discharged.

Before Mr. Justice Norman and Mr. Justice E. Jackson.

BAKAR HALSANA v. DINO BANDHU BISWAS AND OTHERS.<sup>1</sup>

1869.

June 1.

3 B. L. R.  
A. Cr. 17.

[12 W. R. 1.]

*Mischief—Indian Penal Code, s. 425—Wrongful Loss—Proof of Title.*

The right to a fishery was in dispute between the zemindar of Bally and the zemindar of Moharajpore. The former obtained a decree in the Civil Court declaring the fishery to be his, in proceedings to which the latter was not a party; and the servants of the Bally zemindar thereupon removed a bamboo-bar, which the Moharajpore people had erected to prevent the passage of fish. For this they were convicted of mischief under the Indian Penal Code, and punished by fine.

*Held*, on reference to the High Court, that the conviction could not stand, as the Moharajpore zemindar had not shown that he was legally entitled to the fishery, and as it did not appear that the defendants were acting otherwise than from a *bond-fide* belief that the Moharajpore zemindar was encroaching on their master's rights.

THE facts will be sufficiently clear from the following judgment of

NORMAN, J.—The prisoners, servants of the zemindar of Bally, have been convicted of committing mischief by destroying a bar of bamboo laid across a watercourse. The Deputy Magistrate finds that there is a dispute about a right of fishery in the watercourse between the zemindar of Bally and the zemindar of Moharajpore; that the zemindar of Moharajpore having set up a bar across the watercourse, which obstructs the egress and ingress of fish, while it allows the water to pass freely, the defendants, being unable to induce the police to interfere, threw down the bar. Before the Deputy Magistrate the defendants produced a decision of the Sudder Ameen of Moorshedabad, affirmed by the Judge on appeal, to show that the fishery belonged to the zemindar of Bally. The Deputy Magistrate said it was unnecessary for him to go into a question of title, and adds that the decision, to which the zemindars of Moharajpore were not parties, is not evidence against them. He says the evidence does not clearly establish the fact of exclusive possession in either party; that even supposing the zemindar of Bally to have been in exclusive possession, it does not follow that the removal of the bar was justified. He says that the prisoner Dinobandhu should not have taken the law into his own hands. He fined the prisoners rupees 10 each. The Magistrate, Mr. Hankey, has sent up the case under s. 434.

We think that the conviction cannot be sustained. The conviction does not show that the prisoners threw down the bar with intent to cause, or

<sup>1</sup> [This case is referred to in *Reg. v. Kastya Rama* (8 Bom. H. C. B. 63).—ED.]

knowing that they were likely to cause, wrongful loss within s. 425. Wrongful loss is defined to be the loss by unlawful means of property to which the person losing it is legally entitled. The conviction does not show, on the face of it, whether the mischief, for which the defendants have been convicted, is the damage to and loss of the bar, or the mischief to the fishery. Suppose it to be the injury to and loss of the bar. If the fishery belonged to the zemindars of Bally, and they were in possession, servants acting under order might lawfully remove an obstruction newly set up to the passage of fish to prevent injury to their property and interference with its enjoyment.

In Blackstone's Commentaries, Book III., Chap. I., it is said: "Whatsoever unlawfully annoys or doth damage to another is a nuisance, and such nuisance may be abated, that is, taken away by the party aggrieved thereby, so that he commits no riot (or breach of the peace) in doing it. If a new gate be erected across a public highway, which is a common nuisance, any of the King's subjects passing that way may cut it down and destroy it."

It is not found that the defendants wantonly destroyed or injured the bar, the whole cost of which is stated to have been about a rupee in removing it. Suppose the mischief for which the Deputy Magistrate intended to convict is mischief to the fishery. First, the Deputy Magistrate has not found, or even enquired, whether the zemindars of Moharajpore are legally entitled to the fishery. If not, no wrongful loss was inflicted on them. Secondly, it is entirely consistent with the finding of the Deputy Magistrate that the defendants were acting in good faith for the protection of their master's interests, and repelling what they believed to be an unlawful intrusion on the part of the zemindars of Moharajpore. If the defendants really acted in the belief that the fishery belonged to their masters, the zemindars of Bally, it cannot be said that, in removing a bar which interfered with that fishery, they acted with intent to cause or knowing they were likely to cause injury to the zemindars of Moharajpore. Admitting that the decision of the Sudder Ameen is not evidence on a question of title as against the zemindars of Moharajpore, it may well have led the defendants to suppose that their masters had a legal right to the fishery, and should have been considered by the Deputy Magistrate with reference to the question of the good faith of the defendants, whether they acted with intent to cause or knowing they were likely to cause injury to the zemindars of Moharajpore.

The Deputy Magistrate finds that the parties were jointly in possession. If the act had been in its nature malicious and wanton, one which could have had no other object than that of the injury or destruction of the property, or to prevent the title to the property being ascertained, or otherwise to injure the zemindars of Moharajpore, we have no doubt that the parties might have been convicted as in the illustration.

"When A, having joint property with Z in a horse, shoots the horse, *intending* thereby to cause wrongful loss to Z, A has committed mischief." In the present case, we think no intent to injure, or knowledge that injury would be caused to the zemindars of Moharajpore, appears. The act is even presumably done with a totally different object. The conviction is, therefore, bad, and must be quashed, and the fines repaid.

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*Before Mr. Justice Norman and Mr. Justice E. Jackson.*

THE QUEEN v. BISHONATH PAL (APPELLANT).<sup>1</sup>

*Evidence at former trial—Procedure.*

1869.

June 14.

3 B. L. R.

A. Cr. 20.

[12 W. R. 3.]

Where the evidence of witnesses taken in the absence of the prisoner at a former trial was read out to them, and put in on their assenting to it as a true record of the facts:

*Held*, that the proceeding was irregular and prejudicial to the prisoner, that such witness should have been subjected to a fresh oral examination, and that then the former depositions might have been put in, not to add to his testimony, but to corroborate it. A new trial was ordered.

NORMAN, J.—The prisoner has been convicted of dacoity by the verdict of a jury, and sentenced to transportation for life. There appears to have been a very serious irregularity in the mode of conducting the trial. The depositions of witnesses taken on the trial (in July 1867) of other persons charged with having been engaged in the same dacoity are put up with the record. The witnesses appear to have been re-sworn, and each in turn says in effect: "I gave evidence before in this Court, and that evidence is true."

Without going into the details of the dacoity, which must have been taken by the Judge and the jury entirely from the former depositions, each witness in turn merely adds a few particular facts and details to shew the connection of the prisoner with the dacoity. Even while making these statements, the witnesses refer to their former depositions; as, for instance, thus: "It is true that I recognized Bishonath Pal during the dacoity," &c. "It is true that I saw the prisoner Bishonath strike two or three blows at Hira Lal."

The Judge's record does not clearly shew in what order the evidence was laid before the jury. But I am led to infer that the Judge probably in the first instance allowed the deposition on the former trial to be read in the presence of the jury, and then proceeded to question the witness. However that may be, the course of proceeding was most irregular. Under s. 31 of Act II. of 1855 the depositions containing the statements of a witness as to the commission of the dacoity taken on the trial in July 1867 would have been admissible, in order to corroborate his testimony given on the trial of the prisoner Bishonath.

The evidence of the witness whose testimony it was proposed to corroborate should have been first taken, and after such witness had finished his evidence, and not before, the former deposition might have been put in; not to add to his testimony, but simply to corroborate it, by showing that the statements made by him while the facts were still fresh in his memory correspond with those made by him in the Court of Session in the present case. In the present case, at the time when each deposition was put in, the evidence of the witness not having been given in the Court of Session, there was nothing on the record which made it admissible. There was nothing which was corroborated by it.

In the *Attorney-General of New South Wales v. Bertrand*,<sup>2</sup> on a second trial, when the witnesses were before the jury, the depositions taken on the first trial were read, and the witnesses were asked in turn whether what was read was true, and they were then submitted to fresh oral examination and cross-examination. What was done was done by the consent of the prisoner

<sup>1</sup> [This case follows *Elakee Bukeh, Appellant* (5 W. R. 80).—ED.]

<sup>2</sup> 36 L. J., P. C., 51; S. C., 4 Moore's P. C., C. N. S., 460.

Their Lordships remark they were not in a condition to say that any injustice to the prisoners resulted from it. But they add that no one called on to review the proceedings could be certain of the contrary. They disregard the consent of the prisoner, and speak of the wisdom of the common understanding that a prisoner on his trial can consent to nothing. They say it is essential that no unnecessary difficulty should be thrown in the way of the jury's understanding or rightly appreciating the evidence. They point out the difficulty that a jury must experience in sustaining their attention or collecting the value of different parts of the evidence when merely read out to them. They shew that the most careful note must often fail to convey the evidence fully in some of its most important elements, those for which the open oral examination of the witnesses in the presence of the prisoner, Judge, and jury, is justly prized; that it cannot give the look or manner of the witness, his hesitation, his doubts, his variation of language, his confidence or precipitancy, his calmness or consideration. It cannot give the manner of the prisoner, when that has been important in the statement of anything of particular moment; nor could the Judge properly take upon himself to supply any of these defects, who indeed will not necessarily be the same on both trials. They say: "It is in short or it may be the dead body of the evidence without its spirit, which is supplied when given openly and orally to the ear and the eye of those who receive it." Their Lordships add that they do not hesitate to express their anxious wish to discourage generally the mode of laying the evidence before the jury which was adopted in that trial.

The observations of their Lordships apply in all their force to the present case. There are, moreover, many objections to the course of proceeding in the cases now before us which did not apply to that before the Privy Council. There, the depositions read had been taken on the former trial of the prisoner himself. The prisoner had been present, and had had the fullest opportunity of cross-examining the witnesses. Here the depositions read were taken in the absence of the prisoner on the trial of other persons. There the prisoner was represented by Counsel, who, no doubt, had copies of the depositions, and not only took no objection, but actually consented to their being read on the second trial. Here the prisoners appear not to have been defended. To read evidence from written depositions must place a prisoner who is defending himself at a disadvantage. If the evidence is given slowly and taken down sentence by sentence in the usual way, the prisoner can follow each witness without difficulty. He has time to observe and reflect on each point that appears to make against him, and when his turn comes he has at least an opportunity of cross-examining or answering in his defence, with reference to each of such points in detail. The disadvantage at which he will stand if the evidence of each witness is read out without pause as a connected story is enormous. Probably of slow apprehension at best, having lost what little presence of mind he ever possessed from the terror and confusion produced by the new and alarming position in which he finds himself, his thoughts necessarily diverted from the words of the reader by the noise and bustle about him, the prisoner would find himself incapable of fixing his attention closely on the several facts, the hurried recital of which gives him no time to appreciate their importance, or consider their bearing on the case made against him. If he does understand their significance at the moment, his mind will not have dwelt on them long enough to enable him to fix and arrange them in his memory, so that when his time comes to defend himself he can cross-examine or make answer in reference to them in detail in his address to the jury. All that will be present to his mind when he comes to his defence will be a blurred and most imperfect impression of the case which he has to meet. But that is

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not all. The course we suppose to have been taken of reading his deposition to one of the witnesses against the prisoner, and putting the question to him whether or not the deposition is true, is not only open to the objection that it is putting a leading question in the most objectionable of all possible forms; prompting the witness as to all the details of the story which he is expected to tell, in a great degree therefore depriving the prisoner of the means of testing the veracity or the recollection of the witness by cross-examination; but to the witness himself it is a dangerous snare. He is reminded that on a former occasion he deposed to circumstances tending to establish the prisoner's guilt, and it is impliedly intimated to him that the same story is expected from him again.

To illustrate further the injury to the prisoner that may result from this course of proceeding, suppose on the former occasion the witness spoke positively to having recognized three or four prisoners then under trial amongst a body of dacoits, and also named one or two other persons not before the Court. Suppose the witness to be speaking quite honestly, and to the best of his knowledge; he could not, as regards such other persons, speak under the same sense of responsibility as he would with respect to a prisoner under trial. He might have felt some doubt, hesitation, or uncertainty as regards the absent person which he might not have thought it necessary to express. No one would be there to cross-examine, to check his statements as regards such persons, or to induce him to consider whether on reflection he really was quite as sure of their identity as he supposed and represented himself to be. If, at the end of two years, the deposition is put into the hand of the witness, it would at once occur to him to think that having, when the facts were quite fresh in his memory, spoken positively to the identity of the person, he was, no doubt, then right. Doubts and hesitation would be forgotten or cast away, and he would feel sure that what he then said was correct.

In the present case the facts are few and simple, and it may be that the prisoner has sustained little or no actual injury by the course adopted at the trial. But I would say with their Lordships of the Privy Council in the case I have cited that the object of a trial is the administration of justice in a course as free from doubt or chance of miscarriage as merely human administration of it can be.

A prisoner defending himself against a charge of an offence alleged to have been committed a long time previously, if he has any defence, must always be under a great difficulty in substantiating it by proof, and therefore in such cases it is peculiarly necessary to see that the case for the prosecution is not conducted so as further to prejudice him. It is impossible to say that the prisoner may not have been injured in his defence by the course adopted in the present case.

As the evidence has not been legally taken, this Court has not before it materials on which it can properly form a correct judgment as to the guilt or innocence of the appellants, and therefore, according to the opinion of the Full Bench upon an analogous point, in Elahi Buksh's case, it is necessary that there should be a new trial. This is a jury trial in which the Court has not the power to reverse the finding of the jury on a question of fact. The prisoner has a right to the opinion of the jury or of this Court on evidence duly and legally taken against him. I am therefore of opinion that the conviction must be quashed, and that a new trial must take place.

JACKSON, J.—I concur with Mr. Justice Norman that the mode in which this trial was conducted was irregular. The evidence of witnesses given and taken down in the absence of the prisoner is no evidence against the prisoner.

The irregularity alluded to is one which has been frequently animadverted upon by this Court, and upon which numerous trials have been set aside even in the time of the late Sudder Court. The conviction of the prisoners is quashed, and a new trial will be held.

*.Before Mr. Justice Norman and Mr. Justice E. Jackson.*

THE QUEEN v. PUNAI FATTAMA AND ANOTHER (PRISONERS).

*Death caused by Snake-charmers—Culpable Homicide—Murder.*

1869.  
June 14.

3 B. L. R.  
A. Cr. 25.  
[12 W. E. 7.]

Certain snake-charmers, by professing themselves able to cure snake-bites, induced several persons to let themselves be bitten by a poisonous snake. From the effect of the bite, three of these persons died.

*Held*, that the offence was murder under cls. 2 and 3 of s. 300 of the Penal Code, unless it could be brought within the 5th exception to that section. If the prisoners, really believing themselves to have the powers they professed to have, induced the deceased to consent to take the risk of death, the offence would be culpable homicide not amounting to murder.

THE facts are fully stated in the judgment of

NORMAN, J.—The prisoners have been convicted by the Judge of Purnea, concurring with the assessors, of the offences of culpable homicide not amounting to murder, of three persons, Jatru, Menghan, and Jikri, and of causing grievous hurt by means of dangerous weapons and means to Itwari Musahar, and sentenced to five years' rigorous imprisonment. They appeal.

From the evidence as taken before the Judge, it appears that the prisoners, who said they were gurus, and came from Caragola, joined a gang of coolies employed in making bricks and doing other work for the Darjeeling and Caragola Road, and offered to teach them snake-incantation. Ten or twelve coolies, amongst whom were the three deceased and Itwari the injured man, were learning the incantation. They were to have paid Rs. 2 or 1-8 each to the prisoner. After some days the prisoners wished the deceased and their other pupils to allow themselves to be bitten by snakes. They produced from an earthen pot two koraitis and a keranti. The witness Bachu Sirdar says, "They began to make the snakes move about in front of us all. We became afraid. They said, 'Why do you fear? We are gurus, and will soon restore you.' After this, they made us place our right hands on the ground, and began to make the big korait move towards our hands. We immediately from fear raised our hands. After this the prisoners struck us with rattans, and when the snake moved to a distance, we again placed our hands on the ground. Then the prisoners took the snake near to Jitru, Menghan, Jikri, and Itwari, and by striking it with a rattan made the snake bite Jitru on the fore-finger of the right hand. The throat of Jitru immediately became dry, and he became senseless. Then the snake was made to bite Menghan on the fore-finger of the right hand; but Menghan did not suffer or become senseless. After this the snake was made to bite Jikri on the right hand; he did not either become senseless, but remained tottering. Then the snake was made to bite Itwari on the right wrist. He did not appear to suffer. Then Jitru died two hours before dawn, and the prisoners then ran away." The witnesses went in search of them, arrested them at 10 o'clock the following morning, brought them back, and made them over to the police. The story told by the witness Bachu Sirdar is corroborated by Itwari, Lalu, and Lochan. There is no substantial difference in their statements, except as one or another gives fuller details on particular points.

[This case is distinguished in *Empress v. Gonesh Dooley* (1. L. R., 5 Cal. 351).—ED.]

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The examination of the prisoners before the Magistrate shews that they were fully aware of the deadly character of the bite of a korait. The prisoner Punai says he broke out the fangs of the korait and squeezed out the venom a week before the occurrence. He admitted that he knew the korait was a deadly snake. Jumai said he knew nothing about its teeth being extracted. He said, "When the snake was brought in, a pang of fear shot through my vitals, and I was afraid of its biting."

When the first man Jitru had been bitten, and was suffering from the effects of the bite, the prisoners did not at once desist, but went on urging the snake to bite others. When they found Jitru suffering, they apparently did not occupy themselves with uttering over him their *mantra*, which, according to the statement of Jumai before the Magistrate, is nothing more than "O mother, one of your children has bitten this person, heal," &c. When the snake was exhausted, and could bite no longer, their attention was directed, not apparently to the sufferers, but to the snake. They took it up, rubbed it, and, having partially restored it, painted it on the head with vermilion, and turned it out in a paddy-field.

The motive for the act of the prisoners does not seem to have been the desire of gain. Though they were to have got from their pupils two rupees and one rupee and eight annas each for teaching, they do not seem to have actually received anything, or even to have pressed for payment. The deceased did not force the experiment on the prisoners. They did not desire to have the value of the charm tested in their own persons.

They did not willingly allow themselves to be bitten. It is proved by all the witnesses that the coolies were afraid of the snake, and it was by repeated assurances from the prisoners that they were gurus, and would protect them from harm, and even by actual force, for the prisoners are said to have struck and twisted the ears of some of them, that the coolies submitted to be bitten.

It is a most extraordinary case. The Judge thinks that the act was not done with the intention of causing death, but to show that the prisoners possessed the power of restoring to health persons who may have been bitten by venomous snakes. Looking at the ignorance and superstitious practices which seem to prevail amongst the low-caste coolies, to which the prisoners and the deceased belonged, the conclusion arrived at by the Judge upon the evidence, as it stood before him, was probably correct.

The Judge finds the prisoners guilty of culpable homicide not amounting to murder. The Judge seems to assume that the case does not come within s. 300. He refers to cl. 1, and says that the act was not done with the intention of causing death, and that none of the illustrations apply. But cl. 2 applies to the case, and cl. 3 still more expressly. The act was done with the intention of causing such bodily injury, that is, a bite by a deadly snake, which the offenders knew to be likely to cause the death of the person to whom the harm was caused. Cl. 3 appears to have been enacted to obviate any doubt which, in a case like the present, might exist under cl. 2. It says it is murder if the act is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient, in the ordinary course of nature, to cause death. Illustration c is as follows: "A intentionally gives Z a sword-cut or club-wound sufficient to cause the death of a man in the ordinary course of nature. Here A is guilty of murder, though he may not have intended to cause Z's death."

The two clauses explained by this illustration show that the act of the prisoners in wilfully and intentionally causing the deceased to be bitten on

their naked bodies by a deadly snake, an injury sufficient in the ordinary course of nature to cause death, is not the less murder, though they may have believed that they could remove, and intended to remove by their incantations, the effects of the injury.

If the offence is not murder, it is because it falls within the 5th exception in s. 300, namely, where the deceased takes the risk of death with his own consent. S. 90 provides that a consent is not such a consent as is intended by any section of this Code, if the consent is given under misconception of fact, and if the person doing the act knows or has reason to believe that the consent was given in consequence of such misconception. No doubt, the deceased gave their consent under a misconception of fact, namely, a belief that the prisoners by incantations could heal, or protect them from the effects of, the bites of venomous snakes.

But if, as the Judge held, the prisoners believed, though erroneously, that they had the power of restoring to health persons who might have been bitten, in that case they did not know that the consent of the deceased was given "in consequence of a misconception." They must in that case have acted in the belief that the deceased gave their consent with a full knowledge of the facts and in the belief of the existence of powers which the prisoners asserted and believed themselves to possess. It is because, on the finding of the Judge, the case appears to come fairly within excep. 5, that I think the conviction of culpable homicide under s. 304 must be taken to be correct, and in that view of the case the sentence of five years' rigorous imprisonment seems to me a very proper one.

There are, however, circumstances in this case which lead to a suspicion that the guilt of the prisoners in causing the snake to bite the coolies may have been of a far deeper dye than the Judge supposes. Itwari, says Punai and Jumai, held a puja of Bischari in the *angin* of Musan's house. If by Bischari is meant Bisseswari, the puja was a puja to Kali or Bhowani, the goddess of the Thugs, the goddess of whom it is said that the blood of a human being delights her for a thousand years. But it has been suggested that the puja was what is called a Beshari puja, from bish (poison). But if that is so, the question still remains—Who was the goddess to whom the puja was addressed? Jumai says, "We did puja to the snake-deities, offering flowers and sweetmeats." The snakes were brought in, and put in an earthen vessel on the mandab, or puja-place, and were taken from thence, and made to bite the deceased. The prisoners cherished the snake when exhausted by biting, and not only did it no injury themselves, but carried it off to a place of safety, painted its head with vermillion, as if to indicate that it was a sacred object, and to protect it from all harm, and then ran away.

It looks as if in causing the death of the coolies the prisoners were performing some religious rite, or doing an act in honour or for the gratification of their goddess. It seems to me that some inquiry should be made by the police as to the prisoner's associates and their habits. Jumai says that he was bitten by a korta the Dussara before last, and shewed the marks on his arm. He also says that he saved the life of Brihaspati, a gariwan, by his *mantra*, in the previous year. The appeal is rejected.

JACKSON, J.—I certainly would not interfere with the conviction of the prisoners or with the sentence passed upon them. The only doubt which I have regarding their case is whether they should not have been convicted of the offence of murder. The prisoners are snake-jugglers or charmers. The proceedings held upon this trial prove incontestably that they possess no

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charm or antidote against the bite of a deadly snake, and also that they have no belief in any charm. They, like all jugglers, impose upon the credulity of other persons by pretending to rely upon charms, and in this way endeavour to make money. From constant practice they are able to handle snakes without undergoing any particular risk, and the sole charm which they possess is the precaution which they take with venomous snakes of removing the poison from their fangs, and sometimes of removing the fangs altogether. That is the only real defence which is made in this case. One of the prisoners states that they had broken the snake's fangs, and destroyed its power of injuring others. From his own account, however, this had been done a week before the prisoners made the snake bite the coolies, and most probably the poison-fangs had not been totally destroyed, and had filled again, and hence death followed upon the bite.

It seems to me that, in trying this case, we should deal with the prisoners in exactly the same manner as we should deal with any other person who acted as they have done. We should at once discard all idea that they have any charm over a snake-bite, or even that they believe they have, unless they can prove it. On the contrary, the prisoners, being in the constant practice of dealing with snakes, must be held to have a thorough knowledge of the deadly nature of the bite of a korait; and it is for them to show that when they made a deadly korait bite several people, and cause the death of three persons, they had taken the most certain precautions to prevent the bite from being injurious. If they cannot prove this, they should be dealt with as any other person would be who made a poisonous snake bite any one. The consent of the coolies to be bitten is, in my opinion, under the law, no consent, because it was founded on a misconception of facts, and the prisoners knew that the consent was given in consequence of such misconception. The coolies believed that the jugglers had power by charms to cure snake-bites. The jugglers pretended that they had such power, when they had no such power; and the consent to be bitten was given by the coolies only under the misconception that the jugglers possessed some such power. The jugglers then knew that the consent of the coolies was given under a misconception of facts as to their power over snakes. I concur with Mr. Justice Norman that the offence of the prisoners comes under the 4th clause of s. 300. Culpable homicide is murder, if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, and commits such act without any excuse for incurring the risk of causing death. Any person who makes a poisonous snake bite another must be held to know that he is likely to cause death, and must be held to know that it is an act imminently dangerous; and there was no excuse for incurring the risk of death in this case. The prisoners, being snake-charmers, must be held to know the effect of snake-bites better than other people. It is no sufficient answer for them to say that they thought that they had made the snake safe by destroying his poison-fangs and bag a week previously. The evidence proves that one of the men bitten suffered from the snake-bite even before the snake had been made to bite the others, and still the prisoners went on and made the snake bite another person. Even if the prisoners supposed, when they commenced, that the snake was at the time innocuous, they must have seen, when the first cooly was so immediately affected by the bite, how dangerous it was to go on with their proceedings. They must have known that the act they were committing was likely to cause death.

I do not see that there is anything to be gained by further inquiry. The prisoners seem to me to have been mere snake-jugglers imposing upon

the people in order to make money, and pretending to teach snake-charms or incantations, in return for which they were to obtain money from the persons whom they were teaching.

*Before Mr. Justice L. S. Jackson and Mr. Justice Markby.*

IN THE MATTER OF DOMESTIC SERVANTS.<sup>1</sup>

*Act XIII. of 1859—Servants—Artificer, Workman, Labourer.*

1869.  
July 10.

Act XIII. of 1859 does not apply to contracts for a "chakri," domestic or personal service, but to contracts to serve as artificer, workman, or labourer.

8 B. L. R.  
A. Cr. 32.

JACKSON, J.—We are of opinion that Act XIII. of 1859 does not apply to contracts to serve as domestic servants, and that the proceedings of the Deputy Commissioner, sitting as Magistrate in the two cases before us, were erroneous.

To bring any person under the operation of the Act, it must be shown that he has contracted to serve as an artificer, workman, or labourer.

This was not shown in either of the cases before us: on the contrary, the agreement produced was for "chakri," which usually means domestic or personal service, and not service of the kind referred to in the Act.

The accused, Sukura, was sentenced to rigorous imprisonment for one month. The sentence must be reversed.

The accused, Subhai, agreed to complete the remainder of his service, and a recognizance to that effect was taken from him. This recognizance must be quashed as taken without authority.

*Before Mr. Justice Norman and Mr. Justice E. Jackson.*

THE QUEEN v. RAMTAHAL KAHAR.

1869.  
July 12.

*Grave Provocation—Presumption—Loss of the Power of Self-control—Providing oneself with a Deadly Weapon—Culpable Homicide not amounting to Murder.*

8 B. L. R.  
A. Cr. 33.

The wife of the prisoner had been forcibly taken to the house of the deceased, a native physician, who alleged that her presence was necessary to the due performance of certain incantations. The prisoner, armed with a sword, and watching from the roof of the house, saw his wife being actually violated by the deceased. He jumped down from the roof, and struck deceased with his sword in several places, from the effects of which he died.

*Held*, that the prisoner's conviction for murder could not be sustained. The offence committed was culpable homicide not amounting to murder.

NORMAN, J.—The prisoner has been convicted by the Judge of Gya of the murder one Bahuri Tewari, and sentenced to transportation for life. While passing this sentence, the Judge suggested that the papers should be sent to the Lieutenant-Governor of Bengal, in order that the sentence might be reduced, if his Honor should think fit to exercise the powers of mitigating the sentence under s. 54 of the Code of Criminal Procedure.

On a perusal of the abstract statement of the cases tried before the Sessions Judge, we sent for the record under s. 403.

<sup>1</sup> Reference from the Judicial Commissioner of Assam, under s. 434 of the Code of Criminal Procedure.

[This case has been followed in *Muni Chundra v. Hariram Ahom* (8 C. L. R. 254). —Ed.]



1869.

QUREN  
a.  
RAMTAHAL  
KAHAR,

3 B. L. R.  
A. Cr. 33.

The facts are shortly as follows :—

The prisoner is a ryot, and he and his wife appear to be servants of one Durgaprasad. He, suffering from partial blindness, sent for the deceased Bahuri Tewari, a brahmin, who practised as a baido or native physician.

Bahuri represented that he must perform certain incantations, for which the presence of a young woman was necessary. The wife of Durgaprasad, assisted by two female servants, and her brother, Narayan Sing, forcibly took the prisoner's wife, Chunya, to Bahuri to do some puja. They fastened the door, and went away, leaving her with Behuri. This was on Wednesday night. On the following day she complained to her husband, the prisoner. The prisoner says that she told him she had been ravished by Bahuri, and that she would not survive the disgrace. Chunya in her evidence says that she did not tell her husband that she had been ravished on Wednesday night, but that she told him all that had occurred, which was, that after she had been left with Bahuri, he told her to prepare a *chula* in the corner to light a fire and place incense on it; that there was then a noise at the door; that Bahuri asked if there was any one outside, and then let her go.

The prisoner borrowed a *phulsi*, or sword, and on the following night placed himself on the roof of the cow-house, in which Bahuri and his nephew lodged, to watch what went on.

The prisoner's wife was again taken to Bahuri. After some pretence at incantations, Bahuri threw her on a charpoy, and attempted to have connection with her by force. The prisoner jumped down from the roof, and rushed into the room; his wife escaping by the door saw the prisoner strike Bahuri with the sword in several places. From the effects of the wounds so received, Bahuri died the next day from loss of blood.

It appears to me that the prisoner should not have been convicted of murder. I think the story of the wife that she had not been ravished, and did not complain to her husband that she had been ravished on the Wednesday night, is evidently true. The prisoner, no doubt, found himself helpless, unable to resist the united influence of Durgaprasad, who stood in the relation to him of both master and zemindar, of his master's wife and family, and of the brahmin baido. Practically he probably could not have prevented his wife from being left with the baido for the purpose of his incantations. All he could do was to watch and protect her if she should be assailed during the night. The deceased is described as a robust middle-aged man, and he had a nephew with him. It seems not unreasonable that the prisoner should have provided himself with a weapon of offence on such an occasion. When the prisoner found that his wife was actually being violated by the deceased, it seems to me that he received the gravest of all possible provocations, and that he may and ought to be presumed to have been deprived of the power of self-control by such provocation. The wounds were just what a man under the impulse of sudden passion on a sudden emergency would inflict. Having struck three or four blows, the prisoner went away without waiting to see the effect of them, without staying to see that he had killed the deceased outright. There was no mutilation and no wanton cruelty on the prisoner's part. The offence of which the prisoner should have been found guilty is culpable homicide not amounting to murder. I think a sentence of eight months' imprisonment, to be computed from the date of his sentence by the Sessions Court, will be amply sufficient to meet the ends of justice.

JACKSON, J.—I quite concur.

Before Mr. Justice Norman and Mr. Justice E. Jackson.

THE QUEEN v. HARDYAL<sup>1</sup>

1869.  
July 13.

*Power of Sessions Judge—False Evidence—Penal Code, ss. 193, 194.*

3 B. L. R.  
A. Cr. 35.

The Sessions Judge has no power to commit a man for having given false evidence before the Magistrate, but he can commit him for having given false evidence in his own Court.

In the trial of a prisoner for murder, a witness stated on oath before the Sessions Court that another had committed the murder, whereas before the Magistrate he had stated, as was the fact, that the prisoner had committed the murder.

*Held*, that such witness was guilty under s. 193, and not under s. 194 of the Penal Code, as he did not know that he would cause a conviction for murder.

JACKSON, J.—The Judicial Commissioner has now proved the deposition which the prisoner gave before the Sessions Court in the trial of Mohan Lal for murder. In that deposition, the prisoner stated that one Dava had cut down his aunt Patti. It is proved that before the Magistrate he had stated that Mohan Lal had committed the murder. The other evidence taken in the case also proves that Mohan Lal committed the offence. Finally, the prisoner in his defence has admitted that his deposition before the Judicial Commissioner was false, and that before the Magistrate was the true statement. The prisoner is therefore guilty of having given false evidence before the Judicial Commissioner, but I think his offence falls within s. 193, and not s. 194. The prisoner, when he made that false deposition, did not know that he would cause, or know it to be likely that he would cause, Dava to be convicted of the offence of murder. In fact, in giving that deposition in the trial of Mohan Lal, he could not possibly cause the conviction of Dava of murder. The offence, however, tending as it might have done to throw suspicion on an innocent person of the murder, which the prisoner knew was committed by Mohan Lal, was of a more than usually grave description. I would therefore sentence the prisoner to two years' rigorous imprisonment.

I have confined my attention to the deposition made before the Judicial Commissioner, because a Sessions Court has authority to commit only for perjury committed before such Sessions Court. It has no authority to commit for perjury committed before the Magistrate. It follows that the charge for perjury before the Magistrate framed by the Judicial Commissioner was irregular.

NORMAN, J.—I concur in reducing the sentence on the grounds stated above.

<sup>1</sup> [This case is followed in *Queen v. Mati Khawa* (3 B. L. R. A. Cr. 86; 12 W. R. 31) and *Queen v. Nomal* (4 B. L. R. A. Cr. 9; 12 W. R. 69).—ED.]

Before Mr. Justice Norman and Mr. Justice E. Jackson.

THE QUEEN v. MATI KHOWA.<sup>1</sup>

1869.

July 13.

3 B. L. R.

A. Cr. 36.

[12 W. R. 31.]

*Powers of Judicial Commissioner to commit—False Deposition—Alternative Statements.*

A Judicial Commissioner has no power, under s. 172 of the Code of Criminal Procedure, to commit a witness for a false deposition given before the Assistant Commissioner. The evidence of a writer in the Judicial Commissioner's office, to the effect that "the document shewn to him is a deposition taken before the Assistant Commissioner; it appears to have been taken in due form upon solemn affirmation, and is attested by the signature of the Assistant Commissioner," is not sufficient evidence of the prisoner having duly deposed.

*Per* NORMAN, J.—*Query*, notwithstanding the decision of the Full Bench as to the correctness of convictions for perjury upon alternative statements.

In an alternative charge, that the statement of the prisoner before the Assistant Commissioner was false, or that his statement before the Judicial Commissioner was false, his statement before the Judicial Commissioner was fully proved, but there was no direct evidence to prove the deposition made by the prisoner before the Assistant Commissioner.

JACKSON, J.—The papers of this case have been sent for an examination of the abstract statement. The prisoner has been convicted of the offence of perjury in the alternative, either that his statement before the Assistant Commissioner was false, or that his statement before the Judicial Commissioner was false. These depositions were made in the trial of one Pahita for the murder of a child. Before the Assistant Commissioner the prisoner had stated he had seen Pahita taking a child with her, but did not know who the child was. Before the Judicial Commissioner he had deposed that he met Pahita leading a child, whom he knew to be the child of Gorai. The Judicial Commissioner thereupon committed the prisoner for trial. I understand that he acted under s. 172, Criminal Procedure Code, and the following sections, as the charges against the prisoner are signed, not by the Assistant Commissioner, but by the Judicial Commissioner, who holds the position of Sessions Judge. On the trial the deposition made before the Judicial Commissioner was fully proved, but there was no direct evidence to prove the deposition made by the prisoner before the Assistant Commissioner. The writer of the Judicial Commissioner's office merely deposes "that the document shown to him is a deposition taken before the Assistant Commissioner; it appears to have been taken in due form upon solemn affirmation, and is attested by the signature of the Assistant Commissioner." The Judicial Commissioner accepted this evidence, and upon it charged the jury, who convicted the prisoner in the alternative. The prisoner pleaded guilty to having made a false statement before the Assistant Commissioner, but averred that his statement before the Judicial Commissioner was correct. The Judicial Commissioner sentenced the prisoner to three years' imprisonment, remarking on the lamentable indifference which witnesses manifested for the truth.

Upon the facts this Court has no power to interfere. But the commitment of the prisoner by the Judicial Commissioner for a false deposition given by the prisoner before the Assistant Commissioner is illegal. S. 172 gives the Sessions Court, that is, the Judicial Commissioner, power to charge a

<sup>1</sup> [This case is followed in *Queen v. Nomal* (4 B. L. R. A. Cr. 9; 12 W. R. 69); and referred to in *Queen v. Mahomed Roomayoon Shaw* (13 B. L. R. 324; 21 W. R. 72); *Queen v. Mussamut Zumeerun* (6 W. R. 65; B. L. R. Sup. Vol. 521); *Palany Chetty, Appellant* (4 Mad. H. C. R. 51).—ED.]

person for an offence committed before itself, but not for an offence committed before the Assistant Commissioner. The evidence also as to the prisoner's deposition before the Assistant Commissioner is in fact no evidence at all. Under such circumstances, the conviction as to the statement made before the Assistant Commissioner cannot be sustained, and it follows that the conviction in the alternative must equally fall.

Norman, J.—I entirely concur. There was no evidence before the jury that the prisoner was examined before the Assistant Commissioner. The mere production of a deposition purporting to be signed by the Assistant Commissioner is not enough. There is no evidence that what the prisoner said before the Assistant Commissioner was known or believed by him to be false. The prisoner says he made a mistake, and I think it quite intelligible that he may have done so, or not made his meaning clear. There is, no doubt, a contradiction between the statement made before the Assistant Commissioner that he saw Pahita leading a child and that he did not know the child, and that made before the Judicial Commissioner that she was leading a child, and that he knew the child to be the child of Gorai Dome. But it is quite possible that, when he saw the child in the first instance, he did not recognize it, but afterwards, on reflection, satisfied himself it was the child of Gorai.

The prisoner seems to have made two contradictory statements; and without any inquiry as to which statement was untrue, without any satisfactory inquiry as to whether the statement supposed to be false was made wilfully and corruptly, whether the prisoner knew or believed it to be false, he has been convicted and sentenced to three years' imprisonment for giving false evidence. As far as I can judge, from the very short summary inquiry that took place, it was wholly or almost immaterial whether the prisoner knew or did not know the child to be the child of Gorai. I agree that the conviction must be quashed, and the prisoner discharged.

I desire to add that I think it desirable that the question of alternative convictions in cases of perjury should be reconsidered. I dissented from my learned brothers when the case on this subject was before the Full Bench, and subsequent experience leads me to think that I ought to have expressed my dissent in more unqualified terms than I did. In the present case there was not before the jury any evidence to show that the prisoner's statement made before the Judicial Commissioner was not quite true. This is the only statement in respect of the supposed falseness of which the Judicial Commissioner had authority to try the prisoner.

1869.

QUEEN

v.

MATT  
KHOWA,

3 B. L. R.  
A. Cr. 86.

[12 W. E. 31.]

Before Mr. Justice L. S. Jackson and Mr. Justice Markby.

1889.  
July 13.

IN THE MATTER OF THE NORTHERN ASSAM TEA COMPANY.<sup>1</sup>

*Act VI. of 1865 (B.C.), ss. 31 and 32—Protector of Labourers, Powers of—  
Wages of Labourers—Mode of taking Account.*

3 B. L. R.  
A. Cr. 39.  
[12 W. R. 29.]

*Held*, that until an inquiry is made under s. 31, Act VI. of 1865 (B.C.), the Protector of Labourers is not competent to act under s. 32.

That the procedure under s. 31 must be conducted in accordance with s. 444 of the Criminal Procedure Code.

That to support a conviction under s. 32, Act VI. of 1865 (B.C.), it must be shewn that the wages or part of the wages due have remained unpaid for more than six months. But in an account current, the payments are not to be appropriated for the wages of the month in which the payment was made.

This was a reference by the Officiating Judicial Commissioner of Assam, for reversal of the order of the Protector of Labourers, under the following circumstances:

This proceeding is taken with reference to a case under Act VI (B.C.) of 1865, of certain labourers in the employ of the Northern Assam Tea Company, who appear, though this is not directly stated by the Protector in his judgment, to have been released from their contracts with the Company, and to have been awarded in the aggregate Rs. 635-5-10.

In appeal it is contended that the Protector's proceedings were illegal; that there was nothing before him to have warranted a conclusion that the wages of the labourers had not been paid for a period of more than six months after they had become due; and that, owing to the decision of the Protector of Labourers, the Northern Assam Company have been subjected to loss, having been deprived of the valuable services of the labourers, and having had to pay Rs. 630. With reference to this appeal, the Court, having perused the proceedings held by the Protector of Labourers, is of opinion that the objections taken to them merit attention.

In the first place, in conducting his inquiry upon the complaint of the labourers of Hugrijan Tea Garden, the Protector has altogether ignored procedure. There is nothing in the record which can be deemed evidence. Parties were not examined according to law on solemn affirmation; evidence was not taken in support of their representations; and with reference to the list of labourers appended to the Protector's decision, there is nothing to prove that the entries therein made are correct according to the factory-books, as far as can be gained from the Protector's notes. In all, 55 labourers made complaint to him, representing, with the exception of one man, that they were seven months in arrears of wages; but with reference to such statements, there is nothing in the record to show what amount of wages the labourers were entitled to, or to demonstrate the date on which they last received payment. All that is apparent is, that the labourers had a running account from month to month with the factory; and that when the Protector held his inquiry, certain balances were due to them.

The Protector in his decision writes: "I am decidedly of opinion that 47 of them have made out a good case, and that I believe, according to the simple and natural reading of s. 32, Act VI. of 1865."

Now, though the Protector writes about "simple" and "natural" reading, yet he does not explain his impressions in connection with such words.

<sup>1</sup> Reference under s. 434 of the Code of Criminal Procedure, from the Judicial Commissioner of Assam.

On referring to the law, Act VI. (B.C.) of 1865, s. 32, the Court finds that in the matter of non-payment of wages it enjoins that, if it shall be proved before a Magistrate that the wages of a labourer have not been paid for a period of more than six months after they shall have become due, it shall be lawful for the Protector, on the application of the labourer, to cancel the contract of such labourer, and to award him compensation not exceeding 30 rupees. Now, in respect to the provisions of this law, there would appear to the Court to be but one interpretation to its meaning, which is, that to meet it, it must be proved that a labourer has not received his wages, has not received payment on such account over a period of six months, that is to say in common parlance, that he is six months in arrears of wages.

For the reasons given, the Court, being of opinion that the proceedings held by Dr. Meredith, Protector of Labourers, are contrary to law, and that they did not warrant the conclusion he came to, would set aside his judgment; but as the Court does not consider that it has jurisdiction in the matter of this appeal, inasmuch as there is nothing in Act VI. (B.C.) of 1865 to show that an appeal will lie to the Sessions Court, under the circumstances the Court is obliged, agreeably to the provisions of the Criminal Procedure Code, s. 434, to submit this proceeding, together with the papers in the case, for the orders of the Honourable the Judges of the High Court of Judicature.

Judgment of the Court was delivered by

MARKBY, J.—The Magistrate and Protector of Labourers appears to us to have proceeded in a manner which is altogether illegal, and to have made a wrong and illegal order. The Act evidently contemplated two entirely distinct proceedings by two distinct officers in ss. 31 and 32; and the fact that the same officer is both Magistrate and Protector of Labourers does not enable him to merge these two proceedings into one. Until the inquiry under s. 31 has been completed by the Magistrate, and it has been ascertained by him that the wages of the labourers are more than six months in arrear, the Protector of Labourers is not competent to act under s. 32.

The inquiry by the Magistrate under s. 31 is also one which we think must be conducted in accordance with s. 444 of the Code of Criminal Procedure; that is to say, as near as may be, in accordance with the ordinary procedure of a Magistrate's Court. A definite complaint must be made; the party complained against must be duly summoned; the witnesses sworn and examined; a formal order drawn up, and a full record kept of the proceedings. The Magistrate is not at liberty to enter into a correspondence with parties concerned as to the interpretation of the law, but must decide it for himself after hearing the arguments of the parties or their agents.

Even upon the merits, as far as we can gather from the memoranda sent to us, we think the order was wrong. We think that there was nothing to show that the wages of these labourers had not been paid for a period of six months. We do not say that to support a conviction under this Act six months' full wages must be due, but clearly there must be some wages due which have been more than six months unpaid. There the coolies had received something on account every month less than the full amount of their wages; but it seems a strange mode of making up the account to appropriate these payments to the actual month in which they were made. The natural and ordinary course in an account current is to appropriate payments to the earliest debt due, and unless some special arrangement was shown to have been made to the contrary, that is how the accounts of these labourers ought to have been made up. No such arrangement was shown, and we think, therefore, that the Magistrate's computation was incorrect.

1869.

IN THE  
MATTER OF  
NORTHERN  
ASSAM TEA  
COMPANY,  
3 B. L. R.  
A. Cr. 39.  
[12W.E.29.]

Upon these grounds we set aside the order of the Magistrate; but as the sums ordered to be paid to the coolies do not appear to exceed the amount actually due for wages, we do not consider it necessary to order those sums, if paid, to be refunded.

*Before Mr. Justice L. S. Jackson and Mr. Justice Markby:*

THE QUEEN *v.* GAJRAJ AND ANOTHER.

*Document—Evidence—Misdirection.*

1869.  
July 20.

3 B. L. R.  
A. Cr. 43.

Upon a plea of *alibi* by the prisoners that they had left the place on the 12th of April 1869, and reached Port Canning on the 20th of the same month, and were not at Patna on the 30th May, the prosecutor adduced in evidence a written statement engrossed on two pieces of stamp-paper, one bearing the endorsement of the stamp-vendor as sold on the 13th, and the other on the 18th April, filed on the 20th April, and alleged to bear the verification of the prisoners. No evidence was adduced to prove that the prisoners had signed it. The Judge drew the attention of the jurors to this document, and adverted to it in these terms: "If the written statement was drawn up on an earlier date than the date it bears, it could not have been prepared earlier than the day on which the principal stamp was bought, i. e., the 18th."

*Held*, that the document should not have been received in evidence; and that there was a misdirection which contributed materially towards the jury finding the prisoners guilty.

JACKSON, J.—I think the objection taken by the vakeel for the prisoners in this case must prevail. The objection is that the Judge in his direction to the jury has drawn their attention to a certain paper which was put in as evidence for the prosecution, and which purported to be a written statement on the part of the two prisoners and other persons. That statement the Judge has adverted to in these words: "The prosecutor has put in a written statement filed in the Sudder Moonsiff's Court, on 20th April 1868, which is verified at foot by Gajraj under his own hand. The verification for Anigri is under another hand. The date of the statement is the 20th, and it is engrossed on two stamps, one purchased on the 13th, and one on the 18th. If the written statement was drawn up on an earlier date than the date it bears, it could not have been prepared earlier than the day on which the principal stamp was bought, i. e., the 18th."

This document was apparently relied upon by the prosecution as an answer to evidence adduced on the part of the prisoners to prove an *alibi*; namely, that the prisoners, on and for some time before the date of the murder, had been far away from Patna, that is to say, at Port Canning, in the neighbourhood of Calcutta. The murder took place on the 30th May, and the case made for the prisoners was, that they had left Patna on the 5th Baisakh, and reached Port Canning on the 25th Baisakh. Those dates correspond with the 12th and 22nd April 1868. Now, the way in which this document was put in, was that a person named Feuzal Huq, who describes himself as a mohurrir of the Sudder Moonsiff's Court, appeared at the trial, and gave evidence in these words: "This written statement, of Ram Tohal Sing, Rang Lal Sing, Gajraj Sing, Pratap Sing, Anigri Sing, and Gandowri Sing, was filed by Munshi Durga Charan on the 20th April 1868, and it is dated the same day. The stamps appear to have been purchased on the 13th and 18th April, as shown by the stamp-vendor's endorsements. The statement bears the verification of the defendants."

It is quite clear that nothing that is in evidence in any degree connected this written statement with the prisoners. The Judge therefore, if he drew the attention of the jury to this document at all, which he ought not to have

done, and ought not to have received it, should have pointed out, in the first place, that there was nothing to show that it had been signed by Gajraj, or had been signed by any body on behalf of and at the desire of Anigri, the other prisoner; but that, also supposing it to have been so signed and presented, it would be quite consistent with the prisoners being, as they alleged, at Port Canning on the 22nd April. They might have signed this document on the 18th, and could very well have been at Port Canning on the 22nd April; and even supposing that they had not arrived at Port Canning on the 22nd April, that would not be, to my mind, a very material contradiction of their statement that they had been at Port Canning for a considerable time before the murder took place. I think it is impossible to say that the production of this document in evidence, and the terms in which the Judge has referred to it in his direction, have not produced a serious effect on the mind of the jurors, and contributed materially towards their finding the prisoners guilty. I think, therefore, that we are bound to use the power given to us by s. 399 of the Code of Criminal Procedure and annul this conviction, and order a new trial of the prisoners upon the charges exhibited against them.

MARKBY, J.—I am of the same opinion.

*Before Mr. Justice Norman and Mr. Justice E. Jackson.*

IN THE MATTER OF AMIRADDI AND 31 OTHERS.<sup>1</sup>

*Penal Code, s. 188—Code of Criminal Procedure, s. 62.*

A Magistrate issued an order warning owners of cattle to take proper care of them, and that in case of disobedience or neglect they would be punished according to law, and did punish them for disobedience under s. 188 of the Penal Code.

*Held*, that the Magistrate was not competent, under s. 62 of the Code of Criminal Procedure, to pass such an order. The order contemplated under this section is in the nature of an injunction, and such an order passed by a Magistrate would not be legal.

That the conviction under s. 188 of the Penal Code was illegal.

NORMAN, J.—These cases have been sent up by the Judicial Commissioner of Assam. It appears that the Deputy Commissioner of Seebasagor, finding that great inconvenience and mischief were caused by cattle found straying on the high roads about the station and in the bazar, on the 13th of March last issued an order warning owners of cattle to take proper care of them; and that, if they let loose their cattle without any one to look after them, and caused such mischief, they would be punished under Act V. of 1861 and other Laws and Regulations relative to contempt of orders. Notwithstanding this order, people continued to allow cattle and horses to run at large on the roads. The Deputy Commissioner ordered that such cattle should be seized and impounded, and on the owners claiming their cattle caused proceedings to be taken against them for disobedience of the order of the 13th of March. The parties now before the Court have been fined in divers small sums, from one rupee to five rupees.

The Judicial Commissioner, there being no appeal, sent the proceedings before this Court under s. 434. And the main questions appear to be, first, whether that order was one which, under s. 62 of the Code of Criminal Procedure, the Magistrate was competent to pass; and, secondly, whether the parties now before the Court can legally be punished, under s. 188 of the

<sup>1</sup> Reference under s. 434 of the Criminal Procedure Code, from the Judicial Commissioner of Assam.

1869.

QUEEN  
v.  
GAJRAJ,  
8 B. L. R.  
A. Cr. 43.

1869.

July 26.

8 B. L. R.  
A. Cr. 45.



1869.

IN THE  
MATTER OF  
AMIRADDI,  
3 B. L. R.  
A. Cr. 45.

Indian Penal Code, for disobedience of that order. The Judicial Commissioner supposes that the defendants were punishable under Act III. of 1857, but that is not so. The preamble of that Act recites that "loss and injury are suffered by cultivators and occupiers of land for damage done to crops and other produce of land by the trespass of cattle, and that damage is done to the sides and slopes of public roads and embankments by cattle trespassing thereon, and that it is expedient to make provisions for the disposal of cattle found straying," and makes provisions for such cases. But it contains no enactment providing for the punishment of persons causing nuisance to the public and interruption of traffic by allowing cattle to stray in public roads and bazars.

On a careful consideration of the 62nd section, we have come to the conclusion that the order of the 13th of March is not one which a Magistrate is competent to make under the provisions contained in it. The order in question is of the nature of a bye-law—an attempted exercise of a supposed power of legislation on the part of the Deputy Commissioner. The Code of Criminal Procedure was passed, as appears by its preamble, to simplify the procedure of certain Courts of Criminal Judicature. It certainly would be very extraordinary to find in such a Code powers given to Magistrates to make regulations or bye-laws for the government of Municipalities. It is clear that the order contemplated by s. 62 is a particular and specific order addressed to a particular person or particular persons to do or abstain from a particular act or particular acts. An order, in short, of the nature of an injunction or command which the Magistrate is to make in a judicial capacity as the Judge in a Criminal Court, is not a regulation or a law.

We think, therefore, that the parties in question could not be convicted under s. 188 of the Indian Penal Code of disobedience of the order of the Deputy Commissioner by allowing their cattle to stray about the roads. We therefore quash the conviction. The Deputy Commissioner seems to have supposed that he could have proceeded against the offenders under s. 34, Act V. of 1861. That seems to be a mistake. But probably some of them might have been properly punished under s. 283 of the Indian Penal Code.

*Before Mr. Justice Kemp and Mr. Justice Markby.*

### THE QUEEN v. JAN MAHOMMED.<sup>1</sup>

1869.

Aug. 8.

3 B. L. R.  
A. Cr. 47.

[12 W. R. 41.]

*False Evidence—Preliminary Investigation by Magistrate—Act XXV. of 1861, s. 173.*

A Moonsiff sent a witness before a Magistrate in order that the latter might hold a preliminary investigation on a charge of giving false evidence under s. 193 of the Penal Code. The Magistrate, without completing the investigation, sent the case back to the Moonsiff, who finally committed the prisoner. *Held*, that while the Moonsiff could have committed the prisoner himself under s. 173 of the Criminal Procedure Code, without sending him before the Magistrate to conduct the preliminary investigation, on a charge of giving false evidence, the Magistrate had acted irregularly in not himself completing the inquiry. Case remanded to the Magistrate accordingly.

THE prisoner Jan Mahommed, along with his brother Ram Mahommed, was sued before the Moonsiff of Rungpore, upon a bond alleged to have been executed by them to one Darbaru Sirkar. On the 4th June 1869, the defendants, through their vakeel, filed a written statement containing the usual

<sup>1</sup> Reference under s. 434 of the Criminal Procedure Code, from the Officiating Sessions Judge of Rungpore, dated the 16th July 1869.

<sup>2</sup> [This case is referred to in *Reg. v. Amruta Nathu* (7 Bom. H. C. B. 29).—Ed.]

verification, and denied the execution of the bond. Afterwards the case was postponed to the 22nd June, when Jan Mahommed alone presented a petition, stating that he alone executed the bond, and wanted to settle the matter by agreement, and deposed on oath to the same effect. As there was thus found by the Moonsiff a variance between his statements made on the two different occasions, the Moonsiff sent the record to the Magistrate for the purpose of a preliminary investigation, and, if necessary, for the commitment by him of Jan Mahommed before the Court of Sessions. This was on the 26th June, and the record was accordingly transmitted to the Magistrate; but the Magistrate, without completing the inquiry himself, and committing the accused to the Sessions, sent the case back to the Moonsiff, fixing the 14th July as the day for trial before the Sessions.

The Moonsiff, on receiving back the record, after correction, framed a charge under s. 193 of the Indian Penal Code, and committed the prisoner to the Sessions. The Officiating Sessions Judge, by an order of reference under s. 434, Criminal Procedure Code, dated 16th July 1869, sent the case to the High Court for revision on the following grounds:

"The committing order of the Moonsiff, if such it can be called, is illegal. When the Moonsiff did once make over the case to the Magistrate for investigation on a criminal charge, his order of commitment, after the case was illegally made over to him by the Magistrate, is contrary to law.

"Now, it appears to me that the case is not properly before the Court, and I think the irregularity is of such a serious nature that the whole proceedings should be quashed. My reasons are: 1st.—That when once a Civil Court makes over a case to the Magistrate for investigation, it must be disposed of by the Magistrate, either by the discharge, acquittal, conviction, or commitment of the accused. It cannot be returned to the Civil Court: 3 Agra 21 (Prinsep's Criminal Procedure Code, 64, first edition). In this case also, when the case was once made over to the Magistrate, it was clearly beyond the power of the Magistrate to refer it to the Moonsiff again for correction or drawing up a charge. 2nd.—From the proceedings of the Moonsiff, dated 26th June, it seems as if he was referring the case to the Magistrate for investigation, but the record shows that he did administer oaths to the witnesses, so that his proceedings take the same shape as that of a committing officer. 3rd.—Nothing can be made out from the charge, as it has been framed by the Moonsiff, as to what was the stage of the judicial proceeding, and what were the statements which constituted the offence on which the accused has been committed by the Moonsiff. From all this it is evident that the proceedings throughout the case, from beginning to commitment, are illegal.

"As the accused is up to this time in *hajat*, in default of bail, I send up the case to the Honorable Court, without calling for an explanation from the lower Court, as delay would subject the parties to more vexation and trouble."

The opinion of the High Court was delivered by

KEMP, J.—In this case the offence was one against public justice (s. 193, Indian Penal Code). It can be entertained by the Criminal Court with the sanction of the Civil Court before whom the offence was committed; *vide* s. 169, Code of Criminal Procedure.

The Moonsiff sent the case for investigation to the Magistrate, under s. 171, Code of Criminal Procedure. The Magistrate returned the case to the Moonsiff, who has committed the accused to the Sessions on a charge under s. 193 of the Indian Penal Code.

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[12 W. R. 41.]

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[12 W. R. 41.]

The Moonsiff, as the case was triable in the Sessions Court, was competent to commit, instead of sending the case to the Magistrate for investigation, s. 173, Code of Criminal Procedure; and we think it was perhaps irregular in the Moonsiff committing the case himself after sending it to the Magistrate for investigation and commitment. We direct the Judge to instruct the Magistrate to proceed according to law after taking the evidence. The papers of the case are returned to the Judge.

*Before Mr. Justice E. Jackson and Mr. Justice Mitter.*

IN THE MATTER OF NYAN SUK METHER.

*Penal Code, ss. 73 and 74—Solitary Confinement.*

1869.  
Aug. 10.

3 B. L. R.  
A. Cr. 49.

Solitary confinement must not be imposed for the whole term of a person's imprisonment. Under s. 74 of the Penal Code it is to be imposed at intervals.

JACKSON, J.—This case was called for by the Court, under s. 404 of the Code of Criminal Procedure, in order that the legality of the Joint-Magistrate's order might be determined.

A prisoner named Nyan Suk Mether was convicted of hurt, and sentenced to 14 days' rigorous imprisonment, the whole of which was ordered to be passed in solitary confinement.

It appears to us that the Joint-Magistrate was not competent to give such an order. S. 74 of the Penal Code expressly declares that solitary confinement shall be imposed at intervals; indeed, the whole gist of the section is to prevent any prisoner being kept in solitary confinement continuously, or without some break in his punishment.

S. 73 lays it down that an offender may be kept in solitary confinement for any portion or portions of his sentence according to a certain specified scale, and it could never have been intended that a prisoner should be kept for the entire term of his sentence in solitary confinement, merely because that term was a short one, coming within the extreme limit (14 days) of solitary confinement allowed by law. The words "any portion" of a prisoner's sentence do not appear to us fairly to mean or to be applicable to the whole sentence, and in this case the prisoner has been sentenced to pass the whole of his term (14 days) in solitary confinement.

The Joint-Magistrate's order is therefore quashed as illegal.

*Before Sir Barnes Peacock, Kt., Chief Justice, and Mr. Justice Mitter.*

IN THE MATTER OF KRISHNANAND BHUTTACHARJEE.<sup>1</sup>

*Postponement of Sentence.*

1869.  
Aug. 21.

3 B. L. R.  
A. Cr. 50.  
[12 W. R. 47.]

A sentence of imprisonment ought to commence from the time that the sentence is passed, unless there is some lawful reason for ordering it to commence at some future period. Except as in the cases provided for by ss. 46, 47, and 48 of the Criminal Procedure Code, a Magistrate cannot authorize a sentence passed by him to take place from some future date; nor, except as provided for by s. 421 of the Code of Criminal Procedure, can a sentence, which is to take place immediately, be suspended.

PEACOCK, C. J.—I am of opinion that the order made by the Deputy Magistrate for suspension of the sentence of imprisonment was not warranted by law, and consequently that the sentence of imprisonment cannot now be

<sup>1</sup> [This case is distinguished in *Okhoy Kumar, In the Matter of* (7 C. L. R. 393).—*Ed.*]

lawfully carried into effect. It appears to me that a sentence of imprisonment ought to commence from the time that the sentence is passed, unless there is some lawful reason for ordering it to commence from some future period. One of those cases is provided for by s. 46 of the Code of Criminal Procedure, where a person is convicted at the same time of two or more offences punishable under the same or different sections of the Indian Penal Code, and by which it is enacted that it shall be lawful for the Court to sentence the offender to the several penalties prescribed by the Code, such penalties, when consisting of imprisonment, to commence the one after the expiration of the other. Another instance is in s. 47, where sentence is passed on an escaped convict; and a third in s. 48, in which sentence is passed on a person already under sentence of imprisonment or transportation for another offence. A sentence of imprisonment, therefore, in an ordinary case, to commence at a future period, would, in my opinion, be bad. If postponed for a long period, the imprisonment might never take effect at all, as the person sentenced might die before the period fixed for the commencement of the imprisonment.

If a sentence would be bad where the commencement is postponed for a long period, it would also be equally bad in law if the postponement is for a short period. It may be inferred from s. 70 of the Penal Code that a sentence of imprisonment in an ordinary case is to commence forthwith. That section enacts that, in a case in which fine is awarded as a punishment, the fine, or any other part thereof which remains unpaid, may be levied at any time within six years after the passing of the sentence; and if, under the sentence, the offender be liable to imprisonment for a longer period than six years, then at any time previous to the expiration of that period, the intention evidently being that the fine must be levied either within the period of six years or before the expiration of the imprisonment.

In this case, no doubt, the Deputy Magistrate acted out of consideration for the persons accused and at their request, the persons accused contending that under the new Code of Criminal Procedure the Deputy Magistrate had no power to hear the case, and asking that the execution sentence might be postponed to give them an opportunity of appealing. This, however, as it appears to me, makes no difference. S. 421 of the Code of Criminal Procedure authorizes the Appellate Court, in cases where an appeal is allowed, to suspend the sentence, and, if the appellant be in confinement for an offence which is bailable, to order his release on bail. The fact that this power is expressly given to the Appellate Court shews that it does not exist in cases in which it is not given. It may be said that the imprisonment awarded (three days) was for so short a period that it would have expired before the accused could obtain relief under that section of the Code of Criminal Procedure. The law, however, has not provided for the case, and therefore the Deputy Magistrate had no power to suspend the sentence.

The only remaining question is, was the suspension valid, it being at the request of the accused. I apprehend it was not valid, even though ordered at their request. If a criminal asks a Magistrate or a Judge to do that which he has no power to do under the law, the request would not justify the Court in acting in accordance with such request. If a criminal were to ask the Court to pass a sentence upon him not allowed by law, instead of the sentence which the law warrants, the request would not render valid a sentence otherwise unlawful. If the accused had asked the Deputy Magistrate to pass a sentence of imprisonment upon them to commence at the expiration of six years, and the Deputy Magistrate had passed such a sentence, that sentence would have been invalid. If an original sentence, to commence

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at a future period, would be bad, then I apprehend that the suspension of a sentence to commence immediately would also be bad. For the above reasons it appears to me that the sentence cannot now be carried into effect, and I am glad to say that, in my opinion, looking at all the facts of the case, no evil consequences will result from the mistake of the Deputy Magistrate.

These remarks will be communicated forthwith to the Deputy Magistrate.

MITTER, J.—I concur.

*Before Mr. Justice Kemp and Mr. Justice Glover.*

DULALI BEWA v. BHUBAN SHAHA AND OTHERS.<sup>1</sup>

1869.

Aug. 28.

S B. L. R.  
A. Cr. 53.

*Code of Criminal Procedure, ss. 66 and 180—Dismissal of Complaint without recording Evidence—Illegal Procedure.*

A charged B before a Magistrate for wrongful confinement of her brother. Previous to the petition to the Magistrate, the charge had been investigated by the police, and reported to be false. The Magistrate, without recording the complaint under s. 66 of the Code of Criminal Procedure, sent for the police-papers, and under s. 180 of the same Code dismissed the case.

*Held*, that the proceedings were illegal; that the Magistrate was bound under s. 66 of the Code of Criminal Procedure to record the examination of the complainant, before he could, under s. 180, dismiss the complaint.

THIS case was referred to the High Court by the Judge of Dinagepore, under s. 434 of the Code of Criminal Procedure, for revision of the order passed by the Magistrate of that district, dated 18th July 1869, dismissing a complaint under s. 180 of the Code of Criminal Procedure. The Sessions Judge considered the proceedings to be illegal, for the reasons contained in his letter to the Registrar of the High Court, of which the following is an abstract:

“I believe it to have been illegal, because the complaint was not recorded in the manner prescribed in s. 66.

“The complaint was one of wrongful confinement, and was first made to the police, by whom it was reported to be false. Thereupon the complainant petitioned the Magistrate. The order passed was to bring up the police-papers. These having been inspected, it was ordered that the case be dismissed under s. 180, Code of Criminal Procedure.

“The Magistrate, in his explanation called for by this Court, reports that he did not consider that s. 66 applied to the case, because there was no application in the petition for a summons or warrant against any person. This does not seem to me to be of much force, for if s. 66 did not apply, neither did s. 180, under which the case was dismissed. If the Officiating Magistrate had not considered it to be virtually a complaint of an offence on which a summons or warrant should issue, he would not have referred to s. 180 in dismissing it. What I contend for is that a case cannot be dismissed under s. 180 until the complaint has been duly recorded under s. 66.”

<sup>1</sup> Reference under s. 434, Code of Criminal Procedure, from the Judge of Dinagepore.

<sup>1</sup> [This case is referred to in *Bhugobut Churn Sein v. Siam Ali* (8 W. R. 18) and *Queen v. Haru* (9 B. L. R. 146); approved in *Queen v. Girish Chandra Ghose* (7 B. L. R. 518); and followed in *Iswar Chandra Koer v. Umesh Chandra Pal* (8 B. L. R. 7).—Ed.]

The judgment of the High Court was delivered by

GLOVER, J.—In this case the Magistrate dismissed the complaint of one Dulali Bewa, charging certain persons with wrongful confinement of her brother, under s. 180 of the Code of Criminal Procedure. The Sessions Judge holds that this proceeding was illegal, and that, before dismissing the complaint under s. 180, the Magistrate was bound to record the examination of the complainant under s. 66. The Magistrate, in his explanation, states that he does not consider the case to come under s. 66, as the object of the complainant was not to have a summons or warrant issued against any person. We think that s. 66 does apply, and that, before the complaint could be dismissed under s. 180, the Magistrate was bound to have recorded the examination of the complainant.

The petition filed by her asks for a summons to be served on her witnesses, and, in proof of her allegations, for orders to the police to make a further investigation, and release her brother, who, she stated, was illegally confined. In the heading of this petition she distinctly prays that, after proof taken, the accused parties might be sent for. This petition, taken as a whole, appears to us clearly to mean that the petitioner wished those whom she charged with the unlawful confinement of her brother to be sent for by the Magistrate on proof of the truth of her allegations. The inquiry by the police, which was also prayed for, was only a means to the end. We think, therefore, that the Magistrate was not right in dismissing the complaint without going through the process enjoined by s. 66, and we think further that he should send for the petitioner, Dulali Bewa, and give her the opportunity of strengthening her case by deposing on oath to its truth.

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Before Mr. Justice Glover and Mr. Justice Mitter.

THE QUEEN v. DOYAL BAWRI.

1869.  
Sept. 1.

*Penal Code, ss. 511 and 436—Attempt to commit an Offence, Acts sufficiently indicative of—Possession of a Fire-ball.*

S B. L. R.  
A. Cr. 55.

*Held*, by GLOVER, J., that incendiarism having, on several occasions, occurred in a village, produced by a ball of rag with a piece of burning charcoal within it, and the prisoner one evening being discovered to have a ball of that description concealed in his dhoti, which contained burning charcoal, he is, under s. 511 of the Penal Code, guilty of an attempt to commit mischief by fire. The possession of the instrument to commit mischief by fire, and the going about of the person with it, are sufficient to raise a presumption that he intended to commit the act, and had already begun to move towards the execution. These facts are sufficient to constitute an attempt.

*Held*, by MITTER, J., that the possession of a fire-ball and moving about with it cannot support a conviction under ss. 436 and 511 of the Penal Code. These facts are not sufficiently indicative of an intention to destroy a building used for human dwelling. To constitute an offence under s. 511 of the Penal Code, it is not only necessary that the prisoner should have done an overt act towards commission of the offence, but that the act itself should have been done in the attempt to commit it.

GLOVER, J.—I think that this conviction should be affirmed. I had at first some doubts as to whether there had been a sufficient commencement of an act tending towards the commission of the offence; but, on further consideration, I am of opinion that the prisoner has been properly convicted.

I see no reason to disbelieve the evidence for the prosecution, that the prisoner had the fire-ball in his possession when laid hold of by the villagers. I admit that it might, as alleged by the prisoner in his defence, have been very easily placed there by persons determined to get up a case against him; but

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the evidence, in support of the prosecution, is that of respectable persons, with whom the prisoner has no enmity; whilst the prisoner does not attempt to support his side of the story.

The case for the Crown is that there had been one or two attempts (which had more or less succeeded) at incendiarism in the village, the active agent of which was a ball of rag enclosing a piece of burning charcoal, and that the villagers were, on the evening of the prisoner's arrest, discussing the subject amongst themselves, and saying that it must have been the "Bawris" who had done it. The prisoner, himself one of that caste, defended himself and brethren from the charge, and abused the villagers; and they at last threatened to take him to the thanna. Whilst they were hustling him about, a ball of rag of a similar description to the one already found to have caused the previous fires fell from his dhoti, which, on being opened, was found to contain a piece of burning charcoal. Had this ball contained a piece of unlighted charcoal only, I should have considered that there had been no sufficient commencement of any act which tended towards the commission of mischief by fire, and that the prisoner would have been in the same position as a person who, intending to murder some other person whether by shooting or poisoning him, buys a gun or poison, and keeps the same by him, such acts being ambiguous, and not so immediately connected with the offence as to make the parties punishable under s. 511 of the Penal Code.

But, in this case, the instrument for causing mischief by fire was completely ready, and was not used, only because the party carrying it had no opportunity. It must, I think, be assumed that a person going about at night provided with an apparatus specially fitted for committing mischief by fire intends to commit that mischief, and that he has already begun to move towards the execution of his purpose, and that is sufficient to constitute an "attempt." The appeal must be rejected.

MITTER, J.—The prisoner in this case has been convicted of "attempting to cause mischief by fire, knowing that he would thereby destroy a building used as a human dwelling," and sentenced to rigorous imprisonment for five years, under the provisions of ss. 511 and 436 of the Indian Penal Code. I am of opinion that this conviction ought not to stand. The only fact proved against the prisoner is that he was apprehended with a ball of rag containing a piece of lighted charcoal in his possession; but this fact is no more consistent with the intention of setting fire to a human dwelling than with that of setting fire to a stack of hay or to something else. There is not a particle of evidence on the record to show that the prisoner intended to destroy any particular object by fire, and in the absence of such evidence it is impossible to say that he intended to destroy a building used as a human dwelling. The conviction under s. 436 is clearly bad, and I am at a loss to understand how and upon what evidence the Sessions Judge has come to the conclusion that that section is applicable to the present case. But, be this as it may, I am clearly of opinion that the mere fact of being in possession of a ball, like the one which was found with the prisoner, is by no means sufficient to warrant a conviction for attempting to cause mischief by fire. In order to support a conviction for attempting to commit an offence of the nature described in s. 511, it is not only necessary that the prisoner should have done an overt act "towards the commission of the offence," but that the act itself should have been done "in the attempt" to commit it. The Sessions Judge says that the very fact that the prisoner went out of his house with the ball, which was found in his possession, was an overt act "towards the commission of the offence," but the question is, was there any attempt to commit a particular offence, and, if so, was the act done "in such attempt." I am of opinion that both these

questions ought to be answered in the negative. Suppose a man goes out of his house into the street with a loaded gun in his possession, and suppose even that there is evidence to show that he did so with the intention of shooting Z. If Z is not found in the street, or when found no attempt is made to shoot him either from fear or repentance, or from any other cause, can it be said that the man is guilty of attempting to murder Z? The going out of one's house with a loaded gun and with the intention of shooting a particular individual might be in one sense considered as an act done towards the shooting of that individual; but so long as nothing further is done, so long as there is no attempt to shoot him, and no overt act done "*in such attempt*," it is impossible to hold that there has been an attempt to murder. There can be no doubt that the man, who goes out of his house in such a manner and with such an intention, does an act which is highly reprehensible and improper, and the Legislature might have, if it thought fit, declared it punishable as an offence; but in the absence of such a declaration, it is not for us to say that the author of that act ought not to go unpunished. At any rate, it is perfectly clear that the act is not tantamount to an attempt to commit murder. The distinctions made by the Legislature between the offences of "attempting to commit dacoity," "making preparations for dacoity," and "assembling together for the purpose of committing dacoity," seem to support this view very strongly. The first offence is punishable under the provisions of s. 393; the second, under those of s. 399; and the third, under those of s. 402. It will be further seen that there is a material difference in the punishment prescribed for the first and third offence, and that prescribed for the second. Now, in order to constitute an offence punishable under any of the three sections above referred to, it is absolutely necessary that the prisoner should have done some overt act or acts, and it may be said that in each case the act done is in one sense an act done towards the commission of dacoity. Why then do we find that the Legislature has treated three offences as distinct from one another, and why is it that a different punishment has been prescribed for the first and third offences from that which is prescribed for the second. Making preparations for the purpose of committing dacoity, or assembling together with the object of committing dacoity, requires an overt act just as much as attempting to commit dacoity; but the act required in the first two cases need not be one directly approximating to a dacoity, whereas the act required in the third case must be one of that description. "In many cases, however," says Mr. Russell in his work on Crimes and Misdemeanors, vol. 1, p. 84, "acts in furtherance of a criminal purpose may be sufficiently proximate to an offence, and may sufficiently show a criminal intent to support an indictment for a misdemeanor, although they may not be sufficiently proximate to the offence to support an indictment for an attempt to commit it; as where a prisoner procures dies for the purpose of making counterfeit foreign coin, or where a person gives poison to another and endeavours to procure that person to administer it." The cases referred to in this passage, when contrasted with the illustrations of s. 511, given in the Code, leave no doubt in my mind that the facts of the present case are wholly insufficient to support an indictment for attempting to commit mischief by fire. It may be said that the prisoner had some mischievous object in view when he secured the possession of a ball like the one which was found with him, but there is nothing to show what was the particular mischief which he contemplated, or that he attempted to commit any such mischief.

For the above reasons, I am of opinion that the judgment and sentence passed by the Sessions Judge ought to be set aside, and I would therefore direct the immediate release of the prisoner.

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v.DOYAL  
BAWRI,3 B. L. R.  
A. Cr. 55.



*Before Sir Barnes Peacock, Kt., Chief Justice, and Mr. Justice Mitter.*

THE QUEEN v. RADHU JANA AND OTHERS.<sup>1</sup>

1869.

Aug. 7.

8 B. L. R.

A. Cr. 59.

[12 W. R. 44.]

*Criminal Procedure Code, ss. 205, 366, 367—Examination of Prisoners—Attestation by Magistrate—Postponement of Trial for Evidence of a Witness—Discretion of Judge—New Trial.*

A Deputy Magistrate committed certain prisoners for trial on a charge of dacoity. Some of the prisoners had confessed before the Deputy Magistrate, but he failed to record the examination of the prisoners, or to attest it as required by s. 205 of the Code of Criminal Procedure. The Sessions Judge therefore refused to admit the examination of the prisoners by the Deputy Magistrate in evidence, and also refused to postpone the trial for the purpose of summoning the Deputy Magistrate and taking his evidence in the matter.

*Held* (1), the examination of the prisoners was inadmissible in evidence; (2) that it being wholly within the discretion of the Judge, under s. 366, to say whether or not he should postpone the trial or summon any witness to give his evidence, the High Court as a Court of Revision would not interfere or order a new trial.

The prisoners, Radhu Jana, Nitai Das, Lakhi Jana, and Madu Das, were committed by the Deputy Magistrate of Tamlook for trial by the Sessions Judge of Midnapore on a charge of dacoity. Three of the prisoners confessed before the Deputy Magistrate, and their examination was recorded, but not in such a way as is required by the Criminal Procedure Code, the questions asked the accused not being included in the examination, nor was their examination attested by the Deputy Magistrate as required by s. 205 of the Code. The Sessions Judge, under these circumstances, refused to admit the examination of the prisoners in evidence against them; and also refused to postpone the trial or summon the Deputy Magistrate to give his evidence as to what had taken place before him. The prisoners were acquitted. The Government pleader now applied to the High Court by petition, on behalf of the Government of Bengal, to set aside the order of the Sessions Judge, and direct a new trial of the prisoners.

The judgment of the High Court was delivered by

Peacock, C.J.—We have heard this case in the absence of the accused. I am not sure that we could make an order for a new trial in their absence; but it is unnecessary to consider that question now, because it appears to me that we ought not to set aside the judgment of acquittal and order a new trial.

S. 199 of the Code of Criminal Procedure, to which reference has been made, relates to the examination of witnesses, and does not apply to the examination or confession of prisoners. The sections applicable to this branch of the subject, in the old Code of Criminal Procedure, which was in force when these prisoners were tried, are ss. 202 to 208 inclusive.

S. 205 enacts "that the examination shall be attested by the signature of the Magistrate, who shall certify, under his own hand, that it was taken in his presence and in his hearing, and contains accurately the whole of the statement made by the accused person." The examination in this case did not follow the directions of that section. There is no certificate that it was taken in the hearing and in the presence of the Magistrate (although no doubt it was so); nor is there any statement that it contains the whole of the statement made by the accused persons. It was admitted by the learned pleader for the Government that the examination was not strictly accurate. It appears to me that it was wholly wanting in the requisites of s. 205.

<sup>1</sup> Application on the part of the Government of Bengal, under s. 404, Code of Criminal Procedure, through the Government Pleader.

S. 366 enacts "that the examination of the accused person before the Magistrate shall be given in evidence at the trial. The attestation of the Magistrate shall be sufficient *prima facie* proof of such examination, and such attestation shall be admitted without proof of the signature to it, unless the Court shall see reason to doubt its genuineness." That section makes the examination of an accused person taken before the Magistrate admissible in evidence, but that is when the examination is taken down and certified by the Magistrate in the manner required by the Act. The attestation mentioned in this section must mean an attestation in conformity with s. 208. There was no certificate in compliance with the requirements of s. 305, and therefore the confession was not admissible in evidence, and the Judge was right in rejecting it, and not allowing it to go to the assessors or acting on it himself.

But it is said that the Judge was wrong in not postponing the trial, and sending for the Deputy Magistrate to make good by his evidence that which was deficient in the record of examination. Whether the Judge exercised a sound discretion or not in not postponing the trial, and not sending for the Deputy Magistrate, it is not necessary for the Court to decide.

S. 367 enacts "that it shall be in the discretion of the Court (that is, the Court of Session), at any stage of a trial, to summon and examine any witness whose evidence it shall consider essential to the just decision of the case."

But the fact of the Judge not having postponed the case and not having summoned the Deputy Magistrate is not an error in point of law, but an error, if it is an error at all, in the exercise of his discretion. This Court as a Court of Revision cannot say that the Sessions Judge was wrong in point of law in not postponing the trial, or in the exercise of his discretion in not summoning the Deputy Magistrate. Under these circumstances, it appears to me that this Court as a Court of Revision has no power to interfere with the decision of the Judge passed in accordance with the opinion of the assessors.

It is said that the Judge simply says that the case was in the nature of unproven rather than not guilty, but still there was a verdict of acquittal. The parties were put on their trial, and were acquitted. There is no point of law on which we can say that the Judge was wrong in acquitting the prisoners, and therefore as a Court of Revision we cannot set aside the acquittal.

With reference to the general suggestions of the Judge to the Magistrate, it appears to me that that is not a judicial matter which can be decided by this Court judicially; but it is a matter which ought to be referred to the English Department of the Court, in order that they may give such directions with reference to that order, and with reference to what the Magistrate may have done under it, as they may think just and proper.

The application is refused, and the letter of the 17th day of June 1869, containing general suggestions of the Judge to the Magistrate, is referred to the English Committee for orders.

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v.

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3 B. L. R.  
A. Cr. 59.

[12 W. B. 44.]

Before Mr. Justice Glover and Mr. Justice Mitter.

ANONYMOUS CASE.<sup>1</sup>

1869.

Aug. 19.

3 B. L. R.

A. Cr. 62.

*Act VIII. of 1869, s. 422—Act XXV. of 1861, s. 422—Remand—Power of Appellate Court.*

A remand of a case under s. 422, Act VIII. of 1869, can only be for the purpose of taking further evidence and certifying the result thereof to the Appellate Court, and not for the purpose of re-trying the case upon such fresh evidence. After remand under this section, the Appellate Court can only try the case as an ordinary appeal, and has no power to enhance the punishment.

*Abstract of doubtful point.*—A conviction under the Cattle Trespass Act was appealed, and orders passed to take additional evidence, being the evidence of defendant's witnesses whom the lower Court had refused to examine, because the defendant had not brought them himself, or procured their attendance. Additional evidence was taken by the Deputy Magistrate, and the record was returned to this Court, but no order regarding the accused was passed by the Deputy Magistrate. Under the former law, this Court would pass sentence of conviction otherwise itself. Under the present law, it can only dispose of the appeal. The question is, whether the lower Court should or should not record some specific order or finding on the additional evidence. The Deputy Magistrate says that the Appellate Court is bound to pass judgment, and that the lower Court should only take the evidence.

*Opinion of Officer making the Reference.*—It seems to me that the lower Court, if it takes fresh evidence, should come to a fresh finding, and that without this to dispose of the appeal is anomalous. The Court of Appeal reverses or confirms the decision, with reference to what the Court below formed its judgment on. I apprehend that otherwise the result of appeals might tell most unfavourably and most unjustly against lower Courts. If this is so, the lower Court should apparently have the opportunity of amending its finding, as is the case in rent-appeals, that it should either uphold or remit the sentence originally passed. It is plain that the Appellate Court cannot pass judgment or orders as under the former law, for the concluding sentence of s. 422 of Act XXV. of 1861 has been entirely omitted, and the Appellate Court is limited to trying the appeal on the evidence as complete, in which case the judgment appealed against should apparently lie on the same evidence, and not only on a portion of it.

*Remarks by the Sessions Judge.*—I do not myself see the object of this reference. Under s. 422, Act VIII. of 1869, the wording of s. 422, Act XXV. of 1861, has been slightly altered. It allows, as before, further inquiry or additional evidence upon any point bearing upon the guilt or innocence of the appellant to be taken. The result of the further inquiry and the additional evidence shall be certified to the Appellate Court, and it directs that the Appellate Court shall thereupon proceed to dispose of the appeal in the manner prescribed by s. 419, Act XXV. of 1861. Under s. 419, "the Appellate Court may alter or reverse the finding and sentence or order of such Court, but not so as to enhance any punishment that shall have been awarded."

There is nothing about the subordinate Court passing any fresh sentence, nor does it appear that the Magistrate has directed that the subordinate Court should pass any fresh sentence after recording the additional evidence for the defence.

<sup>1</sup> Reference under s. 422 of Act VIII. of 1869, by the Judge of Purneah, for the opinion of the High Court.

The opinion of the High Court was delivered by

GLOVER, J.—It does not appear that the Magistrate, when he directed further evidence to be taken under s. 422, ordered the first Court to retry the case; but, even if he had, it seems to us that under s. 422, Act VIII. of 1869, all that the Deputy Magistrate was bound to do was to “certify the result of the further inquiry and the additional evidence to the Appellate Court.”

1869.  
ANONYMOUS  
CASE,  
8 B. L. E.  
A. Cr. 62.

We do not understand these words to mean that the first Court is to pass any judgment in a case remanded, but that it is to record the additional evidence or to make the further inquiry and to certify the result, leaving the Appellate Court to pass judgment. Certifying “the result of further inquiry” might include an expression of opinion on the part of the officer making the inquiry, but would not, we think, justify him in passing sentence. If the law meant to give him such power, the words of the section would have left no doubt of its intention.

We understand the law to be that in all cases remanded for further evidence or inquiry under s. 422, the Appellate Court itself tries the case on that evidence or inquiry, and that the Court of first instance is not required to give any opinion, and cannot record any judgment.

The alterations introduced into s. 422 of Act XXV. of 1861, by s. 422, Act VIII. of 1869, were made to prevent any enhancement of punishment in cases that had been remanded. The words of the old law were, “pass such judgment, sentence, or order as shall seem right;” those of the new are, “dispose of the appeal in the manner prescribed by s. 419.”

A Full Bench of this Court had ruled that, under s. 422 of Act XXV. of 1861, an Appellate Court could enhance punishment when the case has been remanded for additional evidence or for further inquiry. The section, as it now stands, amended by s. 422, Act VIII. of 1869, takes away that power, and places remanded cases in the same category with ordinary appeals; but it leaves the other parts of the section untouched, and nowhere says that the first Court is to do more than certify the result of the further inquiry and additional evidence.

If, as the Magistrate thinks, the Deputy Magistrate was bound to decide the case *de novo* on the additional evidence or inquiry, it might very easily be that the result of the inquiry and the additional evidence would never come before the Appellate Court at all, for both parties might be satisfied with the second decision, and neither appeal.

The section supposes the case to remain on the Appellate Court's file, and that could only be, we think, on the supposition that the first Court's powers were over for anything else than making further inquiry or recording additional evidence.

It appears to us therefore that the Deputy Magistrate did all that he was bound to do in sending up the additional evidence called for, and that he could not have decided the case himself, after it had been once remanded under s. 422. .

*Before Mr. Justice Glover and Mr. Justice Mitter.*

IN THE CASE OF WAZIR SING.

1869.  
Aug. 19.

3 B. L. R.  
A. Cr. 65.

[12 W. R. 46.]

*Act VIII. of 1869, s. 435—Jurisdiction of Sessions Judge—Offences triable by a Magistrate.*

The Sessions Judge has no jurisdiction to annul a conviction and order a commitment for an offence triable by a Magistrate.

THIS case was referred to the High Court by the Sessions Judge of Gya, under a letter to the Registrar, of which the following is an extract :

"2. It appears to me that the order of commitment is illegal, in so far as the prisoners whose commitment is directed by me had been convicted of an offence triable by the Magistrate ; and I did not, as directed in s. 435 of the new Procedure Code (third part), annul the said conviction and sentence.

"3. Under such circumstances I imagine that it would be advisable to quash any order of commitment, and direct me to pass a fresh order on the application under s. 435."

GLOVER, J.—We think that the Sessions Judge's order for commitment should be quashed.

The offence of which the accused had been convicted by the Magistrate was, as is admitted by the Sessions Judge, one triable by a Magistrate ; and therefore it was beyond the power of the superior Court to annul the conviction and order a commitment.

S. 435, Act VIII. of 1859, refers only to cases which are not triable by a Magistrate, and in which therefore he had exercised a jurisdiction that did not belong to him.

*Before Mr. Justice Glover and Mr. Justice Mitter.*

THE QUEEN *v.* TULSI DOSAD (PRISONER).

1869.  
Sept. 1.

3 B. L. R.  
A. Cr. 66.

*Evidence of Approver.*

The evidence of an approver is not sufficient to convict a person charged with an offence.

MITTER, J.—I am of opinion that this conviction cannot be supported. The only evidence against the prisoner is that of the approver Ganga Dosad, and as there is nothing on the record to corroborate that evidence, the prisoner ought to have the benefit of the Full Bench Ruling in the case of *Elahi Buksh*.<sup>1</sup> It is true that a *sindmaree* was found by the police in the court-yard of the prisoner's house, but this circumstance cannot be regarded as corroborative of the approver's evidence. It does not "connect or identify the prisoner with the particular offence" of which he has been accused, and it cannot therefore be accepted as legal corroboration under the ruling above referred to.

For the above reasons, I would set aside the judgment and sentence passed by the Court below, and direct the immediate release of the prisoner.

GLOVER, J.—I also think that the evidence against the prisoner is insufficient.

He is acquitted and released.

<sup>1</sup> Criminal Appeal, No. 75 of 1866 ; May 29th, 1866.

*Before Mr. Justice Kemp and Mr. Justice Markby.*

**THE QUEEN v. MAHIM CHANDRA CHUCKERBUTTY AND OTHERS.<sup>1</sup>**

*Code of Criminal Procedure, ss. 66, 273, 426, 439—Complaint to be reduced to writing—Irregularity in the commencement.*

1869.  
Sept. 1.

3 B. L. R.  
A. Cr. 67

Under s. 66 of the Code of Criminal Procedure, the examination of the prosecutor should be reduced to writing, and signed by him.

When a complaint is made before a Magistrate, but not reduced to writing, he cannot, under s. 273 of the Code of Criminal Procedure, refer the case to a Deputy Magistrate for trial. Ss. 426 and 439 do not apply to a case where the prosecution is not commenced by a complaint, as directed in the Code. A conviction with such irregularity cannot stand good, merely because the amount of punishment would have been the same if proper proceedings had been instituted.

KEMP, J.—This is an application, under s. 404, on the part of the prisoners, who have been sentenced to various sentences, under ss. 183, 323, 347, and 384 of the Indian Penal Code. The papers were sent for by Justices E. Jackson and Dwarkanath Mitter, and the case has been argued to-day before this Bench. It appears to me that the proceedings in this case have been illegal, and that the conviction must be quashed. A complaint may be made, either under s. 66 of Act XXV. of 1861, to the Magistrate of the district or to a Magistrate in charge of a division of the district; or under s. 135, by either complaint or information to any officer in charge of a police station. In the latter case, under s. 139, the complaint shall be reduced into writing, and the substance thereof entered into the diary. In the former case, the procedure laid down is that the complainant shall be examined by the Magistrate, the examination shall be reduced into writing, and shall be signed by the complainant and also by the Magistrate. In the case before us, the Judge of the Small Cause Court of Backergunge, Baboo Ganga Charan Shome, wrote to the Magistrate of Backergunge, informing him that certain peons attached to his Court had been resisted by the prisoners, Mahim Chandra Chuckerbuttery and others, in the discharge of their duty; that they had been beaten; and that both the peons and the plaintiffs had been confined by the prisoners and their people, who also extorted a sum of Rs. 500 from the plaintiff. The Judge of the Small Cause Court requested the Magistrate to take cognizance of the offence, and to inform his Court of the results of the case. On this, on the back of the letter, Bhagwan Chandra Poddar, the plaintiff in the case, appears to have made a statement; but this statement is not signed by him; and it is not a complaint coming within the meaning of s. 66 of the Code of Criminal Procedure, that is to say, it is not an examination reduced into writing, and signed by the complainant, as required by the law. The police were then directed to make a local inquiry on this illegal complaint, and the case was made over to the Deputy Magistrate for trial. Now, under s. 273 of the Code of Criminal Procedure, criminal cases brought before the Magistrate on complaint may be referred by him to any Magistrate subordinate to him. In this case no complaint having been made within the meaning of s. 66, the reference by the Magistrate of the case to the Subordinate Magistrate for trial was illegal. The proceedings of the Deputy Magistrate, therefore, being without jurisdiction, must be quashed, and the prisoners discharged.

<sup>1</sup> [This case is overruled by *Queen v. Narayan Naik* (5 B. L. R. 660; 14 W. R. 34); approved in *Queen v. Grish Chandra Ghose* (7 B. L. R. 513; 16 W. R. 40); distinguished in *Queen v. Umesh Chandra Chowdhry* (5 B. L. R. 160; 14 W. R. 1); followed in *Iswar Chandra Koer v. Umesh Chandra Pal* (8 B. L. R. 19); and referred to in *Queen v. Surendra Nath Roy* (5 B. L. R. 274; 13 W. R. 27), *Queen v. Mahima Chandra Chuckerbuttery* (7 B. L. R. 26; 15 W. R. 45), and *Queen v. Haru* (9 B. L. R. 146; 18 W. R. 18).—ED.]

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MARKBY, J.—I am of the same opinion. It seems to me that there are but three modes in which criminal proceedings can be instituted under the Code of Criminal Procedure. The first one is pointed out by s. 66; and in that case the complainant is to be examined by the Magistrate, the examination reduced into writing, and signed by the complainant and by the Magistrate himself. The next mode is under s. 68, which gives power to the Magistrate himself to take cognizance of any offence which may come to his knowledge, and initiate proceedings himself in the same manner as if a complaint had been made. The other is under s. 135, which allows of a complaint being made before a police-officer, and under s. 139 that complaint must be reduced into writing, although it need not be signed; that complaint is referred by the police to a Magistrate. It appears to me that there was, in this case, neither of these proceedings. The matter having been brought to the notice of the Magistrate by the Judge of the Small Cause Court, the deposition of a person named Bhagwan was taken; but this was not a complaint under s. 66, as Bhagwan did not sign the deposition, so that there was no complaint. Neither was there any complaint made before and reported by the police. Nor can it be supposed that the Magistrate took cognizance of this offence without complaint under s. 68, because in that case, as was admitted in the argument before us, he could not have referred the case for trial to the Deputy Magistrate under s. 273; that section only empowers a superior Magistrate to refer cases, where the complaint is made to himself or before a police-officer, but not cases where he himself takes cognizance of an offence. It appears to me, therefore, that there was nothing upon which these proceedings could be founded, and that the conviction must be quashed.

It has been contended for the prosecution that, under ss. 426 and 439, we ought not to interfere with the sentence passed on account of a mere irregularity or defect, which does not affect the amount of punishment awarded; but I do not think it can be contended that either of these two sections applies to a case like the present, where the complaint which is laid down in the Procedure Code as the commencement of a prosecution is altogether absent. I do not think we ought to say that the conviction must stand good, because the punishment awarded would probably have been the same had the proper proceedings been observed. I think it never was intended that these sections should be used to the extent of doing away altogether with the procedure laid down by the Code, and to rendering convictions valid, where the proceedings prescribed as preliminary to the institution of a criminal prosecution are altogether omitted, and the jurisdiction of the Court which passed the sentence is affected by the omission. If carried to this extent, Magistrates might altogether desert the Code of Procedure. The prisoners will therefore be discharged.

Before Mr. Justice Norman and Mr. Justice Glover.

IN THE CASE OF LAKHIMANI RAR.<sup>1</sup>

1869.  
Sept. 22.

Act XIV. of 1868, ss. 11, 21—Registry of Common Prostitutes—Jurisdiction of Magistrates to entertain Pleas of Irregularity in the Registry—Possession of Registry Ticket.

3 B. L. R.  
A. Cr. 70.

[12 W.B. 56.]

Under Act XIV. of 1868, the police are not empowered to put a woman on the register of "common prostitutes" against her will.

The penalty prescribed by s. 11, Act XIV. of 1868, for disobedience of any of its rules, is for a "woman" who voluntarily registers herself as a "common" prostitute.

A Magistrate has authority to hear any objection urged by a woman charged with disobedience of the rules under Act XIV. of 1868, against the legality of her registry, on that she is not a common prostitute.

The possession of a registry ticket is not sufficient evidence of being a common prostitute.

THIS case was submitted for the order of the High Court under s. 434 of the Code of Criminal Procedure, by the Officiating Judge of the 24-Pergunnahs, who stated the case as follows :

The police charged the defendant before the Deputy Magistrate of Sealdah with not having presented herself for medical examination, although she was a registered prostitute. The defendant urged in her defence that as she had been illegally registered she was not liable under the Act ; that as the registration was not made in accordance with the procedure laid down by the law, all subsequent proceedings were null and void ; and that as she was not a prostitute as contemplated by the Act, any registration of her name was illegal.

The Deputy Magistrate refused to entertain the pleas set forward in her defence, on the ground that he did not consider he had jurisdiction ; and that as the executive considered her properly registered, and her petition to His Honor the Lieutenant-Governor had been rejected, he would not further interfere, but must consider her liable for her non-attendance for medical examination. It seems to me that the Deputy Magistrate was wrong, and that the defendant had a right to have the issue tried as to the validity of her registration, and whether, if the registration was illegally made, the error in the procedure vitiated the subsequent steps taken by the police. Otherwise the whole case would be an *ex parte* one ; for the police having offered *prima facie* evidence of the registration, unless the defendant was allowed to rebut it, and establish her non-liability, the calling upon her to reply to the charge would be altogether a mere form. The police having brought the charge before the Deputy Magistrate, he was to determine judicially, after hearing both parties, whether liability existed or not. In his judicial capacity he was bound to determine (when the matter was called in question) whether the executive had legally acted ; and the mere fact that the executive said they had made no error was not conclusive against the defendant when she pleaded the contrary, and offered to prove the allegation. Under s. 25 of the Act, the defendant had the power of instituting proceedings to call the acts of the executive in question, and when the latter took the initiative, it appears to me that the defendant would equitably be entitled to urge in her defence all the points which she might have taken under that section to set aside the acts of the executive. Under these circumstances, it seems to me that the refusal of

<sup>1</sup> Reference under s. 434, Code of Criminal Procedure, by the Officiating Judge of the 24-Pergunnahs.

<sup>1</sup> [This case is approved in *Empress v. Nistar Raur* (I. L. R., 6 Cal. 163 ; 7 C. L. R. 197).—ED.]



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the Deputy Magistrate to entertain the pleas set up in the defence was illegal, and prejudiced the defendant, inasmuch as it made the proceedings entirely *ex parte*; and that the Deputy Magistrate took a wrong view of the law when he considered that he, in his judicial capacity, was incompetent to determine upon the legality or otherwise of the acts of the executive department with respect to the pleas set up by the defendant.

NORMAN, J.—The defendant has been convicted, under the provisions of the 11th section of Act XIV. of 1868, for not having presented herself for medical examination, as required by her registration ticket, and by Rule No. 23 made by the Government of Bengal in pursuance of the provisions of ss. 10th and 11th of that Act, and sentenced to 15 days' imprisonment and a fine of 25 rupees, or 15 days' further imprisonment.

The defendant contended before the Deputy Magistrate, Kumar Harendra Krishna Bahadoor, that she was not a public prostitute, and that she was not duly registered. The Deputy Magistrate considered that he had no power to go into these questions, and that, under the rules made by the Government of Bengal, the Commissioner and Deputy Commissioner of Police are the proper persons to inquire into them.

The case was sent up to this Court by the Judge of the 24 Pergunnahs under s. 434 of the Code of Criminal Procedure. Now the 11th section of Act XIV. of 1868 enacts that any registered woman disobeying any rule made under this section shall, on conviction before a Magistrate, be punished with simple imprisonment for a term which may extend to one month, and with fine, &c. The question is whether the defendant is a registered woman within the meaning of that clause.

The 5th section provides that the Local Government may make rules for the registration of common prostitutes, and that every woman complying with such rules shall be deemed to be registered under that Act. And the registering officer is to furnish her with such evidence of registration as the Local Government shall, from time to time, direct. Rule No. 3 provides that when a woman desires to carry on the business of a common prostitute, she should present herself at the Police Section in which she resides, and state her name, age, caste or religion, place of birth, residence, and the proximate date when she commenced a life of prostitution; and in the event of her living in a brothel, she shall further state the name of the owner of the house, &c. By Rule 4, the Inspector of Police shall, on receipt of this information, forthwith record it in a register (Form A) to be kept up at each Police Section. He shall then fill up the columns of the registration ticket (Form B), and forward it for signature to the officer of the Commissioner of Police. By Rule 5, it shall be the duty of the Commissioner of Police to have such woman entered in a general register, &c. The registration ticket is to be signed by the Commissioner or Deputy Commissioner of Police, and returned to the Inspector, who, after noting the serial number in his register, is to deliver it to the woman to whom it belongs.

The defendant is in possession of a registration ticket, dated the 7th of May 1869. Except her own admission, there is no evidence to show how she became possessed of it. She says herself, "I did not attend for examination twice a month, as I have not been a prostitute." She says, "I had my name registered at the thanna. The Inspector registered my name. I did not voluntarily register my name at the thanna." In a petition presented by the defendant to the Commissioner of Police on the 9th of August, she says that she is not a common prostitute, but works at Mr. Angelo's factory, and lives under the protection of one Matooh, who is also employed in the same

factory. She says that, in the beginning of May last, she was informed by the police that they had orders to arrest her, and take her to the thanna, if she did not go; she accordingly went, and was asked her name, father's name, &c. By answering which questions, she did not know that she was rendering herself liable to registration under Act XIV. of 1868; and certainly never intended to register herself as a common prostitute. She says that, on the 30th of June last, she was served with the registration ticket of a common prostitute, and the next morning appeared before the Deputy Commissioner with a petition requesting that her name might be removed from the list; but in consequence of the delay in serving her with the ticket, her petition was rejected, and she was made to appear before the Deputy Commissioner on the next morning.

It is clear that neither the Act nor the rules empower the police to put women on the register against their will. If a woman carries on the business of a prostitute without having been registered, she incurs the penalty provided by s. 4, and alluded to in Rule 10. Mr. Wingrove's evidence shews that notices were served on women to appear at the thanna. He says, "If any woman failed to appear at the thanna, she was to be summoned. No compulsory measures were adopted against any woman in my jurisdiction." But he adds, what is a matter of more significance, "They were brought to the thanna by the police-officer; at least the police accompanied each woman."

The register was in Court. By reference to it, if kept in proper form, it would have shown whether the woman who appeared and was registered as Lakhimani Rar, No. 153, stated from what date she commenced a life of prostitution. But the register book does not appear to have been put in evidence: and this, though the police authorities knew that on the day following that on which she says the registration ticket was served upon her she had protested by appealing to the Commissioner of Police, and by letter to the Government of Bengal, through Mr. Angelo, that she was not a prostitute, and that her name had been improperly placed on the register. If she merely appeared in obedience to a summons or order from the police, and answered questions put to her, without stating or showing that she desired to be registered as a prostitute, the officer had no right under the Act or rules to register her name as such.

The delay in forwarding the registration ticket from 9th of May to the 30th of June is uncontradicted and unexplained. In my opinion, the Magistrate was bound to have tried the question whether the defendant's name was legally placed upon the register, and as I am satisfied that on the evidence there is not any sufficient proof of that which is a necessary ingredient in the offence, I would quash the conviction.

GLOVER, J.—The only point which has been referred to this Court, under s. 434 of the Code of Criminal Procedure, by the Sessions Judge, is, whether or not the Deputy Magistrate was wrong in refusing to adjudicate on the defendant's objection that she was not a duly "registered" prostitute in the terms of Act XIV. of 1868. The Deputy Magistrate considered that as the woman was in possession of a registry ticket, she must be presumed to have been properly registered, and he therefore refused to decide on the evidence whether the woman had voluntarily registered herself, or whether she was in fact a common prostitute or not.

In this, I think, he was wrong. The mere possession of a registry ticket would not necessarily make the holder of it a duly registered prostitute under the Act, for registration must be voluntary, and this is a condition precedent. S. 4 of the Act prescribes penalties in case of non-registration,

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but a woman may, if she pleases, elect to pay these penalties over and over again, and refuse to register herself, and the Act cannot make her do so.

In this case the defence of Lakhimani Rar was that she did not voluntarily register herself, but was compelled to take the registry ticket; and as corroborative of this declaration she averred that she had no reason to take out a registry ticket, not being and never having been a common prostitute, and she offered evidence to make out her plea.

If Magistrates are not competent, by reason of Act XIV. of 1868, to take cognizance of and to determine pleas of this description, the result will be that every woman of a certain class will be at the mercy of the police, and will be called a "common prostitute" or not as it suits their will and pleasure. There is nothing in the Act that gives the police this irresponsible power, and their possession of it would be in every respect most objectionable.

I think that the woman Lakhimani was entitled to prove, if she could, that she had not voluntarily registered herself as a common prostitute, and that the Deputy Magistrate ought to have adjudicated on the plea. Her further plea, that she was not a common prostitute at all, could only have been taken in connection with her special defence; for if she were proved to have voluntarily registered herself as a common prostitute, I do not think that she could be allowed afterwards to give evidence that she did not, as a matter of fact, belong to that class, in order to avoid the effects of a previous voluntary registration.

Her remedy in that case would, I suppose, be under s. 21 of the Act. I concur therefore so far with Mr. Justice Norman in that I would quash the Deputy Magistrate's conviction. I do not, however, think it necessary to give any opinion on the merits of the case, nor does the Sessions Judge ask it. They ought to be considered and disposed of by the Court below.

Before Mr. Justice Norman and Mr. Justice Kemp.

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IN THE CASE OF KASHI KISHOR ROY AND ANOTHER (1ST PARTY) v.  
TARINI KANT LAHORI (2ND PARTY).<sup>1</sup>

3 B. L. R.  
A. Cr. 76.

Act XXV. of 1861, s. 318—Jurisdiction of Magistrate—Likelihood of a Breach of the Peace.

A Magistrate has no power to decide a question of possession, under s. 318, Act XXV. of 1861, until he has recorded a proceeding stating the grounds of his being satisfied that the dispute for possession is likely to induce a breach of the peace.

THIS case was referred to the High Court for revision by the Officiating Magistrate of Mymensing on the following grounds:

1st.—That no proceeding was recorded. The nathi of the case contains no proceeding, and the Deputy Magistrate who decided the case gives as an explanation on that point that he had ordered a formal proceeding to be written, but cannot say it was so written. There is no such order to be found in the case.

<sup>1</sup> Reference under s. 434 of the Code of Criminal Procedure.

<sup>1</sup> [This case is approved in *Abhaya Chowdhry v. T. Bras* (6 B. L. R. Ap. 148; 15 W. R. 42), and *In re Kunund Narain Bhoop* (1 L. R., 4 Cal. 650; 3 C. L. R. 551); distinguished in *Gunga Narain Mitter v. Gour Soonder Chowdhry* (15 W. R. 85); followed in *Damodar Biddiyadher Mohapatra v. Syamanand Dey* (1 L. R., 7 Cal. 885; 3 C. L. R. 514), *Obhoy Chowdhry* (15 W. R. 42), and *Sheikh Munglo v. Durga Narain Nag* (25 W. R. 74); and referred to in *In the Matter of the Petition of J. D. Sutherland* (9 B. L. R. 229; 18 W. R. 11).—ED.]

All the late decisions make the drawing up of a proceeding indispensable, and on this ground alone the case appears to me to be bad. *Queen v. Runjit Molla*; <sup>1</sup> *Harvey v. Brice*; <sup>2</sup> *Amrith Nath Jha v. Ahmed Reza*; <sup>3</sup> *Musamut Anunda Kooer v. Rani Sonnaet Kooer*.<sup>4</sup> There is one case, *In re Musamut Zahoorun*,<sup>5</sup> expressing a contrary view of the law; but it has, I conceive, been overruled by the subsequent decisions.

2nd.—That the police-report, on which the order was given, does not show that any breach of the peace was likely.

On this point the Deputy Magistrate states that the police-report in question did show that a breach of the peace was likely. In the end of the police-report are the words, "a breach of the peace is not improbable;" and although this expression of opinion does not seem borne out by the evidence of the witnesses, as shown in the report, still I think it was sufficient to take action on.

3rd.—That the report of a police officer is not sufficient to justify action under s. 318.

I think that under s. 285 police-reports are considered credible information, and I conceive that they must be considered to satisfy a Magistrate under s. 318. The fourth objection about the hearing of witnesses does not seem to have much force.

Baboo Srinath Dass and Ramesh Chandra Mitter for 1st party.

Baboo Nalit Chandra Sen and Hem Chandra Banerjee for 2nd party.

NORMAN, J.—This is a proceeding by the Deputy Magistrate of Jumal-pore in Mymensing, by which one Tarini Kant Lahori has been maintained by the Deputy Magistrate in possession of some disputed land under s. 318 of the Code of Criminal Procedure. This case has been sent up to this Court under s. 434, Code of Criminal Procedure, by the Magistrate, Mr. O'Kinealy.

Several objections are taken to the regularity of the Deputy Magistrate's proceedings. But there is one, and that the first, which is fatal, showing that the Deputy Magistrate proceeded without jurisdiction, and that his order cannot be sustained.

It appears that in consequence of some petition, presented prior to April last, an order was issued to the police to proceed to the mofussil, and make some inquiries as to the complaint of Kashi Kishor Roy, one of the parties to the dispute, that some men had been collected by Tarini Kant Lahori with a view to a serious affray, and that a serious affray was likely to occur.

On the 5th of April the police-officer made his report. He stated that on the preceding day, that is, on the 4th of April, he had been to the spot in question; that he had found no assemblage of persons, and that he had seen nothing to lead him to think that there was any dispute, or likelihood of an affray.

On the 14th of April there was a further report by the police, which, after stating, as in the former report, that there was no assembly or disturbance, concludes with the statement, wholly unwarranted by anything in the report itself, that if a recognizance were not taken, a very serious riot might take place in future with respect to a boundary-dispute, which might lead to violence, if not murder.

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CASE OF  
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TARINI KANT  
LAHORI,  
S B. L. E.  
A. Cr. 76.

<sup>1</sup> 2 W. R., Cr. Rul., 31.

<sup>2</sup> 4 W. R., Cr. Rul., 28.

<sup>3</sup> 6 W. R., Cr. Rul., 61.

<sup>4</sup> 9 W. R., Cr. Rul., 64.

<sup>5</sup> 6 W. R., Cr. Rul., 4.

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LAHORI,  
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The Deputy Magistrate makes an order which is endorsed upon that paper. He does not say that he is satisfied that a dispute likely to lead to a breach of the peace existed concerning the land in dispute. He records no proceeding stating the grounds on which he is so satisfied, but he simply orders that the case be registered under s. 318, and that the 12th day of May be fixed for the hearing of the several parties. And he directed that notice to that effect be served on the parties. Now, it has been pointed out in many cases before this Court, more particularly in the case of *Dewan Elahi Nawaz Khan v. Suburunnissa*,<sup>1</sup> that it is a condition precedent to the powers of a Magistrate to take up and decide a case under s. 318, that he should decide judicially that he is satisfied that a dispute likely to induce a breach of the peace exists, and that he should record a proceeding stating the grounds of his being so satisfied. Unless, and until, he shall have decided that preliminary matter, he has no jurisdiction to take up the case, and decide the question of possession under s. 318.

In the present case there has been no such decision, and certainly there is no record of the grounds upon which such decision could be based. Therefore it is clear that the order of the Deputy Magistrate adjudicating that Tarini Kant Lahori is in possession, and entitled to retain possession until ousted by due course of law, is an order made without jurisdiction, and is therefore void, and must be quashed.

It would be quite enough for us to say that we are bound by the many decisions of this Court on this point. But we desire to add that we are of opinion that there is a clear reason for requiring a distinct adjudication as to the existence of a dispute likely to occasion a breach of the peace before the Magistrate proceeds further. It is intended to prevent the Magistrate from rashly interfering with questions of possession which should ordinarily be decided by the Civil Courts, unless in cases where a breach of the peace, or the commission of a crime, is apprehended, and where it is necessary for the preservation of the public order that steps be taken by the Criminal Court.

We quash the order of the Deputy Magistrate.

KEMP, J.—I am of the same opinion.

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<sup>1</sup> 5 W. R., Cr. Rul., 14.

## Appendix.

*Before Mr. Justice Markby and Mr. Justice Glover.*

### THE QUEEN v. NANDKUMAR BOSE AND OTHERS.<sup>1</sup>

*Act XXXI. of 1860, s. 26—Act XLV. of 1860, s. 188—Act XXV. of 1861, ss. 250, 251*  
*—Carrying Fire-arms without License—Disobedience to an Order promulgated by*  
*a Public Servant.*

1868.

Sept. 14.

3 B. L. R.  
 App. 149.

A Magistrate issued a notification that all persons desirous of carrying arms should take out a license enabling them to do so, under s. 26 of Act XXXI. of 1860; and certain persons were, in consequence of his notification, arrested and brought before him, charged in a police-report with carrying arms without license. No summons or warrant had been applied for, or any complaint lodged before the Magistrate previous to the arrest of the prisoners. No charge in writing was framed as required under ss. 250, 251 of the Criminal Procedure Code. No evidence was taken; but the prisoners admitted carrying the fire-arms. The Magistrate convicted them, under s. 188 of the Indian Penal Code, of disobedience to an order duly promulgated by a public servant. There was no evidence that the disobedience would cause or tend to cause annoyance, obstruction, or injury to human life, health, or safety. *Held*, the convictions must be quashed. Necessity of observing the rules laid down in the Criminal Procedure Code remarked on.

THIS was a reference from the Officiating Sessions Judge of Backergunge, dated 29th July 1869. The circumstances are set out in the order of reference as follows :

2. "In the cases noted in the margin, it appears that the police, under

1. *Queen v. Nandkumar Bose and others.*

2. *Queen v. Moni Gomez and another.*

3. *Queen v. Ram Chand Christian.*

general orders from the Magistrate, arrested and sent in certain persons as having possession of guns without licenses. The Magistrate took their statements, and convicted them under s. 188 of the Penal Code. No complaint or deposition preceded the conviction.

3. In the case noted in the margin,<sup>1</sup> the accused appears to have at-

<sup>1</sup> *Queen v. Rohandi Napa.*

<sup>2</sup> *Queen v. Lashkar Mahomed.*

tended, of his own accord, after a warrant had issued; he was similarly convicted; and in the next case,<sup>2</sup> the accused was arrested on warrant, and convicted in the same manner.

*Queen v. Krishna Mohan Saha.*

4. In the case noted in the margin the accused was duly convicted after examination of witnesses.

5. In all these cases I think other illegalities of procedure or of law have occurred, and I beg to submit them for the consideration of the High Court. Two similar cases came before me in appeal, and I annulled the convictions, and I submit a copy of my decision in those cases.

6. In the cases noted in paragraph 2, it appears to me that the police have, under the Magistrate's orders, acted illegally in arresting the persons carrying arms. The proper course was for them to apply for a warrant or summonses.

7. In the cases noted in paras. 2 and 3, there appears to me to have been a defect in the procedure, as some complaint or information on oath was

<sup>1</sup> Reference, under s. 434 of the Code of Criminal Procedure, from the Officiating Sessions Judge of Backergunge, dated the 29th July 1869.

1869.

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v.  
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BOSE,  
3 B. L. R.  
App. 149.

necessary before a case could be brought on for trial. S. 257 allows the Magistrate to issue a summons or warrant on complaint, and it is not till this has been done that s. 265 can be brought into action; and I do not understand that s. 68 absolutely allows the Magistrate to convict the accused or call on him to plead to a police-report. On the above grounds, I consider the convictions to be illegal.

8. I believe the Magistrate was not justified in convicting the accused of disobedience to his notification dated September 1868. That notification (a copy of which is appended) was issued in consequence of the Government Resolution, No. 4500, of 17th August 1868, in which it is directed that Magistrates shall insist upon licenses being taken out before arms are carried. This is in effect that Magistrates are to enforce s. 26, Act XXXI. of 1860. That section prescribes the penalty for going armed or carrying arms without a license, and I do not think any additional penalty is incurred, because the Magistrate issues an order to all persons to take out licenses. It seems to me that it would be as just to say that a Magistrate might, by notification, direct mukhtars to take out licenses, and then punish them under s. 188 of the Penal Code for practising without licenses.

9. The subject is one of considerable importance in this district, because great exertions are being made to enforce the orders of Government; but I do not think the convictions in these cases are legal, and I beg to refer the cases for the orders of the High Court."

MARKBY, J.—I think that in these cases all the convictions were wrong. They were made under s. 188 of the Indian Penal Code. In the first place, there was a defect in procedure, because the Magistrate did not, as required by s. 250, frame any charge in writing against the prisoners, or follow or comply with any of the requirements of ss. 251 and 252; but not only is there a defect in procedure, but there is no doubt, as the Magistrate would himself have discovered, if he had followed the prescribed procedure, and framed a specific charge, that there is no evidence to establish an offence under s. 188. S. 188 only applies where a person, knowing that an order has been promulgated by the proper authorities, disobeys that order, and such disobedience either causes or tends to cause any obstruction, annoyance, or injury to any one, or the risk of such obstruction or injury. Now, as far as I can see, there was no evidence that the carrying of arms by these persons was of that nature, and if their defence is true, it is clear that it was not of such a nature as would make them punishable under s. 188, because what they were carrying arms for was the lawful purpose of destroying game, and there is not the slightest indication to show that in so doing they would cause, or were in the least likely to cause, injury or annoyance to any person. The proclamation issued by the Magistrate under the orders of Government may have been a very proper one, and under certain circumstances might have become a proper foundation to proceed under s. 188; but for the reasons I have pointed out, it cannot be so in these cases. The conviction and sentences must therefore be quashed, and the fines, if any have been levied, must be returned to the parties.

GLOVER, J.—I am of the same opinion.

Before Mr. Justice Glover and Mr. Justice Mitter.

SHANTO TEORNI v. MRS. BELILIAS AND OTHERS.<sup>1</sup>

*Charge of Theft—Police Enquiry and Order thereon—Counter Charge of bringing a False Complaint.*

1869.  
Sept. 16.

3 B. L. E.  
App. 151.

[12 W. E. 53.]

S. T. brought a charge of theft against B. before a Magistrate. The case was made over to the Deputy Magistrate, on whose suggestion the Magistrate ordered that there should be a police-inquiry. The Police Superintendent reported that, in his opinion, the charge was false, and that the plaintiff should be summoned for bringing a false charge; and the Magistrate, while declaring that he would not encourage charges of "false complaint," said that the injured party might swear an information, if she chose. S. T. then petitioned to be allowed to call witnesses in support of her charge of theft, and objected to the police-proceedings. The Magistrate recorded the following order: "The case has been dismissed, and the accused, Mrs. B., has received permission to prosecute the woman, S. T., for false charge; the present petition may be put in in defence in that case." *Held*, the order of the Magistrate must be quashed—(1) because he had no jurisdiction, the case having been made over to the Deputy Magistrate; (2) because the order above was not a judicial dismissal of the case. The case remanded for the trial of the original charge as brought by S. T.

Baboo Ambica Charan Bose for prisoners.

GLOVER, J.—The Sessions Judge of Hooghly objects to a certain order passed by the Magistrate as illegal, and requests this Court, under s. 434 of the Code of Criminal Procedure, to reverse that order.

It appears that a charge of theft was preferred to the Magistrate, and the case made over by him to Mr. Deputy Magistrate Godfrey. The Deputy Magistrate, after taking the deposition of the complainant, considered that there ought to be a police-inquiry, and requested the Magistrate to order that inquiry. The Magistrate did so, and the result was an opinion on the part of the Police Superintendent that the charge of theft was false. There was also a recommendation by that officer that the party complaining should be summoned for preferring a false charge. The Magistrate, in his order upon this report, came to no decision on the question of the original complaint, but merely declared that he would not encourage the bringing of charges of "false complaint," but that the injured person might appear and swear an information, if she chose, under s. 212.

The complainant, a day or two after this, again petitioned, asking that her witnesses might be summoned to prove the charge of theft. She also objected to the police-proceedings as irregular, and asked that the police-report, together with the other papers in the case, might be sent back to the Deputy Magistrate by whom the case was first entertained. On this, the Magistrate passed the following order: "This case has been dismissed as false, and the accused, Mrs. Belilias, has received permission to prosecute this woman, Shanto Teorni, for false charge. The present petition may be put in in defence in that case."

In the first place, it appears to us that as the case had once been made over by the Magistrate to the Deputy Magistrate for trial, the Magistrate's jurisdiction to do anything more in the matter ceased, so long as the transfer to the Deputy Magistrate was in existence. If the Magistrate wished to take any further steps in the matter, or to decide the case himself, he ought, formally, to have withdrawn the case from the Deputy Magistrate's hands,

<sup>1</sup> Reference under s. 434, Code of Criminal Procedure, from the Sessions Judge of Hooghly.

<sup>†</sup> This case is followed in *Queen v. Girish Chandra Ghose* (7 B. L. E. 513; 16 W. E. 40).—Ed.]



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under s. 30 of the Criminal Procedure Code. Not having done so, the only person who could deal with the case was the Deputy Magistrate to whom the trial of that case had been referred.

In the next place, we do not find on the record any judicial order on the part of the Magistrate dismissing the plaintiff's charge of theft. It is stated certainly, in one part of the record, that the case "has been dismissed," but we can find no order on the record to that effect; and that being so, there seems to be no reason why the complainant should not be permitted to produce her witnesses before the Deputy Magistrate, and to have the case tried on the merits, unless the Deputy Magistrate considers himself justified, under the provisions of s. 180 of the Criminal Procedure Code, in dismissing the case at once as false, after taking the examination of the complainant.

We think, therefore, that the Magistrate's order is wrong in law, and should be quashed; and that the case as brought by Shanto Teorni against Mrs. Belilias should be returned to the Court to which it was originally made over for final disposal.

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*Before Mr. Justice E. Jackson and Mr. Justice Miller.*

1869.

Sept. 21.

3 B. L. R.  
App. 155.

[12 W.R. 54.]

#### IN THE CASE OF KALIKANT ROY CHOWDHRY, PETITIONER.<sup>1</sup>

*Forfeiture of Recognizance—Evidence to be taken in Presence of the Accused.*

Before a Magistrate can declare that recognizances to keep the peace have been forfeited, he must record legal evidence in the presence of the accused, proving that he was about to do something which would cause a breach of the peace.

JACKSON, J.—This is an application to this Court to revise the proceedings of the Magistrate of Dacca, passed against the applicant, Kalikant Roy Chowdhry. Both the orders passed by the Magistrate are dated 14th of June 1869. In one of them the applicant was ordered to forfeit his recognizances for rupees 1,000, which he was ordered to pay, or, on failure, to suffer imprisonment for a period of six months. By the other, he was required to furnish security to the extent of rupees 5,000 to keep the peace for 20 months. The period of 20 months appears from a proceeding of the Sessions Judge to have been since changed to one year. The Magistrate has recorded in his decision the grounds upon which he has passed those orders.

It is enough to say that from that decision it is quite clear that no evidence was recorded in the presence of the accused before those orders were passed upon him. The accused was called upon to show cause why his recognizances should not be forfeited. He appeared, and did show cause. If the Magistrate still considered that the recognizances should have been forfeited, it was his duty to record the evidence upon which it was proved that the accused had acted in such a way that it became necessary to forfeit those recognizances for rupees 1,000. There must be a regular judicial trial and legal inquiry before such punishment can be inflicted. Similarly, it has been lately held by a Full Bench of this Court that, even before recognizances are required from any person from whom a breach of the peace is apprehended, there must be some evidence before the Magistrate that such breach of the peace is likely to occur.

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<sup>1</sup> Revision of proceedings under s. 404 of the Code of Criminal Procedure.

<sup>2</sup> [This case is followed in *Empress v. Nobin Chunder Dutt* (4 C. L. R. 243; 1 L. R., 4 Cal. 865).—ED.]

It may be that a defendant may make certain admissions upon which the Magistrate can assume that a breach of the peace is likely to occur, and in such case the Magistrate might act upon such admission. But where the accused denies the charge, it is incumbent upon the Magistrate to record the legal evidence, proving that he was about to do something which would cause a breach of the peace, before recognizances or security can be taken from him.

In this case the Magistrate has taken certain depositions out of another trial, and has placed those depositions on the record of this trial as evidence against the accused. But they are manifestly no legal evidence against him : they were not taken in his presence, or in the presence of any mookhtear duly authorized by him on this trial. The Magistrate states that they were taken in the presence of mookhtears employed by the defendant. But they were taken long before the defendant was called upon to answer the charge, and not taken upon this trial. Such depositions, therefore, cannot be any evidence whatever against the accused.

If the defendant has really forfeited his recognizances, the Magistrate must take evidence upon the point, and pass orders upon him. He must proceed in the same way if it is necessary to take further recognizances from the defendant.

The orders now passed by the Magistrate, dated 14th June 1869, are reversed.

MITTER, J.—I concur.

1869.

IN THE  
CASE OF  
KALIKANT  
ROY CHOW-  
DREY,

3 B. L. R.  
App. 155.

[12 W.R. 54.]



# The High Court of Judicature, AT FORT WILLIAM IN BENGAL.

## FULL BENCH RULINGS.

*Before Sir Barnes Peacock, Kt., Chief Justice, Mr. Justice Bayley, Mr. Justice Kemp, Mr. Justice Macpherson, and Mr. Justice Glover.*

### ANONYMOUS CASE.<sup>1</sup>

*Code of Criminal Procedure, Chap. XV.—Offence punishable with more than Six Months' Imprisonment.*

1868,  
Sept. 6.

4 B. L. R.  
F. B. 41.

Offences punishable under the Penal Code with more than six months' imprisonment are not triable under Chap. XV. of the Code of Criminal Procedure, and consequently do not fall within the provisions of s. 271 of that Code.

THIS was a reference to the Full Bench from a Divisional Bench, composed of the Chief Justice and Mr. Justice Loch, upon the following question:—Is a case of bribery under s. 161 of the Penal Code triable under Chap. XV. of the Code of Criminal Procedure; or do those offences only fall within the scope of that chapter which are punishable with imprisonment for a period not exceeding six months?

The circumstances under which the question arose are thus stated by Mr. Justice Loch in a memorandum dated 26th June 1869:—The charge is one of inflicting a severe wound on the head of the complainant's mother, and is brought under s. 325 of the Indian Penal Code. It was, however, entered in the Criminal Statements for the 4th quarter of 1868, under heading 35, "*Hurt, other cases, ss. 323 and 324*," and was disposed of by compromise.

The Judge in the English Department, on examining the quarterly statements, required the Magistrate to explain how this case had been admitted to compromise, as the punishment assigned to offences under ss. 323 and 324 was imprisonment for a period exceeding six months; and in reply he was referred to a case disposed of by a Division Bench of the Court of the 15th January 1866 (JACKSON and GLOVER, JJ.), in which it was held that a case of bribery is triable under Chap. XV. of the Code of Criminal Procedure, and is therefore withdrawable. Chap. XV. of the Criminal Procedure Code is headed: "Of Cases triable by the Magistrate in which a Summons on Complaint shall ordinarily issue." S. 257, which is the first section in the chapter, sets forth:—

"Whenever a complaint is made before a Magistrate having jurisdiction in the case, that any person has committed, or is suspected to have committed, any offence triable by such Magistrate, and punishable under the Indian Penal Code with imprisonment for a period not exceeding six months, it shall be lawful for such Magistrate to issue his summons directed to such person;" and s. 271 of the same chapter provides that, "If a complainant, at any time before a final order is passed in any case under this chapter, shall satisfy

<sup>1</sup> Extract paras. 1 and 2 of Letter No. 26 P, dated the 8th April 1869, from the officiating Magistrate to the Sessions Judge of Jessore, under cover of Memo. No. 66, dated the 7th April, from Sessions Judge, Jessore.

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the Magistrate that there are sufficient grounds for permitting him to withdraw his complaint, the Magistrate may permit such complainant to withdraw such complaint."

It is clear, therefore, by what is recited in s. 257, that only those offences which are punishable with imprisonment for a period not exceeding six months fall within the scope of this chapter; and that though, according to the schedule annexed to the Code of Criminal Procedure, a summons is the first process issued in regard to other offences punishable with imprisonment for a longer period than six months, they do not fall within Chap. XV., but such process is issued under the provisions of Chap. IV., and is permitted in the majority of bailable offences, though they do not come under complaints brought under Chap. XV. It appears to me, therefore, that the ruling of the learned Judges who passed the decision of 15th January 1866, in the case of *Government v. Chunder Cumar Sein*,<sup>1</sup> is not correct; for, if it be, then all cases in which summons is issued as the first process, whether the punishment for the offence charged be punishable with imprisonment for a period above or below six months, would be open to withdrawal under the provisions of s. 271, which is the only section in the law which treats of withdrawals, but limits the privilege to cases coming under Chap. XV. of the Criminal Procedure Code.

The judgment of the Full Bench was delivered by

PRACOCK, C.J. (the other Judges concurring).—We are of opinion that offences punishable under the Indian Penal Code with imprisonment exceeding six months are not triable under Chap. XV. of the Code of Criminal Procedure; and consequently that such cases do not fall within the provisions of s. 271 of that Code. We do not think that we can add anything to what has been stated by Mr. Justice Loch in his memorandum dated 26th of June 1869.

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<sup>1</sup> 5 W. R., Cr. Rul., 4.

Before Sir Barnes Peacock, Kt., Chief Justice, Mr. Justice Bayley, Mr. Justice Kemp, Mr. Justice Macpherson, and Mr. Justice Glover.

BEHARI PATAK v. MAHOMED HYAT KHAN.<sup>1</sup>

A. D. DUNNE v. HEM CHANDRA CHOWDHRY AND ANOTHER.<sup>2</sup>

GOVERNMENT v. BEHARI LAL BRAJABASI.<sup>3</sup>

1869.  
Sept. 18.

4 B. L. R.  
P. B. 46.

(12 W. R. 60.)

*Recognisance to keep the Peace—Adjudication upon Reasonable Grounds for Apprehension.*

*Held* (GLOVER, J., *dissentiente*), the report of a police-officer, though it justifies the issue of a summons, is not sufficient ground on which to bind a man over in a recognisance to keep the peace.

The Magistrate must adjudicate on the question whether there is reasonable ground for believing that the defendant is likely to commit a breach of the peace, after taking evidence in the presence of the person charged, and giving him an opportunity to cross-examine the witnesses.

The *onus* lies on the person who has obtained the summons to prove that the defendant is likely to commit a breach of the peace.

THE Judges of the Second Bench (LOCH and GLOVER, JJ.) having been divided on the following question, it has been referred by Mr. Justice Loch for the opinion of the Full Bench :

A Divisional Bench (PHEAR and HOBHOUSE, JJ.) decided, in the case of *Narsing Narayan*,<sup>4</sup> that on the appearance of a party summoned under s. 282 of the Code of Criminal Procedure to show cause why he should not enter into a bond to keep the peace, the Magistrate cannot make the order that defendant shall enter into the bond until he has adjudicated judicially, upon evidence properly given, that he is satisfied that it is necessary for the preservation of the peace to take such bond from the defendant.

In the case of *Maghan Misra v. Chamman Teli*,<sup>5</sup> decided by LOCH and GLOVER, JJ., referred to the Court under s. 434, Code of Criminal Procedure, Mr. Justice Loch thought that the above course should be followed. Mr. Justice Glover held that it was not incumbent on a Magistrate, on the appearance of the person summoned, to adjudicate judicially as to the necessity for taking security on evidence given before him.

The judgments of the Full Bench were as follows :

GLOVER, J.—This reference involves the consideration of two somewhat different questions.

The first (referred by LOCH, J.) is, "Whether, when a party is summoned to show cause under s. 282, Code of Criminal Procedure, why he should not be called upon to enter into recognizances to keep the peace, the Magistrate can make an order directing him to enter into the bond until he has

<sup>1</sup> Referred by the Sessions Judge of Gya by his letter No. 192, dated the 25th September 1868.

<sup>2</sup> Referred by the Sessions Judge of Mymensing by his letter No. 210, dated the 20th November 1868.

<sup>3</sup> Referred by the Sessions Judge of Nuddea by his letter No. 11, dated the 19th January 1869.

<sup>4</sup> [This case is approved and followed in *Luchmiput Singh* (14 W. R. 3); *Reg. v. Tridipdin Bardppa* (8 Bom. H. C. R. 182); *Coomar Porish Narain Roy, Petitioner* (16 W. R. 45); *Noor Mahomed v. Nil Rutton Bagchee* (18 W. R. 2); *Queen v. Nussereed-deen* (3 N. W. P. 461); *Queen v. Gossain Munraj Pooree* (24 W. R. 23); *In the Matter of the Petition of J. D. Sutherland* (9 B. L. R. 229; 18 W. R. 11); *Nilmadhub Ghosal, Petitioners*; *Judoonath Roy Petitioners* (19 W. R. 1).—ED.]

<sup>5</sup> 2 B. L. R., A. Cr., 7, note (see p. 58 of this book).

<sup>6</sup> 2 B. L. R., A. Cr., 7 (see p. 57 of this book).

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4 B. L. B.

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[12 W. B. 60.]

adjudicated judicially upon evidence properly given that he is satisfied that it is necessary for the preservation of the peace to take such bond ?”

The second (referred by JACKSON and MARKBY, JJ.) is, “Whether, when a Magistrate has issued a summons upon credible information under s. 282, calling upon a party to show cause why he should not be required to enter into a bond to keep the peace, he may, upon the party appearing and failing to satisfy the Magistrate that there was no occasion to bind him over, without taking further evidence, act upon his previous information, and make an order under s. 288 ?”

I am of opinion (an opinion come to with much diffidence, for it is, I understand, opposed to that of my honorable colleagues) that the Magistrate can make such an order, that is, that he can call upon a defendant to enter into a bond to keep the peace without recording evidence in support of the charge in the defendant's presence. I do not contend that the Magistrate need not “adjudicate judicially,” nor does my opinion in the case of *Tarinikant Lahori*,<sup>1</sup> an opinion the propriety of which is called in question by this reference, go to that length; on the contrary, I think that the Magistrate's action would, in all cases, amount substantially to a judicial adjudication, even though no evidence were recorded by him at the time of coming to such adjudication. He would adjudicate, that is, on the “credible information,” on the strength of which he had already summoned the defendant to show cause.

I understand Chap. XVIII. of the Code of Criminal Procedure to give Magistrates exceptional powers for exceptional purposes—purposes requiring, from their very nature, to be carried out promptly without the delays that accompany the ordinary forms of procedure, and on this ground to sanction some departure from the ordinary rules of evidence; and I can find nothing in this chapter, either directly or by implication, that makes it incumbent on a Magistrate to record the evidence on which he intends to proceed in the presence of the party accused, or to do more than state the grounds on which the accused has been summoned, and to declare judicially that these grounds are sufficient to put the accused on his defence. The defendant already knows the case he has to answer, for the summons under s. 283 would have set forth the substance of the credible information on which the Magistrate was prepared to act.

S. 282 says: “Whenever a Magistrate shall receive credible information that any person is likely to commit a breach of the peace, he may summon that person to show cause why he should not be required to enter into a bond to keep the peace”; that is, the accused is not summoned until the Magistrate has come to an “*ex parte*” decision on “credible information” that he is a person who ought to be put upon his defence, and to show cause why he should not enter into recognizances. The “onus” appears to be laid wholly upon him. The Magistrate is not to show cause why he has summoned him, but the defendant is to show cause why he should not be declared a person likely to commit a breach of the peace.

I cannot find any section in Chap. XVIII. which directs a Magistrate to take evidence in the usual way in support of the information when disposing of charges of this description. S. 287, no doubt, supposes a case where the Magistrate shall not be satisfied that there is occasion to bind over a defendant, but I understand this to refer to the whole proceedings, and not only to evidence supposed to have been taken on the part of the Crown. I understand it to apply to cases where the credible information on

<sup>1</sup> 8 W. B. 79.

which the Magistrate acted has been invalidated by the accused showing that it is not so credible as it at first appeared, or where it had been directly rebutted by evidence still more credible.

In support of my view I would instance the case of a party, the period of whose security-bond has been extended under s. 290. It seems to me clear that in such a case at least the accused is ordered to give security for such further period as the Court of Session thinks fit (not exceeding one year) without being allowed to have a voice in the matter; and yet it might very well be that the accused might, during the first year for which security had been taken, have seen the folly of his ways, and have determined to keep the peace for the future; but in such a case the Magistrate first, and the Sessions Judge afterwards, act, not upon evidence (unless they choose to take it), but simply upon their own impressions, not even supported by "credible information" that a further security-bond is necessary, and the accused has to give that bond or go to jail. He is not called upon to show cause, nor is he given any opportunity of showing that the Magistrate's "impressions" were erroneous. Now, if a party called upon to show cause under s. 282 is entitled to have the evidence on which the Magistrate proposes to act recorded before him, why should not the party under s. 290 have the same privilege? And yet it is clear that he has not.

Again, if no security-bond can be taken without evidence for the Crown being recorded in the presence of the party summoned, what would be the procedure in cases where the information on which the Magistrate acts consists of the report of a Sub-Magistrate or of a police-officer, both of which reports have been declared by this Court to be "credible information" under the section. Is the police-officer to be summoned to swear to the truth of his report, and would the accused have the right to insist upon all the persons through whom the police-officer derived his information being sent for and their evidence recorded before him? The police-officer might be, and frequently would be, 50 miles away, and whilst he and the witnesses were coming, the breach of the peace might take place. Must the Sub-Magistrate's report also be supported by independent testimony? and must that officer prove by witnesses the way in which he got his information?

Suppose again, a not unfrequent case, the case where a Magistrate derives his "credible information" from his own sense of sight. He sees himself circumstances which give him an assured impression that such and such a person is likely to commit a breach of the peace; is he to give evidence of his belief?

Another reason, though I admit a slight one, for supposing that the recording of evidence is not necessary under Chap. XVIII., is to be found in the wording of s. 307, which says that any evidence taken under Chap. XVIII. is to be recorded in the usual way (s. 267). The word "any" seems to suppose cases under that chapter, where there would be no evidence recorded at all.

I admit that, if the opinion I have expressed above be correct, a Magistrate under this section would act without the observance of the ordinary procedure, but his powers under Chap. XVIII. have always seemed to me to be purposely exceptional, and after all they do not involve a very great relaxation of the rules of evidence.

I think that both questions submitted to the Full Bench should be answered in the affirmative.

PEACOCK, C.J. (Bayley, Kemp, and Macpherson, JJ., concurring).—It appears to me that substantially there is only one question before us, viz.,

1869.

BEHARI  
PATAK  
v.  
MAHOMED  
HYAT  
KHAN  
DUNNE  
v.  
HEM  
CHANDRA  
CHOWDHRY  
GOVERN-  
MENT  
v.  
BEHARI  
LAL  
BRAJABASI,  
4 B. L. R.  
F. B. 46.

[12 W. R. 60.]



1869.

BEHARI  
PATAK  
v.  
MAHOMED  
HYAT  
KHAN  
DUNNE  
v.  
HEM  
CHANDRA  
CHOWDHRY  
GOVERN-  
MENT  
v.  
BEHARI  
LAL  
BEAJABAST,  
4 B. L. R.  
F. B. 14.  
[12 W. R. 60.]

whether when a Magistrate has issued a summons upon credible information under s. 282, calling upon a party to shew cause why he should not be required to enter into a bond to keep the peace, he may, upon the party's appearing and failing to satisfy him that there was no occasion to bind him over, act upon his previous information, and make an order under s. 288 without taking further evidence? That is the question which is propounded by L. S. Jackson and Markby, JJ. The question raised by Loch and Glover, JJ., appears to me to involve the same point. It has been decided by a Divisional Bench, consisting of Phear and Hobhouse, JJ., that a Magistrate cannot order a defendant to enter into such a bond until he has adjudicated judicially upon evidence properly taken before him. Loch, J., in the case referred by him and Glover, J., thought that the decision of Phear and Hobhouse, JJ., was correct. Glover, J., however, was of a contrary opinion. No precise question has been referred to us by Loch and Glover, JJ., and the only question which appears to me we have to answer is that which I have stated. That question, I think, must be answered in the negative. S. 282 enacts that "it shall be lawful for the Magistrate of the district or other officer exercising the powers of a Magistrate, whenever he shall receive credible information that any person, whether a European British subject or not, is likely to commit a breach of the peace, or to do any act that may probably occasion a breach of the peace, to summon such person to attend at a time and place mentioned in the summons, to show cause why he should not be required to enter into a bond to keep the peace with or without sureties as such Magistrate shall think fit." I understand my honourable colleague, Glover, J., to say that a report of a police-officer would be sufficient credible information to authorize a Magistrate to call on a person to show cause why he should not enter into a security-bond. The question is not whether that would be sufficient information to justify the Magistrate in calling upon the person to show cause, but whether it would be sufficient without further evidence to justify the Magistrate in adjudicating upon the case and ordering the party to give security.

S. 285 points out what is to be done if the person summoned to show cause does not attend. It enables the Magistrate to issue a warrant for such person's arrest; and it further provides that, if it appears to a Magistrate "upon the report of a police-officer, or upon other credible information" (the substance of which report or information must be recorded), "that there is just reason to fear the commission of a breach of the peace, which may probably be prevented by the immediate arrest of any person, it shall be lawful for the Magistrate at any time to issue a warrant for the arrest of such person."

S. 287 provides that, "if, upon the appearance of the person or of his agent, if he is permitted to appear by agent, the Magistrate shall not be satisfied that there is occasion to bind such person to keep the peace, he shall direct his discharge."

Now, it appears to me that the meaning of this act was that, when the person summoned appears, the Magistrate is to proceed judicially, and that he is not to be satisfied without evidence that there is occasion to bind him over. He is not to take the report of a police-officer upon which he may have issued the summons as evidence when he adjudicates upon the case. If no evidence is given upon the subject when the person summoned appears, the Magistrate cannot, under s. 287, be judicially satisfied that there is occasion to bind him over, but is bound to order his discharge.

My honourable colleague, Glover, J., has put the case of a Magistrate having issued a summons on the report of a police-officer, and he says that

the police-officer may be 50 miles away when the case comes on. But it would be contrary to every principle of natural justice to adjudicate and order a man to enter into a bond to keep the peace on the mere report of a police-officer, who, when the case comes on to be adjudicated, is 50 miles away, and cannot be cross-examined by the party called on to give the security.

Is it not always sufficient for the person summoned to enter into his own recognizance; but he is bound if the Magistrate requires him to find sureties, and if he disobeys the order of the Magistrate, he may be committed to jail, and may be detained there in custody for a year, unless in the meantime he complies with the order. Thus, according to my honourable colleague's view of the case, a European or other person may be called on to give a bond to keep the peace, and to find sureties upon the mere report of a police-officer, without any further evidence, although the police-officer on whose report the summons to show cause was issued may be 50 miles away. If that view is correct, a Magistrate may act upon a report made behind the back of the accused by a person who fails to come forward and submit himself for cross-examination. A person may not always be able to find security. The sureties, if they become bound, or if their bonds are forfeited, are liable to be sent to the civil jail for 6 months, unless they pay the amount.

It appears to me that, before a person can be called on to give a bond to keep the peace, the Magistrate must adjudicate on the question as to whether there is reasonable ground for believing that he is likely to commit a breach of the peace; and that he must adjudicate on that point, in the way in which he must adjudicate in all other cases, after taking evidence in the presence of the person charged, and giving him an opportunity to cross-examine the witnesses. It appears to me that it would be most unreasonable to suppose that the Legislature could have intended to allow a man to be sent to jail for a year for not finding sureties, merely on the report of a police-officer. If sent to jail for one year for not finding sureties, he may be kept in jail for a further year after the Magistrate has submitted a report to the Sessions Judge.

My honourable colleague has referred to s. 307, which says that "any evidence taken under Chap. XVIII. or this chapter shall be taken in the manner prescribed by s. 267, subject to the provision contained in s. 268 of this Act." My honourable colleague seems to think that an argument may be adduced from this section, in which the words "any evidence" are used, to show that the Legislature intended that the Magistrate might, if he pleases, act without any evidence in cases falling within Chap. XVIII. or XIX.; but when we come to look at those sections, I think it is very clear what was intended. Under s. 265, "if the accused person" (that is, on a trial of an offence) "admit the truth of the complaint, and show no sufficient cause why he should not be convicted, the Magistrate may convict him accordingly." So in a case under Chap. XVIII., if the party accused comes in and admits that he is going to commit a breach of the peace, and so admits the charge, there would be no necessity for calling for evidence. It appears to me that the Legislature never could have intended that a man should be imprisoned for a year, and probably for two years, simply on the report of a police-officer, who may be absent when the man appears to answer the summons.

The question as propounded by L. S. Jackson and Markby, JJ., may possibly raise the question as to whether the onus is upon the person called on to show cause, or upon the person who calls upon him to show cause to enter into a bond to keep the peace. It is quite clear that the onus lies on

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BEHARI  
PATAK  
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MAHOMED  
HYAT  
KHAN

DUNNE

v.  
HEM  
CHANDRA  
CHOWDREY

GOVERN-  
MENT

v.  
BEHARI  
LAL  
BRAJABASI,

4 B. L. R.  
F. B. 46.

[12 W. R. 60.]

1869.

BEHARI  
PATAK  
v.  
MAHOMED  
HYAT  
KHAN  
DUNNE  
v.  
HEM  
CHANDRA  
CHOWDREY

GOVERN-  
MENT

v.  
BEHARI  
LAL  
BRAJABASI,  
4 B. L. E.  
F. B. 46.

[12 W. B. 60.]

the person who calls upon the party to show cause to prove the affirmative. S. 287 says that, "if on the appearance of the person, the Magistrate shall not be satisfied that there is occasion to bind him to keep the peace, he shall direct his discharge." What is the meaning of the words, "if the Magistrate shall not be satisfied"? The meaning is, if he shall not be satisfied by evidence given in the ordinary way. He is not to be satisfied by any idle gossip which he may have heard, nor by the mere report of a police-officer, but by evidence taken judicially before him in the presence of the person summoned, who must have an opportunity given him of cross-examining the witnesses adduced by those on whose complaint the charge against him is brought forward.

CASES DETERMINED BY  
**The High Court of Judicature,**  
 AT FORT WILLIAM IN BENGAL,  
 IN ITS APPELLATE JURISDICTION.

APPELLATE CRIMINAL

*Before Mr. Justice Norman and Mr. Justice Kemp.*

IN RE JAGABANDHU MYTI v. GOBARDHAN BERA.<sup>1</sup>

*Act XXV. of 1861, ss. 250, 251, 255, 435—Act VIII. of 1869, s. 435—Discharge of  
 Accused by the Magistrate—Power of Sessions Judge.*

1869.  
Oct. 4.

4 B. L. R.  
A. Cr. 1.

[12 W. R. 65.]

Where no formal charge has been drawn up by the Magistrate under s. 250, Act XXV. of 1861, and the accused has not been called upon under s. 251 to plead thereto, and was not tried thereunder, a release by the Magistrate of the accused does not amount to an acquittal under s. 255, but simply to a discharge under s. 250.

Under such circumstances, s. 435, Act VIII. of 1869, empowers a Sessions Judge to direct the committal of the accused to take their trial.

THE following case was referred by the Judge of Midnapore for the opinion of the High Court:

"A charrandar, manji, and dari, were entrusted with a sloop, with a cargo of paddy, which they were authorized to sell in Calcutta. On the voyage the sloop grounded on a chur, and the paddy was damaged or floated out. The defendants returned, and reported the total loss of the vessel and cargo to their principal. Subsequently he ascertained that the entire cargo had not been lost, and that the defendants had sold the vessel where she lay to a third person.

"Upon this the complainant laid information before the Deputy Magistrate, charging the defendants and the purchaser with dishonest misappropriation of property, criminal breach of trust, and cheating.

"The two defendants present, the manji and dari, denied having sold the sloop. The purchaser defendant admitted his purchase from them, and produced the bill of sale duly registered. There was also other evidence to disprove the defendants' denial.

"The lower Court acquitted the offenders without fully inquiring into the case, because *prima facie* no criminal offence had been committed. I think the order of acquittal, without full inquiry in this case, amounted to a denial of justice, and in that view was illegal. Moreover, the Deputy Magistrate appears to have proceeded on an erroneous view of what was necessary to constitute criminal misappropriation, and he omitted to avail himself of the evidence of the purchaser.

"I feel some doubt on the reported cases, whether an order contrary to the evidence in a case within the jurisdiction of the Magistrate is an illegality within the meaning of s. 434, Criminal Procedure Code. In any case,

<sup>1</sup> Reference under s. 434 of the Code of Criminal Procedure.

<sup>1</sup> [See *In the Matter of the Petition of Ramjai Mozumdar* (6 B. L. R. Ap. 67; 14 W. R. 65).—ED.]

1869.

IN RE  
JAGA-  
BANDHU  
MYTI  
v.  
GOBAR-  
DHAN  
BERA,

4 B. L. R.  
A. Cr. 1.

[12 W. R. 65.]

there seems to have been a miscarriage of justice here, which, I think, justifies the reference. I venture to refer the Court to *Queen v. Nabas Muhton*,<sup>1</sup> *Queen v. Fokto Shah*,<sup>2</sup> *Queen v. Russick Mani*,<sup>3</sup> on the first ground; and to *Queen v. Bhickharee Mullick*<sup>4</sup> on the second. I thought it unnecessary to call for the Deputy Magistrate's explanation, as his reasons are given in his final proceeding."

The judgment of the Court was delivered by

NORMAN, J.—This case is referred to this Court under s. 434 of the Code of Criminal Procedure by the Sessions Judge of Midnapore.

It appears that Jagabandhu Myti, the servant of Abhai Narayn Bhuah Das Mahapatkar, sent a sloop loaded with a cargo of 1,000 maunds of paddy from Balsar to Calcutta. The sloop, with which were two small dinghis, and the cargo were in charge of Gobardhan Bera, manji, Puddo Lochan Bera, dari, and Shobba Das, churandar. The sloop was wrecked in a storm on the Rangafullah sands, and a considerable portion of the paddy floated out. The wreck of the sloop with the boats and the paddy which remained were sold by the persons above-named to one Raj Narayan.

The Deputy Magistrate of Cantai, Munshi Dabiruddin Ahmed, after taking the evidence of the complainant and certain witnesses called by the complainant, and examining the accused, for reasons which we concur with the Judge in thinking wholly insufficient, discharged the accused persons.

On looking through the papers in the record, it appears that, though the nature of the charge was explained to the accused, no formal charge in writing was drawn up against the accused persons, in the manner required by the 250th section of the Code of Criminal Procedure. They were not required to plead guilty or not guilty, or to make their defence to any charge as required by the 251st section. They were not tried by the Magistrate on any such charge, and therefore the order for their release by the Magistrate does not amount to an acquittal under the 255th section, but simply to a discharge under the 250th section.

Under such circumstances, it appears to us that the Sessions Judge is competent, under the power vested in him by s. 435 of Act VIII. of 1869, by which s. 435 of the Code of Criminal Procedure is amended, to direct the committal of such of the accused as he may think ought to be tried, notwithstanding that they have been discharged, as to which he must exercise his own judgment.

With these observations we send back the case for disposal to the Judge.

<sup>1</sup> 8 W. R., Cr. Rul., 65.

<sup>2</sup> 2 B. L. R., S. N., vi.

<sup>3</sup> 11 W. R., Cr. Rul., 54.

<sup>4</sup> 10 W. R., Cr. Rul., 50.

Before Mr. Justice Norman and Mr. Justice Kemp.

THE QUEEN v. KOLA.<sup>1</sup>

1869.  
Oct. 8.

*Perjury—Giving False Evidence—Contradictory Statements of a Witness.*

4 B. L. R.  
A. Cr. 4.  
[12 W. B. 66.]

The statement made by a witness before the Magistrate was opposed to the statement made by him before the Sessions Court. On a charge of perjury being made, *Held*, that a statement made by the accused before one Court was no evidence of the falsity of a contrary statement before another Court to support a conviction of giving false evidence.

*Held*, that neither the Judge nor jury had any right to assume that an explanation could not have been given consistent with both the statements.

The facts are fully stated in the judgment of the Court delivered by

NORMAN, J.—This was a case sent for by this Court under s. 403 on a revision of the abstract statement. The prisoner was convicted by a jury, at a trial held before the Judicial Commissioner of Assam, of the offence of giving false evidence either on the 12th of May by stating before the Deputy Commissioner of Nowgong on solemn affirmation: "Both houses had evidently been set fire to by means of lighted rags which had been thrust into the thatch; we found these rags in the thatch of both houses;" or by stating on the 22nd of June before the Court of Sessions: "After the fires were put out, we found on the ground, amongst the fallen straw, some burnt rags; these rags were found on the ground at both houses; it was not daylight at the time, and one Bhuvan Borah having brought a light we made search and found the rags;" for the statements being opposed to each other, it was considered that he knew one of them to be false. The only evidence of the falseness of either story is the other deposition. In that before the Judicial Commissioner the prisoner had said: "We threw water on the roof, and pulled out the straw, and so put out both fires."

No witness would be safe if convictions on supposed contradictions, such as those now before us, could be allowed to stand. To describe the finding of the "burnt rags," amongst the straw which had formed the thatch which had been just pulled off from the roof of a burning house, as "finding the rags in the thatch," is hardly even an inaccurate expression.

It is clear that neither the Judge nor the jury had any right to assume that if the prisoner had been asked to explain before the Assistant Commissioner the time and manner of his finding the burnt rags in the thatch he would not have given an explanation which would have been entirely consistent with his statement before the Judge.

In our opinion, there is no evidence to support the conviction, which must be quashed, and the prisoners released.

<sup>1</sup> [This case is referred to in *Queen v. Mahomed Hoomayoon Shah* (13 B. L. R. 324; 21 W. B. 71).—Ed.]

*Before Mr. Justice Kemp and Mr. Justice Glover.***THE QUEEN v. UDAI PATNAIK, KHETTRA GAITAL, AND  
BIPRO GAITAL<sup>1</sup>**1889.  
Oct. 28.4 B. L. E.  
A. Cr. 5.

[12 W. R. 68.]

*Act VI. of 1864, s. 4—Punishment of Whipping—Second Conviction.*

The punishment of whipping under s. 4, Act VI. of 1864, can only be inflicted on a second conviction of a person, who, having served a sentence of imprisonment, again commits a crime.

GLOVER, J.—We have gone through the papers in this case, and see no reason to differ from the conclusion arrived at by the Sessions Judge as to the guilt of all the prisoners.

With reference, however, to the sentence of whipping inflicted on the prisoners Uday and Khettra in addition to that of imprisonment under s. 4, Act VI. of 1864, we think that the Sessions Judge's order cannot be sustained.

No doubt, both these prisoners had been previously convicted of dacoity, but these convictions took place at the same sessions, and one day only before the present sentences were passed, and we understand the meaning of the law to be that a sentence of whipping can only be inflicted in addition to other punishment on second convictions of offences specified in s. 4 of the Act, which have taken place at some time previous (although after the passing of the Indian Penal Code).

The object of the law we take to be, that where a person, notwithstanding a previous conviction of dacoity and consequent punishment, and after having a *locus penitentie* afforded him, again, after completing a previous sentence, commits the same offence, he shall be liable to whipping in addition to any sentence of imprisonment awarded. He has, that is to say, been undeterred by imprisonment, and therefore may be punished on the second occasion with stripes in addition.

In a case like the present, the prisoners have had no opportunity of showing what effect a sentence of imprisonment would have had upon them, inasmuch as the two convictions took place at one and the same time, and the two sentences were to commence one after the other.

With this alteration, we confirm the sentence passed by the Sessions Judge, and reject the appeals of all the prisoners.

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<sup>1</sup> [This case is referred to in *Nassir v. Chunder* (B. L. R. Sup. Vol. 951 ; 9 W. R. 41).—ED.]

*Before Mr. Justice Loch and Mr. Justice Glover.*

THE QUEEN v. YASIN SHEIKH.<sup>1</sup>

*Murder—Culpable Homicide—Grave and Sudden Provocation.*

1869.  
Nov. 23.

Culpable homicide not amounting to murder is when a man kills another, being deprived of self-control by reason of grave and sudden provocation. But when the act is done after the first excitement had passed away, and there was time to cool, it is murder.

4 B. L. R.  
A. Cr. 6.  
[12 W. R. 68.]

GLOVER, J.—We have read the evidence in this case, and see no reason whatever to doubt the fact that the deceased met his death at the hands of Yasin.

As the Sessions Judge and assessors have acquitted the prisoner of murder, this Court cannot interfere; but we think it necessary to point out to the Sessions Judge that to take the offence of homicide out of the category of murder by reason of grave and sudden provocation, the act must be done whilst the person doing it is deprived of self-control by grave and sudden provocation; and if Yasin had killed the deceased when he found him with his (prisoner's) wife, the offence would only have been culpable homicide not amounting to murder; but, after beating the deceased, it is proved that the prisoner carried him off still alive and groaning, and on arriving at the banks of the river cut off his head, throwing afterwards head and trunk into the river. This was done after the first excitement had passed away, after the prisoner had time to cool, and to know the precise consequences of his acts. In a word, the act was not done under the immediate influence of the excitement; there was time for the prisoner's passion to subside, and the offence committed was therefore murder.

*Before Mr. Justice Loch and Mr. Justice Glover.*

THE QUEEN v. KHADIM SHEIKH (APPELLANT).

*Act XLV. of 1860, ss. 107, 202, and 382—Abetment—Omission to inform Police when an Offence had been committed.*

1869.  
Nov. 23.

4 B. L. R.  
A. Cr. 7.

An omission to give information that a crime has been committed does not, under s. 107 of the Penal Code, amount to abetment, unless such omission involves a breach of a legal obligation.

A private individual is not bound by any law to give information of any offence which he has seen committed.

GLOVER, J.—The prisoner in this case has been convicted of abetment of an offence under s. 382 of the Penal Code, that is, of theft after preparation made for causing death. The abetment held to be proved was the prisoner's omission to give information of the offence—information which the jury were told he was legally bound to have given.

We think that the jury were misdirected in this point, and that the conviction is therefore bad. The prisoner was arraigned on several charges, on all of which, except the one of abetment, he was acquitted, and the only evidence of the abetment was the man's confession to the Magistrate, in which he stated that he saw two persons, whom he named, hold the boy Umes under water, and drown him.

This admission might, under certain circumstances, have made the accused guilty of abetting a murder, but there is nothing in the law which

<sup>1</sup> Criminal Appeal from the order of the Sessions Judge of Mymensing.



1869.

QUEEN  
v.  
KHADIM  
SHAIKH,  
4 B. L. R.  
A. Cr. 7.

makes it criminal in a person in the prisoner's position to omit to give information that a theft with violence has been committed ; a mere omission to give information can only amount to abetment under s. 107 of the Penal Code when the person who neglects to give the information is one bound by law to give it. For instance, a policeman or a chowkidar would come under this section, if they saw an offence committed, and gave no information ; so would a zemindar in certain particular cases ; but a private individual is only morally bound, and if he omits to do what he ought to do, he may suffer in conscience or character, but the law will not touch him.

The prisoner in this case was not one of those persons whom the law compels to give information ; and we think, therefore, that the jury were wrongly directed to find him guilty of abetment by illegal omission on the strength of the confession made by him to the Magistrate.

As he has been acquitted by the jury on all the other counts of the indictment, we think that he must be immediately discharged.

LOCH, J.—In this case, the Sessions Judge, looking at a note appended to explanation 2 of s. 107 in Morgan's Edition of the Penal Code, held that the prisoner was guilty of abetment, as he had failed to give information of the theft which he had seen committed ; and he charged the jury to find a verdict of guilty, if they believed the prisoner's statements. The jury did accordingly find the prisoner guilty of abetment on the 4th head of the charge ; but after the verdict was given, the Sessions Judge considered this part of his direction to the jury to be incorrect, as the concealment, being subsequent to the commission of the offence, could not be regarded as an abetment of the offence. But, considering that the prisoner had committed an offence punishable under s. 202 of the Indian Penal Code, he sentenced him to six months' imprisonment. It appears to me that the prisoner has been prejudiced by what was a misdirection on the part of the Judge to the jury. He stated the law to the jury ; and on his statement they found the prisoner guilty of abetment. He subsequently found his statement of the law to be incorrect, and the prisoner has been sentenced to punishment for an offence with which he was not charged. A further question arises, whether the prisoner is liable to punishment under the provisions of s. 202 of the Penal Code ? Was the prisoner legally bound to give information of the theft which he had seen committed, attended as it was by circumstances of violence such as brought the offence within the provisions of s. 382 ? Is a private individual bound by any law to give information of a robbery or other offence which he has by accident seen committed ? If not, then the prisoner has committed no offence. I think he must be released.

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Before Mr. Justice Norman and Mr. Justice Kemp.

THE QUEEN v. NOMAL.<sup>1</sup>

Act XXV. of 1861—Criminal Procedure Code, s. 172—*Variances in Evidence—False Evidence.*

1869.  
Nov. 28.

4 B. L. R.  
A. Cr. 9.  
[12 W. R. 69.]

Where a witness makes a statement before the Court of Session, which contradicts that made by him before the Committing Officer, and no evidence is given to show which statement is true, it cannot, under s. 172, Act XXV. of 1861, be said that an offence has been committed under the cognizance of the Court of Session.

A Judge's duty in dealing with the contradictory statements of a witness discussed.

THE facts are fully stated in the judgment delivered by

NORMAN, J.—This is one of four cases sent for by myself and Mr. Justice E. Jackson under s. 403 on a review of the abstract statement of cases tried before the Court of Session by the Officiating Judicial Commissioner. They are all convictions for giving false evidence on alternative charges based on supposed contradictions.

In two cases the prisoners have been already released, there being, in our opinion, no ground for saying that there was any real contradiction between the two depositions.

In the present case the prisoner has been tried and convicted by the verdict of a jury of giving false evidence, either before the Assistant Commissioner of Nowgong in a preliminary inquiry, or in the Court of Session before the Officiating Judicial Commissioner, stating on solemn affirmation that "just before we saw a light outside, and went out to see what it was, we then saw the complainant's brother's house was on fire, and by the light of that fire we saw a man named Tahiram putting his hand into the roof of Shiva's house, which is close to complainant's; when I saw accused putting his hand into the roof of Shiva's house, I saw there was something in his hand which was smoking; the fire broke out in Shiva's house almost immediately afterwards," or, as specified in the second head of charge, namely, that he, on or about the 22nd June 1869, intentionally gave false evidence at Nowgong, before the Court of Session, in a stage of a judicial proceeding at the trial of a case, by stating on solemn affirmation that, "when I first came out and saw the fire, through the light of the flame I saw the accused at the dung-shed," and that the said statements being opposed to each other he knew one of them to be false. The prisoner was sentenced to two years' rigorous imprisonment.

The evidence against the prisoner consisted solely of the two depositions which are supposed to be contradictory.

In both these depositions he charges or means to charge Tahiram with having set fire to the houses of Kaminohola and Shiva, and of course the really important question was whether the charge made by him in those two depositions against Tahiram was false. If, in making a charge which is in substance true, a witness, in giving accounts at different times of what he saw, makes contradictory statements, such contradiction is not *per se* proof that the witness is intentionally giving false evidence.

The Judicial Commissioner, assuming to act under the powers conferred on Courts of Session by the 172nd section of the Code of Criminal Procedure,

<sup>1</sup> [Contra *Queen v. Mussamat Zameerun* (6 W. R. 65; B. L. R. Sup. Vol. 521); *Queen v. Mahomed Hoomayoon Shah* (21 W. R. 72; 13 B. L. R. F. B. 324); *Palany Chetty, Appellant* (4 Mad. H. C. R. 51): and referred to in *Empress v. Lachman Singh* (I. L. R. 2 All. 398).—ED.]

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on the same day in which the prisoner had given evidence against Tahiram, charged, and then and there forthwith tried the prisoner on two charges, one of having given false evidence before the Deputy Commissioner, and the other of having given false evidence before himself.

By s. 359, it is provided that, except in the cases referred to in s. 172, a Court of Session as a Court of Original Criminal Jurisdiction shall not take cognizance of any offence but upon a charge preferred by a Magistrate or other officer empowered to make commitments to such Court.

The 172nd section empowers a Court of Session to charge a person for an offence committed before it or under its own cognizance. As I understand the expression "under its own cognizance," it is meant to provide for a case where it is brought under the notice of the Court of Session in the course of a judicial proceeding that the crime with which the party is to be charged has been committed by him. If, on the trial of a prisoner before a Court of Session, a witness gives evidence which contradicts that given by the same witness before the committing officer, and there is no evidence whatever to shew which statement is true, it appears to me that it cannot be said to be within or under the cognizance of the Sessions Judge that the witness has given false evidence before the committing officer. What is brought under the cognizance of the Judge is that the witness may have given false evidence before the committing officer. It appears to me that without further inquiry the case is not ripe for commitment.

To apply a simple test, if the Judge, in making out a commitment of the prisoner for trial before himself on a charge of giving false evidence before the Assistant Commissioner, had attempted to recite the facts which are necessary to give him jurisdiction, he could not have written that it had come under his cognizance that the prisoner has committed an offence punishable under s. 193 of the Indian Penal Code by giving false evidence in the Court of the Assistant Commissioner, and therefore he would at once have been stopped if he had attempted to draw out a commitment on such a charge. I did not fully explain my views on this subject in the case of *Queen v. Matikhova*.<sup>1</sup> The Judicial Commissioner put the prisoner on his trial on the same day on which he had given evidence in the case against Tahiram. There seems to have been undue haste. I fear that the Judicial Commissioner did not give himself time for reflection, or the prisoner a fair opportunity to prepare his defence. Though the substantial question was whether the prisoner saw Tahiram set fire to the houses or not, the Judicial Commissioner did not examine Tahiram or any other witness to show that the charge was false. There is not on the record any contradiction of the prisoner's statement that Tahiram did set fire to the houses.

If the prisoner saw Tahiram set fire to the houses, his story is in the main true, and neither the Judge nor the jury in the absence of evidence had a right to assume as against the prisoner that Tahiram did not set fire to them. But suppose that the variance between the story told by the witness before the Assistant Commissioner of Nowgong and that before the Judge shew that both cannot be true, it would follow that one must be false, or at least inaccurate. But it is one thing to show that a particular statement made by a witness is inaccurate or even false, to say that a Judge cannot safely act, or ought to disbelieve the evidence of that witness because part of it cannot be true; and another to say that the witness has intentionally given false evidence. Every judicial officer knows from experience that if a person speaking from memory of a transaction which he has witnessed repeats the story

<sup>1</sup> 3 B. L. R., A. Cr., 36 (see p. 112 of this book).

after the interval of a few weeks, he will not, on the second occasion, relate what he has seen in the same words, nor unless he is assisted or his memory refreshed will he probably give the same details on each occasion. At one time one fact, on another occasion another fact, will present itself more prominently to his memory or imagination. Such variances will occur between statements made at different times by honest people intending to tell nothing more than the exact truth, speaking entirely at their ease, and having the full command of their faculties. Such variances become more considerable if the speaker is in any way deprived of his self-possession, or hurried or confounded by questions which he understands but imperfectly. To overlook the difference between the making of contradictory statements by a witness under examination, and the giving of intentional false evidence, is to shut one's eyes to the infirmities of human memory, to fail to understand how slow are the intellects, and how imperfect the powers of expression of uneducated peasants; how readily the fears of such people are excited in Courts of Justice; how completely they lose nerve and presence of mind when frightened. I firmly believe that if a witness could be convicted upon alternative charges of giving false evidence on contradictions of such a character as those supposed to exist in the present case, no native witness of the lower classes, subjected to cross-examination by an adroit and perhaps not over-scrupulous advocate, would be safe.

I now come particularly to the facts of the present case. I may premise that the house of Dobhagu, from which the prisoner says he came out and saw the fire, is close to the house of Kaminohola. Beyond Kaminohola's house is a dungshed, and beyond that is the house of Shiva. Before the Assistant Commissioner the prisoner said: "Just before day-break we saw a light outside, and went out to see what it was: we saw that complainant's brother's (Kaminohola's) house was on fire, and by the light of that fire we saw a man named Tahiram putting his hand into the roof of Shiva's house which is close to complainant's house: when I saw the accused putting his hand into the roof of Shiva's house, I saw there was something in his hand which was smoking; the fire broke out in Shiva's house almost immediately afterwards."

The statement which has been treated by the Judicial Commissioner as opposed to that given by the witness before the Assistant Commissioner is this: "When I first came out and saw the fire, through the light of the flame I saw the accused at the dungshed."

Now, it must be observed that before the Judicial Commissioner the prisoner states where he first saw Tahiram at the time of the fire. The prisoner's statement on that subject before the Judge is not directly contradicted by any statement made by him before the Assistant Commissioner. The prisoner was not asked and did not state before the Assistant Commissioner where he first saw Tahiram. It is not impossible that Tahiram may have been at the dungshed which was close to the house of Shiva when the prisoner first saw him, and may have then put his hand into the thatch of Shiva's house, because the dungshed appears to be close to Shiva's house. Before the Assistant Commissioner the witness's mind was directed specially to the point as what Tahiram was doing. Suppose it had been intended to contradict the witness's statement that he saw Tahiram put fire in the roof of Shiva's house, if the witness were being cross-examined in a civil suit it would have been only common fairness on the part of the cross-examining counsel to direct the witness's attention to the point, and ask him what Tahiram was doing at the dungshed.

The last answer given by the witness on what is called the cross-examination was: "I have deposed to all I know." He had said nothing about Tahiram's putting his hand into the thatch of Shiva's house. The omission was

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most important. But, before coming to the conclusion that the witness was swearing falsely, the Judicial Commissioner should, without alarming him, have drawn the witness's attention directly to the subject on which no explanation had been given, by quietly putting some question direct or indirect to ascertain what the witness could say that Tahiram was doing, such as, Did you see Tahiram's face or his back? Instead of putting any such question of that sort, the Judicial Commissioner asked the witness, How came you to state before the Assistant Commissioner (*reading what the witness did say*), &c.? The reply is: "I cannot say what I said before the Magistrate; I may have made a mistake." The Judge does not follow it up by a question:—Then do you mean now to say that you did not see Tahiram put his hand at the thatch?

No doubt, from the omission by the prisoner of all mention before the Judicial Commissioner of so remarkable a fact as that he himself saw Tahiram put fire into the thatch of Shiva's house, a strong suspicion arises that the charge may have been a false one. But it is one thing to suspect the truth of evidence and refuse to act upon it, and another to come to the conclusion that it must be certainly false. The strongest suspicion that a witness has spoken falsely will not justify his conviction for giving false evidence. Such an offence must be proved by the clearest and most conclusive testimony.

Now, there is a fact which appears on the deposition of the prisoner as recorded, which goes in some degree to confirm his statement as to Tahiram's presence at the fire. Tahiram on his trial seems to have put a question which he would hardly have put, if he had not been fully aware that there was a fire, and that he himself was not far from the scene on the night of the fire. The question is not recorded. But the answer to the question is, "I never went in company with Dobhagu on the night in question to beat the accused Tahiram."

If the Judge thought the evidence against Tahiram was false, he should have tried the prisoner on that charge; and called Tahiram and confronted him with the prisoner to prove that it was so. Tahiram might then have been cross-examined. As the case stands, I am of opinion that there is no evidence to support the finding of the jury. There is no such conflict between the prisoner's two statements as, taken by itself, shews that he intentionally gave false evidence on either occasion.

The conviction must be quashed, and the prisoner released

KEMP, J.—I concur generally in the remarks of Mr. Justice Norman, and think the prisoner ought to be released. There is to my mind no sufficient evidence that the prisoner intentionally gave false evidence.

Before Mr. Justice Norman and Mr. Justice Mitter.

THE QUEEN v. MUKTA SING, APPELLANT.<sup>1</sup>

*Evidence—Judge—Competent Witness.*

1870.  
April 20.

4 B. L. R.

A. Cr. 15.

[13 W. R. 60.]

A Judge is a competent witness, and can give evidence in a case being tried before himself, even though he laid the complaint, acting as a public officer; provided that he has no personal or pecuniary interest in the subject of the charge; and he is not precluded thereby from dealing judicially with the evidence, of which his own forms a part.

NORMAN, J.—The prisoner has been tried by the Judge of Sylhet, and with the concurrence of the assessors found guilty of giving false evidence on the trial of one Gaurkishor for dacoity. He was sentenced to rigorous imprisonment for four years. He appeals.

The evidence given by the prisoner on the trial of Gaurkishor was translated into English, and taken down by the Judge in English. The statement alleged to be false was that he left the station of Sylhet on the 9th of Pash (December 23rd), got to a place called Dewading on the 10th, left Dewading on the 11th, and returned to Sylhet on the 12th. Mr. Cockburn, the Judge, having discovered that this evidence was false, made a complaint against the prisoner before the Magistrate, and was examined by him as a witness. The Magistrate committed the prisoner for trial before the Court of Session on a charge, under s. 193 of the Indian Penal Code, of intentionally giving false evidence in a judicial proceeding. The case came on in due course for trial before Mr. Cockburn, as Judge of Sylhet. On the trial of the prisoner in the Court of Session for giving false evidence, Mr. Cockburn, the Judge, was himself sworn and gave evidence as a witness, and put in and proved the deposition taken by him. In that deposition the name of the month is not given. The prisoner, who is a Manipuri, in his defence, contended that he spoke of the 9th, 10th, 11th, and 12th of some Manipuri month. The Judge, however, proved that though not mentioned in the deposition as taken down, the prisoner spoke of the month of Pash.

The only question is, and it is an important and a difficult one, whether a Sessions Judge sitting and trying cases without a jury, himself the sole Judge of law and fact, can give evidence in a case which he is trying.

On the trial of *Colonel Hacker*,<sup>2</sup> one of the regicides, for high treason, Mr. Secretary Morris and Lord Annesley, who were both in the commission for the trial of the prisoners, came off the bench, and were sworn and gave evidence; it was agreed by the Court that they were good witnesses. They did not return to the bench during the trial of the prisoners against whom they gave evidence. Mr. Taylor says: "A Judge before whom a cause is tried must conceal any fact within his own knowledge, unless he is first sworn; and, consequently, if he be the sole Judge, it seems that he cannot depose as a witness."<sup>3</sup> For this position he cites *Ross v. Buhler*,<sup>4</sup> a case decided before the Supreme Court of Louisiana. "If a Judge be sitting with others, he may then be sworn and give evidence. In the last case, the proper course appears

<sup>1</sup> Appeal against the order of the Sessions Judge of Sylhet.

<sup>2</sup> [This case is approved in *Government of Bengal v. Heera Lall Das* (17 W. R. 39; 8 B. L. R. 422); and referred to in *Queen v. Bholanath Mookerjee* (7 B. L. R. 564; 16 W. R. 28), *Queen v. Donnelly* (1 L. R. 2 Cal. 405), and *Wood v. Corporation of Calcutta* (9 C. L. R. 193; 1 L. R., 7 Cal. 322).—ED.]

<sup>3</sup> 5 State Trials, 1181, note.

<sup>4</sup> Taylor on Evidence, Vol. II., 1197.

<sup>5</sup> 2 Mart., N. S. 312.

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to be that the Judge who has thus become a witness should leave the bench, and take no further judicial part in the trial, because he can hardly be deemed capable of impartially deciding on the admissibility of his own testimony, or weighing it against that of another."

Mr. Taylor seems to consider that there may be some distinction between the case of a Judge, and that of jurors and Peers of Parliament, who must be regarded as much in the light of jurors as Judges.

It is undoubtedly a well established rule that a jurymen may be sworn and examined as a witness, and is not disqualified, by reason of his having given evidence, from continuing to sit as a jurymen, or taking part in delivering the verdict. A case of that sort is mentioned in Viner's Abridgment, Title Evidence H. And on the trial of *Mary Heath*,<sup>1</sup> Proby, a jurymen, was sworn to give evidence to the Court and his fellow-jurors, and gave it accordingly. On trials before the High Court of Parliament, Peers, who have been examined as witnesses, have taken part in the verdict subsequently pronounced. See, for instance, *Lord Stafford's case*.<sup>2</sup> Sir John Howell, Attorney-General in the reign of King William the Third, says: "Every one knows that a Judge in a civil matter tried before him has been enforced to give evidence, for in that particular a Judge ceases to be a Judge, and is a witness, of whose evidence the jury are to judge, though he afterwards reassume his authority, and is a Judge of the jury's verdict."<sup>3</sup> Sir John Howell, in his remarks on the case of *Cornish*<sup>4</sup> already referred to, further says: "Would it not have been easy for Cornish to have got a witness to have said that he heard Rumsey swear at Lord Russell's trials that he was not present at the reading of the declaration. Were not all the Judges who sat upon him, and all the King's Counsels who were against him, present at the Lord Russell's trial, and might he not have subpoenaed them to have testified that matter. Nay, was it not their duty to have done it even without a subpoena." But in that case, even if all the Judges had been examined as witnesses in succession, there would still have been the jury who would have decided on their evidence as judges of fact.

Referring to the case of Colonel Hacker, Serjeant Hawkins, in *Pleas of the Crown*, Book I., Chap. 46, s. 17, says: "It seems agreed that it is no exception against a person giving evidence for or against a prisoner, that he is one of the Judges who are to try him." This passage is cited in Burn's Justice, Title Evidence 4; Bacon's Abridgment, Evidence D 2; Russell on Crimes, Vol. I., p. 988, 3rd Edition; Chitty's Criminal Law, Vol. I., p. 607.

Best, in referring to the same case, says the conduct of Secretary Morris and Lord Annesley may have been a matter of taste and good feeling rather than of right. But, even if that is so, in every one of the cases mentioned it must be admitted that the testimony of the Judge giving evidence would have been submitted to the judgment of some person other than the person giving such testimony. They go undoubtedly to this extent, that a person having to exercise judicial functions may give evidence in a case pending before him, when such evidence can and must be submitted to the independent judgment of other persons, exercising similar judicial functions, sitting with him at the same time.

By s. 14 of Act II. of 1855, it is enacted that the following persons only shall be incompetent to testify:

"Children under seven years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating

<sup>1</sup> 18 State Trials, 123.<sup>2</sup> 11 State Trials, 459.<sup>3</sup> 7 State Trials, 1384.

them truly ; 2nd, persons of unsound mind, who, at the time of their examination, appear incapable of receiving just impressions of the facts respecting which they are examined, or relating them truly."

No exception is made as to a Judge testifying in a case before himself. I find that, after the passing of this Act, in the case of *Tarapersaul Bhutta-charjee*,<sup>1</sup> where the Sessions Judge himself was cited as a witness by a prisoner, and gave his evidence accordingly, it was held that the Judge's jurisdiction was not affected. It should be observed that the trial in this case took place with the assistance of the Mahomedan law officer, who might have given a fatwa acquitting or convicting the prisoner. If the Judge disapproved of that fatwa, and thought that the prisoner should have been convicted when the law officer's fatwa was for an acquittal, he could not himself have sentenced the prisoner, but must have referred the case to the Nizamut Adawlut. See Reg. XXII. of 1817, s. 2.

The cases seem to establish two points : first, that the Judge is a competent witness ; secondly, that the giving of evidence does not preclude him from dealing judicially with the evidence of which his own forms a part.

I think it pretty clear that a prisoner has a right to ask to have the evidence of a Sessions Judge who is trying him taken on a point which he thinks makes in his favour.

Prior to the enactment of the Oode of Criminal Procedure, when a Sessions Judge was trying a case with the assistance of a Mahomedan law officer, it would seem from the case cited, and from the analogy of the English cases referred to, that the Judge might have given evidence in a case tried before himself. By the substitution of a system of trials with assessors, a different species of check was introduced. The assessors give their opinions, which the Judge is bound to record. The Judge must transmit an abstract of the trial to the High Court, and on perusal of such abstract, the Court may call for and examine the record. Or again on appeal, the decision of the Judge on the evidence may be considered or reversed by the High Court.

It may be said in the present case that the complaint in the Magistrate's Court was preferred by the Sessions Judge. It should be observed, however, the complaint is one which could hardly be made, except with the sanction of the Judge under s. 169, Code of Criminal Procedure. The offence charged is triable only before the Court of Session, and, therefore, as such could only be tried before the Judge, Mr. Cockburn ; the evidence being recorded in the Court of Session in English, it is almost certain that cases must occur in which the Judge would be a necessary witness, without whose evidence the case could not proceed.

No doubt, it is extremely inconvenient that a Judge sitting without a jury should try a case in which he himself is the complainant and principal witness. I should have no doubt that if he has any personal or pecuniary interest in the subject of the charge, he is disqualified from trying it. But if that is not the case, if the Judge in making the complaint has merely acted in the discharge of his duty as a public officer, I think we must say that he is not incompetent to try the case.

The only question remaining for us on appeal is, whether the conviction is warranted by the evidence, and we may say that we have not the least doubt of the correctness of the conviction.

We dismiss the appeal.

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<sup>1</sup> N. A. Rep., 1857, Part II., 83,



## Appendix.

*Before Mr. Justice Kemp and Mr. Justice Glover.*

1870.  
Oct. 27.

IN THE CASE OF THE UPPER ASSAM TEA COMPANY v. THOPOOR.<sup>1</sup>

4 B. L. R.  
App. 1.

*Act XIII. of 1859—Breach of Contract to supply Wood.*

A breach of contract to supply wood does not fall within the purview of Act XIII. of 1859.

KEMP, J.—Thopoor was under contract to supply wood to the aforesaid Company on a consideration of rupees 100 advanced to him by the Company. The contract states that he would deliver the wood in June 1869, and in that he would not fail. This is a contract, the breach of which can only be remedied by suit in the Civil Court. The provisions of Act XIII. of 1859 are not applicable. That Act was passed to provide for the punishment of breaches of contract by artificers, workmen, and labourers. The contractor in the present case is not an artificer, a workman, or a labourer.

The order of the Assistant Commissioner is quashed.

*Before Mr. Justice Norman and Mr. Justice Kemp.*

IN THE MATTER OF MAHESH CHANDRA BANERJEE.<sup>2</sup>

1870.  
Jan. 7.

THE QUEEN v. PURNA CHANDRA BANERJEE AND OTHERS.

4 B. L. R.  
App. 1.  
[13 W. B. L.]

THE QUEEN v. KALI SIRKAR AND OTHERS.

*Criminal Procedure Code (Act XXV. of 1861), ss. 66, 68, 76, 188, 207, 222, 224, and 367—Act VIII. of 1869, s. 380—Arrest and Detention of Accused—Arrest and Detention of Witnesses.*

A belief, founded on private and anonymous information, is not "knowledge" within the meaning of s. 68 of the Criminal Procedure Code.

A warrant issued under s. 68, which is a warrant of arrest as described under s. 76 (Form B), is only for the purpose of bringing an accused person before the Magistrate. It is not a warrant for commitment, and does not authorize the detention of a person longer than is necessary for his production before the Magistrate.

To detain him further there must be a fresh warrant under s. 222, charging the prisoner with some offence, on evidence taken on oath or affirmation, and in the presence of the accused.

S. 188 only empowers a Magistrate to issue a warrant for the apprehension of a witness, when he has reason to believe that the witness will not attend to give evidence without being compelled to do so, and it does not empower a Magistrate to commit a witness.

S. 207 gives no power to the Magistrate to call up and examine witnesses for the defence whose names have been given in a list under s. 227, when the prisoners reserve their defence for the Court of Session; but under s. 228, he is bound to summon them to give evidence before the Court of Session.

The necessity of a Magistrate acting in a dispassionate and impartial manner, and not in the spirit of a prosecutor, observed upon.

<sup>1</sup> Reference under s. 434 of the Code of Criminal Procedure from the Deputy Commissioner of Debrogurh, Assam.

<sup>2</sup> [This case is followed in *Abdool Kadir Khan v. Magistrate of Purneah* (20 W. R. 23; 11 B. L. R. Ap. 8); and referred to in *In the Matter of the Petition of Mathuranath Chuckerbutty* (9 B. L. R. 354; 17 W. B. 55).—ED.]

*Mr. Bourke* for the petitioners.

NORMAN, J.—*Mr. Bourke*, on behalf of the parties in these several cases, presented to this Court a petition praying the Court to quash a certain order of *Mr. Grant*, the Magistrate of Bancoah, whereby he directed *Purna Chandra Banerjee*, *Mahesh Goswami*, and *Mahabharat Dobey* to be put on their defence before him, and a certain other order whereby he directed *Kali Sirkar*, *Hari Mookerjee*, *Haru Goswami*, *Ram Chandra Chuckerbutty*, and *Phal Mohan*, to be tried before the Court of Session ; or that, if the Court should be of opinion that there was any evidence against any of the petitioners, the Court should transfer the case for hearing to the Magistrate of Burdwan, or some other Magistrate.

On reading the petition of *Purna Chandra Banerjee*, verified by *Mahesh Goswami*, this Court, on the 26th of October, ordered that the Magistrate should forthwith send up the papers with all the evidence and all orders passed by the Magistrate, and submit to this Court any explanation he might have to offer with reference to the charges made against him in the petitions, and that a copy of the petition and the orders made thereon should be transmitted to the Magistrate, to enable him to submit the explanation required.

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[18 W. B. 1.]

The following outline of the cases in their early stages is taken from the statement of the Magistrate :—

On the 8th of August a complaint was made to the Officer in charge of the Bissenpore Police Station that one *Nanda Dome* had been beaten by the servants of the Banerjees of Ajudhia, and was lying in immediate danger of death. The officer having made an investigation, and having found *Nanda Dome* lying insensible, with some marks of blood on a cloth covering him, but with no visible marks of violence on his body, decided to have him sent for medical inspection to the head-quarters of the sub-division, viz., *Gurbetta*, in *Midnapore*. The *Dome* was removed in a *dooly* to *Bissenpore*, and later on the same day, the 9th, sent on in charge of a constable who had orders to produce him as soon as possible before the authorities (I suppose *Mr. Grant* means the Deputy Magistrate) at *Gurbetta*.

The substance of the complaint, and the fact that the *Dome* had been sent to *Gurbetta* for medical inspection, were duly entered in the station diary of *Bissenpore*.

On the 13th of August the constable who had escorted the *Dome* to *Gurbetta* returned to *Bissenpore*, and reported that the Deputy Magistrate had declined to take up the case as a police prosecution, the case being simply one of hurt, and had dismissed the *Dome*, with the information that he might complain in the usual way if he pleased. On the 15th of August, as no authentic report of the result of any medical examination had been received, the Officer wrote to the Court Sub-Inspector of *Gurbetta* for information. The Sub-Inspector replied that the Deputy Magistrate had refused to take up the case as being merely one of hurt, &c. It is shown that a person, representing himself as *Nanda Dome*, appeared on the 11th before the Deputy Magistrate of *Gurbetta*, but did not desire to prosecute.

On the 13th *Mr. Grant* received information from the District Superintendent of Police that a certain *Dome* had been so beaten by the servants of the Banerjees of Ajudhia that he had lain for days in immediate danger of death, and that his friends begged the interference of the authorities before that event which was momentarily expected, lest by removing the corpse after death the Banerjees should cause all evidence of the crime to disappear. *Mr. Grant* directed the District Superintendent to inquire into the matter, de-

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siring him to employ particular officers to conduct the inquiry. On the 16th, the reports of the two police-officers named by Mr. Grant to conduct the inquiry came before him. These officers conducted their inquiries separately, and made separate reports. The reports, with a letter from the officer who had been in charge of the Bissenpore Police Station, and with the man Nanda Dome, who was alleged to have been beaten, and sent to Gurbetta, were brought before Mr. Grant on the 16th August. The reports were both to the same effect, *viz.*, that Nanda Dome had been beaten; had been taken to Gurbetta; and had been produced before the Deputy Magistrate, who had not taken up the case as a police case, but told Nanda Dome he could himself prosecute, which he was not inclined to do. The man who appeared before Mr. Grant and stated that he was Nanda Dome in Mr. Grant's presence declined to prosecute, whereupon Mr. Grant dismissed him.

Finding that the police-officer, who had been sent with Nanda Dome from Bissenpore to Gurbetta, had reported, on his return to Bissenpore, that he had been fined by the Deputy Magistrate rupees 10 for delay on the road, Mr. Grant called for the proceedings in which the policeman was fined. The return to Mr. Grant's requisition showed that the Deputy Magistrate had not inflicted any fine on the constable, or even noticed the fact of his having delayed on the road.

Mr. Grant says that the distance between Bissenpore and Gurbetta is only 16 miles, the road a public metalled road, with only one unbridged river, which is fordable. On discovering that the policeman, who had started from Bissenpore before noon on the 9th, and ought to have arrived and reported himself the same evening at Gurbetta, did not present himself before the Deputy Magistrate at that place till 10 A.M. on the 11th; that the man in the charge of that policeman, who was supposed to be in an insensible state, unable to stand or move when he left Bissenpore, appeared before the Deputy Magistrate and spoke for himself, Mr. Grant felt convinced that some foul practice had taken place. While considering what steps he should take, he says: "I received privately" (it elsewhere appears that this was by an anonymous petition) information which cleared up the case considerably. It was to the effect that the Banerjees, whose servants, at their orders had committed the assault on the Dome out of which the whole case originated, had taken the sick man out of the hands of the constable while on his way to Gurbetta, had privately removed him, and had prevailed on the constable to allow a substitute to personate the sick man. At the same time I was informed that the sick man had died of his injuries."

In the 2nd, 3rd, 4th, 5th, 6th, 7th, and 8th paragraphs of the petition, it is stated that, on the 16th of August, Nanda Dome was present and withdrew the complaint, and that Mr. Grant himself found that there were no grounds for proceeding further against the petitioners; that since the 16th of August Mr. Grant had not acquired any knowledge of any offence having been committed by the petitioners of which he could legally take cognizance under s. 68 of the Code of Criminal Procedure; that on the 24th of August warrants were illegally issued for the arrest of witnesses for the prosecution, who were thereupon illegally arrested and detained in custody; that on the same day warrants were illegally issued for the arrest of the petitioners, whereupon the petitioner, Mahesh Chandra Banerjee, was illegally arrested, and confined in jail for fourteen days, Purna Ohadra Banerjee for nine days, Kali Sirkar, Hari Mookerjee, Haru Goswami, Ramchandra Chuckerbutty, and Phal Mohan for eight days, between the 24th of August and the 6th of September 1869; that during the fortnight which elapsed between

the issue of the warrants and the 6th of September, several applications were made to Mr. Grant to inquire into the truth or falsehood of any complaints that might have been made, or might be made against the petitioners; that no notice was taken of their applications, though the Magistrate and the police-officers who had made the inquiry were, during the whole of that time, in the sudder station, where the petitioners together with the witnesses were at that time detained in custody; and that the petitioners believe that they were arrested on charges of murder and of grievous hurt; but Mr. Grant would not allow them to inspect the warrants, all which they believe were informal and illegal.

Mr. Grant's explanation is as follows:—

"Acting under s. 68 of the Code of Criminal Procedure, I issued warrants for the arrest of all whom the police reports hitherto made to me had shewn to be concerned, either in the original assault or in the transport of the sick man, under the belief that the sick man had died from the effects of the beating; my warrants referred either to s. 302 of the Penal Code or to that section in connection with s. 109. The persons thus arrested were Mohesh Banerjee, Purna Banerjee, Madhab Dome, Dhankishna, the constable, and the man who had appeared before me calling himself Nanda Dome (whom I believed to be a mere personator of the real Nanda, whom I supposed to have died of his hurts), Mahesh Goswami, and Mahabharat Nagdi. At the same time I ordered warrants of arrest to issue against six persons who had been mentioned in the police reports to me as having identified the above person

Kanai Goswami.  
Dinu Sain.  
Madhab Dome.  
Kailas Dome.  
Tarachand Dome.  
Madhab Chuckerbutty.

Tarrak Roy, head constable.  
Shibu Pattra.  
Jainarayan Mandal.  
Ballai Sheikh.

as the veritable Nanda Dome; these persons, whose names I give in the margin, being arrested at first as witnesses only to speak to Nanda's identity before me, and the warrants being issued under s. 188 of the Code of Criminal Procedure. Again, warrants under the same section were issued against the persons named in the margin, who were understood to be able to give evidence in the matter of taking the sick man out of the charge of the constable. At the same time I gave orders to a certain police-officer to make a fresh investigation and report in the case.

"The accused Mahesh Banerjee was arrested on the 24th of August; Purna Banerjee surrendered himself on the 28th, and Mahesh Goswami on the 27th; Madhab Dome, Dhankrishna, and the questionable Nanda, were arrested on the 28th, and Mahabharat Nagdi on the 29th.

"All those whose names appear in the first marginal list (of witnesses) above given were brought in on the 28th; the witnesses of the second marginal list, on the 29th of August. Mahesh Banerjee, Purna Banerjee, Madhab Dome, the questionable Nanda Dome, and Dhankrishna, were all committed to jail under s. 302, or that and s. 109 combined. Mahesh Goswami and Mahabharat Nagdi, who had at first been arrested under s. 325 only, were committed to jail under the same charge as the above, viz., s. 302, as I found from the reports that they were implicated in the same manner as Mahesh Banerjee and Purna Banerjee. Bail was not permitted to any of the above. The persons named in the first marginal list were, when brought up in custody, after consideration of all the circumstances, which seemed to show that they had intentionally identified to the police, as Nanda Dome, a person who was not Nanda Dome, ordered to be committed to jail on a charge of giving false information, unless they could provide security to the amount of rupees 200 each.

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"Thus far I had acted on two specific sources of information, *viz.*, one the private information received by me on the 23rd of August, and second, the report of the police in the investigation ordered by me on the 13th of August.

"On the 30th of August I received still further information. I was told by a letter from the jailor that two of the prisoners, *viz.*, Madhab and Nanda Dome above-mentioned, wished to see me to make a statement to me. I sent for the two men, and recorded the statement of each; and from information therein received, I issued warrants, under ss. 194 and 101 of the Penal Code, against Kali Sirkar, Hari Mookerjee, Haru Goswami, Ramchand Ohuckerbutty, and Phal Mohan Nagdi.

"At the same time warrants were issued under s. 188 of the Code of Criminal Procedure against Khatu Dome, Haru Dome, and Andarmoodde, a Tamali by caste, as witnesses.

"Of the above accused, Kali Sirkar, Phal Mohan Nagdi, and Hari Mookerjee, were brought in custody on the 1st of September; Ramchand Ohuckerbutty and Haru Goswami at different times on the 6th of September.

"The report made by the officer to whom I had issued orders on the 24th was dated the 29th, Sunday; and on the following day, Munday, I received the fresh information which led me to issue the warrants of that date, and which were executed on the following day, *viz.*, the 1st of September.

"At that date I had in custody every one against whom a warrant had been issued, except Ramchand Ohuckerbutty and Haru Goswami.

"In the meantime, the prisoners had been, by my orders from the commencement, so disposed in jail as to prevent that portion of them, consisting of the Banerjees and their defendants, from communicating with the Domes and others, who, having been first arrested as witnesses, had been afterwards committed to jail as accused of having aided and abetted the Banerjees and their servants.

"This I did because I had almost made up my mind to admit these last as witnesses after all, considering their criminality, if any, was the result of the pressure and compulsion of the Banerjees and their servants, and I wished to prevent the possibility of the latter while in jail tampering with the former. The case was taken up by me judicially on the 6th of September, and the evidence taken by me on that day consisted of that of the four Domes, relations of the assaulted Nanda, who had carried him in the *dooly*, and of the keeper of the *chattri*, where the party lodged after leaving Bissensapore."

But for the Magistrate's own statement it would seem hardly credible that a number of accused persons should have been detained in jail for periods of time ranging from eight to fourteen days, not only without ever having been confronted with their accuser, but without having been informed of the particulars of any charge made against them. Such a proceeding is a violation of the first principles of justice. I now proceed to show that the steps taken by the Magistrate were in direct contravention of the rules laid down by the Code of Criminal Procedure.

The Magistrate assumed to act under the 68th section, which enacts that, except as therein provided, the Magistrate of the district "may, without any complaint, take cognizance of any offence which may come to his knowledge, and may issue a summons, or, in cases where a warrant may issue, a warrant of arrest against the person known or suspected to have committed such offence, in the same manner as if a complaint had been made against such person."

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Now, we have seen that, according to his own statement, the Magistrate issued warrants against Mahesh Banerjee, Purna Banerjee, and others on charges of murder.

By s. 68, the Magistrate is only empowered to take cognizance of an offence which may come to his knowledge. It cannot be contended for a moment that it had come to the knowledge of the Magistrate that the offence of murder had been committed. A gratuitous suspicion or a belief founded on private and secret information contained in an anonymous petition is not knowledge.

Nothing can be more unfair to the prisoners than the mode in which the Magistrate has dealt with the accusation they have lain under. The Magistrate says distinctly that the orders for the arrest of Mahesh Banerjee and Purna Banerjee were founded on private information. If that information was a charge or complaint against the accused, such a charge should only be acted upon when duly recorded by being reduced into writing and signed by the complainant and also by the Magistrate as required by s. 66. It has apparently not been so recorded. The prisoners have had no access to it. To this hour they do not know who is their accuser, or what is the charge which he made against them. In forwarding the record, and in his explanation to this Court, the Magistrate only refers to it as his private information. What that information was, or how obtained, he has not thought fit to tell us: it is, in fact, from a reference in a paper in the vernacular, which we find on the record, that we are led to believe that the private information was contained in an anonymous petition.

The warrant which a Magistrate, acting under s. 68, is empowered to issue in the case of a person suspected to have committed an offence, is a warrant of arrest as described in s. 76 in Form B. This warrant simply authorizes the officer to whom it is addressed to apprehend the party charged or suspected, and produce him before the Magistrate. It is not a warrant of commitment, and does not authorize the detention of the party for any longer period than is necessary for his production before the Magistrate. It is the duty of the officer executing the warrant to bring the party before the Magistrate as soon as possible after his apprehension, when, as the prisoner has been produced before the Magistrate, the warrant has been fully obeyed, and is exhausted. No one can justify any detention of the party charged under that warrant, after he has been produced before the Magistrate. If the accused is to be detained further, it must be under some fresh warrant or order, such as an order of remand under s. 224. A warrant for the further detention of an accused person would be a warrant of commitment under s. 222, directed to some jailor or other person having authority to receive and keep prisoners. The 68th section does not authorize a Magistrate to make out a warrant of commitment. This warrant, which must be in Form C, must state that the prisoner is charged with some particular offence, and must show the authority of the committing officer. Before making out that warrant, the Magistrate must ascertain the existence of a charge, and as that is a matter of fact which must be proved before the Magistrate can fill up the warrant in the form prescribed, he must ascertain the fact by the evidence of a witness or witnesses who must be examined on oath or affirmation, as required by ss. 43 and 193, and in the presence of the accused, as required by s. 194. Before committing an accused person to jail otherwise than for mere temporary custody, as for instance until the arrival of witnesses known to be on their way or the like, the Magistrate is bound to see that upon the evidence some case is made out against the prisoner, or that there are reasonable grounds for believing that he has been guilty of the offence imputed to him.

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If, after the Magistrate has commenced the inquiry, he thinks it necessary to defer the examination or further examination of witnesses, he is empowered by s. 224 by written order to adjourn the inquiry, and to remand the accused person for such time as may be deemed reasonable, not exceeding fifteen days. In the present case there was no question of adjournment of the inquiry. The accused were not brought before the Magistrate at all, nor was the inquiry commenced until the 6th of September, which was the 14th day after the arrest of Mahesh Banerjee, the 9th day after the arrest of Purna Chandra Banerjee, the 8th day after the arrest of the others, and during the whole of that period the above-mentioned accused parties were illegally detained in jail under the warrant of arrest.

I have spoken of the illegal detention of the accused Mahesh Banerjee and others. I now come to the warrants of arrest against witnesses. Under these warrants eleven or more persons were arrested on the 28th and the 29th of August. The warrants are in the following form :—

“Kailas Dome has been cited as a witness ; accordingly you are ordered to seize the said Kailas Dome, and bring him before me without delay.”

It will be seen that they do not state the object or the ground of the arrest. The Magistrate supposes that he was acting under s. 188. But s. 188 only empowers a Magistrate, instead of issuing a summons, to issue a warrant in the first instance, where the Magistrate sees reason to believe, that is, after a reasonable inquiry believes, that the particular witness will not attend to give evidence without being compelled to do so. It was never intended to authorize a Magistrate, without inquiring, to issue warrants by wholesale in lieu of summonses against persons who were understood by him to be able to give evidence, and to shelter himself under the pretence that they would not attend.

A warrant under s. 188 would be a warrant of arrest under s. 76 in Form B. I had occasion some years ago, in the case of a witness improperly arrested and put in irons, to point out that a warrant under s. 188 to be good, and to be in accordance with the Form B, must specify the special matter on which it proceeds.<sup>1</sup> A warrant in Form B, the only one the Magistrate has power to issue, would simply order the production of the witness before the Magistrate, whose duty it would be to examine and discharge him at once.

Of six of the persons so arrested as witnesses, Kanai Goswami, Deno Sen, Madhab Dome, Kailas Dome, Tara Chandra Dome, and Madhab Chuckerbutty, the Magistrate says, “When brought up in custody, after a consideration of all the circumstances, which seemed to show that they had intentionally identified to the police as Nanda Dome a person who was not Nanda Dome, they were ordered to be committed to jail on a charge of giving false information, unless they could provide security to the amount of rupees 200 each.”

On the principles which I have already stated, the committal appears to have been wholly illegal, as it was made by the Magistrate without taking any evidence whatever against the accused. The Magistrate had nothing before him except the police reports and the private information or anonymous letter to which he continually refers.

On the 30th of August Madhab Dome and Nanda Dome being sent for by the Magistrate gave him certain information. The Magistrate took down

<sup>1</sup> 1 W. B., Criminal Circular Orders, 7.

their statements. But those statements are not made on oath or in the presence of any of the accused parties. Mr. Grant says he took down these statements in his executive capacity and not in his judicial capacity. However that may be, he acted upon that information as Magistrate, and forthwith issued warrants for the arrest of Kali Sirkar, Hari Mookerjee, Haru Goswami, Ram Chand Chuckerbutty, and Phal Mohan Nagdi, and at the same time he issued warrants for the arrest of three persons as witnesses, Khatu Dome, Haru Dome, and a moodee whose name the Magistrate did not know. He describes him as a Tamali who keeps a *chattri* at Bankadoho. On the 1st of September all the persons suspected of having committed offences, except Ram Chand Chuckerbutty and Haru Goswami, and nineteen witnesses had been arrested and were in custody. These witnesses were actually detained in custody, under what authority I am wholly unable to understand, from the several dates of their arrest until the 6th of September, and many of them till much later date. Khatu Dome, for instance, was examined on the 29th of September. The Magistrate thinks that he treated the witnesses with some tenderness. He says: "I might have confined all these witnesses in jail, but I did not do so. I left them in comparative liberty in the police lines, where there is excellent accommodation for the purpose, subject only to the surveillance of the police. Only three witnesses whom I had not yet quite determined were criminally implicated in the offences, Madhab Dome, Nanda's brother, about whose identity I had still some doubt, Tara Chand, and Kailas No. 1, were sent to jail."

I have already pointed out that s. 188 does not empower a Magistrate to commit a witness in Form C.

Purna Chandra Banerjee and others in the 6th paragraph of their petition complain that, while they were detained in custody prior to the 6th of September, several petitions were made to the Magistrate to admit them to bail without effect, and that the order of the 6th September, allowing them to be admitted to bail, was so framed as to preclude the possibility of the petitioners availing themselves of it.

Mr. Grant says: "I have no doubt that some verbal motions for admission to bail were made by the petitioner's mookhtears, but no written petitions on this subject were ever presented, and bail was only refused by me on the verbal motions, because there were reasonable grounds for believing that the crimes imputed to the petitioners were such as are not bailable by law. Thus, when Mahesh Banerjee and Purna Banerjee, Mahesh Goswami and Mahabharat Nagdi, were arrested, my information made me reasonably believe that Nanda Dome had died of the effects of the beating which they had given him, wherefore there were reasonable grounds for believing that they were guilty of murder or culpable homicide not amounting to murder, which offences are not bailable. Again, when Kali Sirkar, Hari Mookerjee, Ram Chand Chuckerbutty, and Phal Mohan Nagdi, were arrested, there were reasonable grounds for believing that they had been guilty of abducting Nanda with intent secretly and wrongfully to confine him, and this is not a bailable offence."

I have already pointed out that the Magistrate had no right to cause the detention of the prisoners except under a warrant in Form C; and that before he could legally issue such warrant, it was necessary for him to cause the prisoners to be brought before him, and take evidence.

Had the Magistrate proceeded in regular course, the prisoners would have had an opportunity of applying to be admitted to bail, and the Magistrate, if

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he did not find it necessary to adjourn the inquiry under s. 224, must then have decided upon the evidence, in accordance with the provisions of s. 212, whether the accused should be admitted to bail or not.

The petitioners allege that on the 6th of September the Magistrate made an order that they should be admitted to bail. The petitioners complain that the amount of bail required, which aggregated rupees 96,000 or rupees 65,000 besides their personal recognizances, was excessive, and that the order was accompanied by conditions which rendered it impossible that they should give the required bail.

The conditions were as follows: "The sureties in each case must be zemindars of the district whose names as such are written in the towji of the Collector, and no one zemindar will be accepted as surety for more than one of the accused, i.e. there must be twice as many zemindar sureties as there are accused." This would make it necessary that the accused should find sixteen zemindars to give bail for them. The Judge, upon an application under s. 436, reduced the security required for the appearance of the accused from rupees 96,000 to rupees 6,000.

We may observe that the conditions that the sureties should be zemindars, and that no one zemindar should be accepted as surety for more than one of the accused, throwing unnecessary difficulties in the way of the defendants procuring bail, were illegal, and such as the Magistrate had no right to impose.

Para. 9 complains that the evidence of the witnesses taken on the 6th was not legally recorded, as it was not read over or interpreted to them, as required by ss. 198 and 199.

The note at the foot of each deposition is as follows: "The above deposition was not taken down with my own hand, because I was physically unable to do so owing to the great pain I was suffering from acute inflammation of the parotid gland, but it was taken down from my declaration under my personal direction and superintendence and hearing."

The Magistrate says: "Unfortunately, the requirements of ss. 198 and 199, whereby the deposition must be read over to the witness to be corrected if necessary, and a certificate of its having been so read over, explained, and admitted to be correct by the witness, was omitted. This occurred by pure inadvertence, caused by the unusual mode of procedure, and by the bodily state I was in. I had purposely refrained from reading over the first witnesses' deposition, meaning to recall all the witnesses at the end of the sitting and read over the depositions, with the hope of saving time, but at the end of the sitting, which was a very late one, I overlooked the matter, and thus the omission occurred."

I am not called on to decide whether the omission to read over the evidence to each witness is one by which the accused were so materially prejudiced that a commitment on evidence so taken must necessarily be set aside, notwithstanding the provisions of s. 426. I may say, however, that I should require to consider the case further before I could fully assent to the ruling on this subject in *The Queen v. Issur Raut*.<sup>1</sup> In the present case, if the evidence to which this objection applies, be treated as inadmissible, there is other evidence regularly taken on which a commitment might be rested.

Para. 10 complains that the Magistrate, without notice to the accused, proceeded with the inquiry on the 6th, though requested by the accused to wait until the arrival of their advocate, who was on his way, but had been detained.

<sup>1</sup> 8 W. R., Cr. Rul., 63.

Para 11 contains a very serious charge against the Magistrate. The petitioners say "that the Magistrate considered it desirable that Mahesh Goswami should be particularly identified by a witness named Nodair Chand Dutt, and on the 6th of September 1869, when taking the evidence of the said witness, and immediately after that part of the evidence of that witness, as recorded, in which the witness said, 'I do not recognize the Nagdis. I do not recognize the Domes. I recognize the Gomasta,' the Magistrate rose from his seat, and left the dais on which his seat is placed, and went to the end of the Court room, where the petitioners were in the dock, and brought the said witness with him to the dock, and then asked the witness, 'Do you recognize the prisoners?' and in reply the witness said 'no.' The Magistrate then took hold of the witness by the neck, and pointed out the petitioner, Mahesh Chandra Banerjee, to the witness, and said to the witness, 'Is this Mahesh Baboo?' and in reply the witness said, 'I do not know.' The Magistrate then pointed out the petitioner, Purna Chandra Banerjee, to the witness, and said to the witness, 'Is this Purna?' and in reply the witness said, 'I do not know.' Then the Magistrate struck the petitioner, Mahesh Goswami, in the face, and said to the witness, 'Is this the man?' and in reply the witness said, 'I do not know.' The blow was given with considerable force by the Magistrate, apparently with the intention of inducing the witness to identify the petitioner, Mahesh Goswami." The petitioner says that the assault was witnessed by Dr. Richards, the civil surgeon, Kartick Banerjee, Gowar Mandal, Nudair Chand Chuckerbutty, and others.

The Magistrate repudiates, with the utmost indignation, the charge that he struck the prisoner while in the dock. We are not trying the Magistrate on the charge. But I may say that, for present purposes, I have no hesitation in accepting the explanation of the Magistrate. He says: "I will not here make any appeal to my known character and disposition in disproof of such a monstrous accusation, for I am convinced that those who know me know I could never be guilty of such an offence as that described in the petition, but I will show plainly that this accusation has arisen from a most wickedly coloured and distorted version of facts that I admit did occur, and thus. The witness under examination was a boy apparently under 20 years of age, evidently in a state of great nervousness; and I know that attempts had been made by the accused to tamper with him. He gave his evidence in a frightened, nervous manner, and when asked if he could recognize any of the persons who had come to his shop, he looked at the occupants of the dock, and said he recognized only the gomasta. He was then taken down to the dock in order that he might point out clearly the person whom he recognized. On being taken to the dock, he stood in front of it, trembling and irresolute, not attempting to look any of the accused in the face. Seeing this, I went down to him and encouraged him, and took him from end to end of the dock, and exhibited each of the accused to him in turn, asking if this man was one of those who visited his shop. What I did was this—I went down the dock from left to right. Mahesh Banerjee was the first man. I put my arm through the railing of the dock, which is nearly six feet high, touched him (I believe I laid my hand on his shoulder) in order that the witness might be certain of whom he spoke, and asked him, 'Was this one of the men who visited your shop?' I did the same to the next man, Purna, and so on. But when I got to Hari Mookerjee, just as I was going to bring him forward in the same manner as I did the others, Mahesh Goswami, who was beside or rather behind him, thrust himself forward in a swaggering and impudent manner, and hustled Hari Mookerjee out of my reach. I did not at the moment suspect any motive for this except insolence, but I did not choose that he should

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come forward till I wanted him. I pushed him aside or rather back, and brought forward Hari Mookerjee, whom the witness at once identified as one of the visitors, &c. I did not strike Mahesh Goswami in the face. I did not strike him at all. But as he thrust himself forward just as I was about to bring forward Hari Mookerjee, I thrust him back, placing my hand on his shoulder, and with very little more force than I had used while bringing forward the other accused to the witness."

The Magistrate appeals confidently to Dr. Richards, who was in medical attendance on him, and the numerous other persons present during the sitting, as to the correctness of his version of the facts; impugns the motive of Mahesh Goswami in bringing such a charge against him, and says it was an afterthought, and concocted during his absence in Calcutta.

It certainly is a remarkable fact that on the first application to this Court on the 5th of October, not a word was said as to the assault.

But, accepting the Magistrate's account of the matter, we cannot but lament that he should have so far forgotten his position as to lay hands on prisoners standing in the dock. This act of imprudence appears to have involved him in a species of personal contest with one of those prisoners. He has no right to be surprised if the most unfavourable construction is put on his proceedings by a prisoner subjected to violence at his hands. Taking his own account of the matter, we think his conduct in laying his hands on prisoners in the dock most censurable.

The 12th paragraph complains that on the 6th of September, the Magistrate improperly adjourned the hearing without fixing a day for taking up the case again, as required by the 224th section.

The 15th paragraph of the petition says that, during the inquiry on the 23rd of September, the Magistrate himself declared to the prosecutor that, although directions of the High Court were shown to the Magistrate, directing that a Magistrate should not regard himself as a prosecutor, the Magistrate refused to recognize such directions of the High Court as binding him. The Magistrate admits this. He says: "I did say I was the prosecutor, and that it was impossible I should not be such. I was the chief executive authority in the district: the prosecution had been instituted by my own action in a very special manner under s. 68." The Magistrate refers to a case, *In re Hossein Manjee*,<sup>1</sup> as one in which "the High Court have declared that no Magistrate except the initiating Magistrate has any jurisdiction in cases commenced under s. 68. There was no Government or public prosecutor, and therefore it was an abuse of words to say I was not prosecutor. With regard to the High Court precedent shewn me, I pointed out first that it was an *obiter dictum*, and, secondly, that I doubted the authority of the High Court to adjudicate on a point of purely executive function."

The petitioners further charge that the Magistrate refused to disclose any of the facts connected with the origin of the case, or of the manner in which it came to his cognizance. The Magistrate says: "It is true that I refused to disclose any of the facts connected with the origin of the case, and of the manner in which it came to my cognizance. In so refusing, I only stood on my right. Government would soon become powerless if the secret information and mode of the inquiry adopted in unearthing crime were liable to be proclaimed in open Court. A prosecutor, whether he be a private individual or a Government acting through its police, puts before a Court of Justice

<sup>1</sup> 9 W. R., Cr. Ral., 70.

its case in the form which seems best to it, and if in that form it is not sufficient to vindicate justice, the fault is with the prosecutor. It is not for the Court to command the introduction of matter which the prosecutor does not think fit to present to it, much less is it for the Court to command or allow the production of matter which is by law expressly disqualified from being put before a Court of Justice."

The whole of this argument of the Magistrate appears to me to proceed on a series of misconceptions.

Mr. Grant would have done well to bear in mind, and I hope he will never again disregard the observation of Mr. Justice Trevor commenting on the case of *Somiruddi Shaikh*,<sup>2</sup> "that Magistrates are not prosecutors, that it is their duty to investigate every case thoroughly, examining both sides of every case." It is a most dangerous thing for a Magistrate to assume the character of a prosecutor. It is most difficult for a judicial officer placed in such a position to preserve an attitude of perfect impartiality and to avoid prejudging accused or suspected persons. In following up the traces of crime or supposed crime, the acuteness of the person in hunting down a criminal is taxed to the uttermost; no matter how faint the scent, he must follow the movement of the parties supposed to be guilty. The slightest circumstances tending to bring home the charge of guilt to the accused are full of meaning for him. To bring the accused parties to conviction is a cause of triumph, perhaps involuntary triumph, but it is success. To fail, to allow them to escape, is to be thwarted and beaten. How different is this spirit from the calm impartiality with which it is the duty of a Magistrate to conduct his investigation. But it is in the spirit of a prosecutor zealous to secure a conviction that Mr. Grant has conducted this case. He has taken it up and pursued it as a detective policeman might have done. I shall endeavour to shew elsewhere that Mr. Grant is mistaken in supposing that he alone could proceed with this case.

Mr. Grant's notion that he was at liberty to keep back the knowledge of the contents of the anonymous petition, or whatever else his private information consisted of, is most extraordinary. It may be true that witnesses cannot be examined as to information given by them to the Government for the discovery of the offenders. But the rule is apparently founded on reasons of State policy, and is one of very limited application. I am not aware that it has ever been held to extend to ordinary prosecutions—to any case, in fact, in which the Government is not directly concerned, as it is in offences against the State, or prosecutions for breach of the revenue-laws. It is wholly inapplicable where the information—not merely information privately communicated to the Government to be used or acted upon as the Government or the prosecutor may think fit, which they may perhaps never bring forward in a Court of Justice, but information which has been communicated to a Magistrate, and acted upon by him in his capacity as Magistrate—has formed the ground of orders and warrants under which the party asking the question has been deprived of his liberty, where the questions are these: With what am I charged? Who is my accuser? What does he say against me? Why have you imprisoned me?

The Magistrate writes: "For the satisfaction of the High Court, I do not mind informing them, though I am in no way bound to do so, that my statement had reference to a petition to the Government of Bengal, in which the Banerjee family of Ajudhia were accused of more than one specific crime, amongst them being those the subject of this prosecution, viz., the assault

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<sup>2</sup> 1 W. R., Cr. L., 12.

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on Nada Dome, and his subsequent abduction from the custody of the police. This petition was forwarded to me for disposal through the Commissioner of the Division."

The Magistrate is greatly mistaken if he thinks that he is at liberty to issue a warrant of arrest, detain the party arrested for a considerable time under the warrant, and then keep back from the High Court, whose duty it is to superintend the proceedings of all inferior Courts, the materials which formed the ground of such arrest and detention.

We think that, in justice to the petitioners, we are bound to call for this petition, and to direct that it be placed with the record, so that the accused may have free access to it for the purposes of their defence, or otherwise; and we therefore order the Magistrate forthwith to send up the petition referred to by him, with any other materials on which the warrants of arrest or any of them were based, or on which the Magistrate acted in refusing verbal or other applications for bail.

In the 18th paragraph, the petitioners complain that persons arrested as accomplices were examined as witnesses without a pardon having been tendered to them. But we see no reason to think that the Magistrate was wrong in so examining the witnesses. In the 20th, they state that the Magistrate refused to allow a witness, Sriram Bagchi, a police-constable, to be cross-examined as to the contents of a report made by him on the 9th August.

The Magistrate refers to section 155, and says: "Nothing is more clear than that the report of a policeman is not evidence except against the writer." The reports of policemen may not be evidence of the facts stated therein, but they may be evidence, and very strong evidence, to contradict or explain the policeman's evidence as given before the Magistrate, and an accused party has, therefore, a clear right to cross-examine the policeman as to the contents of such report, and to call for its production if he thinks it necessary to put it in for the purpose of contradicting or discrediting the evidence given by the policeman in Court. We mention this particularly, because the Magistrate says "he did the same in many instances."

The 22nd paragraph alleges that on the 2nd of October the Magistrate asked Kali Sirkar, Hari Mookerjee, Haru Goswami, Ramchand Chuckerbutty, and Phal Mohan Nagdi, whether they wished to examine any witnesses for their defence before him, to which they replied that they did not. Upon this, the Magistrate, in pursuance of the provisions of ss. 233 and 239 of the Code of Criminal Procedure, prepared charges against the accused under the 143rd, 146th, 186th, 201st, 341st, and 365th sections of the Indian Penal Code; the charges were read over, and a copy furnished to the prisoners. The copy so furnished contained in the usual order that the prisoners should be tried by the Court of Session on the said charges. In pursuance of the provisions of s. 227 of the Criminal Procedure Code, the last-mentioned parties were required at once to give a list of witnesses whom they might wish to be summoned to give evidence on their trial before the Court of Session. The parties gave a list of witnesses in writing.

Mr. Grant says: "I then asked the counsel for the accused whether he wished those witnesses to be summoned and examined before me. He said 'no;' that he only required their attendance to give evidence before the Sessions Court."

Mr. Grant adds: "I then exercised my discretion under s. 207 of the Code to summon these witnesses to appear and give evidence before me. I

did this in order that I might prevent the concoction of a false defence. This order was passed designedly under s. 207, but it might also have referred to ss. 201 and 367 as extended by s. 380A of Act VIII. of 1869, both of which sections allow a Magistrate in any stage of a judicial proceeding to summon and examine any witness whose evidence he shall consider essential to the case."

On the 4th of October, the petitioners or their counsel applied to the Sessions Judge to send up the case to the High Court under s. 434. Mr. Grant attended before the Judge, and explained that he had passed no final order. The Judge says: "The Court is of opinion that, if any commitment has been made, the Magistrate has passed a final order, which, under s. 434, may be referred to the High Court. It is very desirable that, where a party has been illegally committed, he should not unnecessarily be brought to trial." The Judge, however, refused to interfere on the ground that no final order for commitment had been made. Now, we desire to observe that, after making an order that the accused person shall be tried by the Court of Session, and after the accused person has given in the list of witnesses whom he may wish to be summoned to give evidence on his trial before the Court of Session, the Magistrate, subject to the provisions of s. 228, is bound to summon the witnesses to appear before the Court before which the accused person is to be tried, that is, the Court of Session. The language of the 227th section is imperative. There is nothing in that section which leaves it open to a Magistrate to prevent a prisoner from reserving his defence for the Court of Session. It is evident that in many instances it might be a great hardship on prisoners to compel them to disclose their defence, perhaps before they have had time to ascertain by what evidence they may be able to support it. The 207th section is relied on by the Magistrate. It has no application to the case before us. The marginal abstract shows very clearly what it means, *viz.*, that it gives a discretion to the Magistrate to take evidence for the defence—the evidence of witnesses offered on behalf of the accused party. Here no witnesses were offered to the Magistrate on behalf of the accused. Ss. 201 and 367, as extended by s. 380A of Act VIII. of 1869, are equally inapplicable. The Magistrate does not pretend to say that he considered the evidence of witnesses named for the defence, or that of any one of such witnesses, essential to the inquiry, as spoken of in s. 201, or to the just decision of the case as mentioned in s. 367. Mr. Grant says: "I asked the advocate for the accused whether the accused wish to have their witnesses heard in defence before me; he replied that he reserved his defence for the Court of Session. I then immediately passed the order for their examination under s. 207." And elsewhere he says: "I did this in order to prevent the concoction of a false defence." Elsewhere again the Magistrate says: "I recorded an order under s. 207, requiring these witnesses to appear on the 6th of October, my object being, by requiring their immediate presence, to prevent what was otherwise certain to happen—the concoction of a story for the defence."

The fact is that the Magistrate had made up his mind of the guilt of the accused, and his object was simply to disable the defendants in any attempt to put forward a defence before the Court of Session, which he chose to assume would be a false defence. That is shown clearly by the manner in which he dealt with the witnesses when brought before him in obedience to the summonses.

On the 9th of October, the mookhtears of the accused, alleging as a reason the absence of counsel for the accused, declined to examine the witnesses.

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The Magistrate then, professing to exercise the power given to him by the 367th section, seems to have asked the two first witnesses if they knew why they were summoned as witnesses. The question is not recorded, but the answer of the first witness, Mr. Cornish, is, "I do not know why the accused have mentioned me as a witness in their defence. I am not personally cognizant of any assault, &c., committed by the accused."

Mr. Weatherall's deposition commences by a similar statement. No questions were put by the Magistrate to any of the other witnesses summoned.

There are two circumstances which, to some extent, explain Mr. Grant's delay in taking up the case. He says: "From the 19th of August I was suffering from inflammation of the parotid gland, ending in an abscess causing me excruciating pain, such as made it quite impossible for me to attend to any but the most routine work, and that at my own house. The disease continued with such virulence that on Sunday, the 5th of September, I was advised to go to Calcutta to undergo an operation. Accordingly, I arranged my departure for the night of the next day, Monday, expressly that I might attend Court that day, and hear and dismiss all the chief witnesses in the case, who had then been nearly a week in attendance. During the whole period from the 20th of August to the 5th September, I had been able to attend office only on four days, and then with the greatest difficulty, and only to dispose of the most urgent business. The 6th of September was the most critical day of the disease, the 12th day of the abscess, and nothing but the absolute necessity of hearing the case made me attend Court. . . . It was necessary for me, if the daring crime committed by the accused was not to be permitted to go unpunished, to take up the case on the 6th September, although my state of pain was such as almost to unfit me for work. . . . For the previous three weeks I had only, on an average, three hours' sleep in the twenty-four, though I had, especially latterly, taken largely of opiates and such like anodynes. During the judicial sitting in open Court on the 6th, I had about a dozen successive poultices applied. The abscess burst about two hours after my leaving Court. It was operated upon the next day in Calcutta by Dr. —, and I remained in Calcutta a week in Dr. —'s hands."

Next the Magistrate supposes that, having originally taken up the case, he could not make it over for trial to any other judicial officer. No doubt, he could not do so under the provisions of s. 36. But it seems to me clear that, though a Magistrate has originated proceedings so far as to issue a warrant of arrest, he may decline to proceed further with the case, and direct the party injured or a police-officer to proceed, or may himself proceed, in the usual way by complaint under s. 66 before any other Magistrate having jurisdiction to receive such complaint. Suppose, instead of inflammation of the parotid gland, the Magistrate, after the issue of a warrant under s. 68, had a paralytic stroke, which incapacitated him altogether from work, could it be said that the prisoner must go free because no other Magistrate could take up the case? Again, suppose a Magistrate were to issue a warrant under s. 68 to apprehend a person for receiving stolen goods, and it should turn out that the goods were the property of the Magistrate himself; or suppose the warrant was to apprehend a person for robbery or murder, and it should turn out that the person robbed or murdered was the wife or son of the Magistrate. There is no ground for contending that under s. 68 the Magistrate must act in a case in which he finds himself to be an interested party. Nor do I think he is bound to proceed in any case in which he finds

it necessary to take upon himself the office of an active prosecutor. The Magistrate considered that there was a ruling of the High Court in support of his view.

The Magistrate has allowed himself to be carried away by misdirected zeal in his efforts to secure the conviction of parties whom he most firmly believed to be guilty, and his judgment may, no doubt, for the time, have been impaired by the great bodily suffering which he was undergoing while the case was pending before him.

There is no doubt that in the condition in which the Magistrate was after taking some formal evidence in each case, he might have remanded the several prisoners under s. 224, till he was in a condition to proceed with the case. But for his illness and the misconception under which the Magistrate appears to have laboured as to his duties, after having instituted a prosecution under s. 68, I should have thought it necessary to remark still more severely on the proceedings of the Magistrate.

The order for the commitment of Kali Sirkar, Hari Mookerjee, Haru Goswami, Ram Chand Chuckerbutty, and Phal Mohan Nagdi, appears to be regular and formal; having made that order, the Magistrate had no power to recall it. I have gone through the depositions, and though I do not express any opinion as to the guilt or innocence of the parties charged, I cannot say that there is not evidence on the record to justify the commitment. If that commitment had been complete, and the case had been transmitted to the Court of Session, I should have felt great difficulty in saying that it should be quashed. But as I am by no means certain that the Magistrate would have proceeded to commit the accused on the evidence as it stands, if his mind had not been influenced, and his judgment warped, by impressions derived from his "private information," as there are questions which, in the interest of justice, ought to have been put to witnesses examined for the prosecution before the accused were committed on the principal charge, particularly a question to the Deputy Magistrate of Gurbetta, as to whether or not he could recognize Nanda Dome as the man who appeared before him, and as Mr. Grant himself treated the inquiry as not concluded by summoning and issuing warrants for the attendance of witnesses after drawing up the charges, at the foot of which is the order for commitment, I think the Court is not bound to do anything to carry out that order. I do not feel myself bound to send back the case to Mr. Grant, in order that he may complete the commitment, issue the summonses to the witnesses, and transmit the record to the Court of Session.

From the manner in which the investigation has been conducted, and the state of antagonism in which Mr. Grant has placed himself as regards some of the accused, I think that it would not be satisfactory that the case should proceed further before him. I think that the Government of Bengal should be requested to depute a Magistrate from Burdwan or some other adjoining district to take up the case. Should the Government think fit to depute a Magistrate for this purpose, an order will issue that the case be transferred for trial before such officer. Should there be a difficulty as to the deputation of a Magistrate for this purpose, the case will be transferred to the Court of the Magistrate of Burdwan. In either case the Magistrate will, of course, take up the case afresh from the commencement. If any of the prisoners are committed for trial to the Court of Session, the Magistrate will, of course, commit them for trial before the Judge of West Burdwan.

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**KEMP, J.**—The four prayers of this application as stated by the learned counsel for the petitioners are :—

*1st.*—That this Court will see fit to quash the order of the Magistrate of Bancoorah, directing the accused Purna Chandra, Mahesh Goswami, and others, to be put upon their trial before the said Magistrate.

*2nd.*—That this Court will see fit to quash the order of the said Magistrate directing the commitment to the Sessions Court of Kali Sirkar and others.

*3rd.*—That the whole case, supposing there be any evidence upon which to go to trial, be transferred to another Magistrate.

*4th.*—That the Court will see fit to refer the whole case to His Honor the Lieutenant-Governor of Bengal, with the view to the removal of Mr. J. P. Grant from the office of Magistrate of Bancoorah.

I concur generally in the remarks made in the elaborate judgment of Mr. Justice Norman. It is to me clear that the Deputy Magistrate before whom the case first came saw no ground for proceeding against the accused.

The Magistrate admittedly acted upon private information. He has not been candid enough to disclose the source of his information, but on reading over the vernacular papers, I accidentally came upon a perwanna addressed by Mr. Grant to a subordinate officer, from which it appears that Mr. Grant acted upon information conveyed by an anonymous petition.

The accused were not even informed, as they most certainly ought to have been, of the nature of the charge made against them, nor of the source of the "knowledge" upon which the Magistrate professed to act. Some of the accused, highly respectable men, were kept for many days in confinement upon a charge originating in an anonymous petition.

Their applications to be admitted to bail were met by a demand for bail to such an extent and under such extraordinary conditions as to amount to a positive denial of justice.

The grave illegalities and irregularities in the proceedings of the Magistrate have been pointed out by Mr. Justice Norman. I am of opinion that the ends of justice require that the order of the Magistrate directing the accused to be put upon their trial before him be quashed : and, further, that the order of commitment, for the reasons given by Mr. Justice Norman, must also be set aside.

The whole case has not been tried in a fair and proper manner. There may be evidence, if credible (and of this I give no opinion), warranting a commitment, but I am clearly satisfied that this evidence must be taken *de novo* by another officer, and for this purpose I would direct the transfer of the case to the file of the Magistrate of East Burdwan. This officer ought, in my opinion, to be instructed to take up the case as "a fresh case, and to try it, and, if necessary, to commit the accused to the Sessions Judge of the same district. I understood the learned counsel during the argument to say that he would not press for a reference to His Honour the Lieutenant-Governor of Bengal, if this Court passed orders for the transfer of this case from the file of the Magistrate of Bancoorah. But for this, I should have considered it my duty to refer the whole proceedings of the Magistrate of Bancoorah, which I consider to have been illegal, arbitrary, and unjust, for the orders of His Honor.

I concur with Mr. Justice Norman in thinking that the Government of Bengal should be addressed with the view of obtaining orders for the deputation of the Magistrate of East Burdwan, or other competent officer, to try

this case. It would be very harassing to the witnesses in the case who reside in West Burdwan to direct them to appear before the Magistrate of East Burdwan.

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*Before Mr. Justice Loch and Mr. Justice Sir C. P. Hobhouse, Bart.*

IN THE MATTER OF GOLAM ARFIN AND OTHERS.<sup>1</sup>

*Unlawful Assembly, Member of—Penal Code (Act XLV. of 1860), s. 149.*

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*Feby. 19.*

4 B. L. R.  
App. 47.

Where a person was killed by a member of an unlawful assembly, in prosecution of the common object of that assembly, the common object being the abduction of that person's mother, *held* that all those who were members of the assembly at the time such person was killed were guilty of the offence of killing her. [13 W.R. 33.]

Baboo *Ashutosh Dhur* for appellants.

LOCH, J.—Of the five prisoners who have appealed in this case nothing has been said in favour of Golam Arfin, who, it is admitted, is proved by the evidence to have been the person who struck the blow which caused the death of the deceased. With regard to the other prisoners, it is urged that the murder of the deceased was not the common object of the parties, but their common object was, as has been found by the Judge, the abduction of Rupa Bibi; that Ferman Bibi, her daughter, in trying to prevent Rupa Bibi being carried off, was struck down by Golam Arfin, and as this murder was not the common object of all the other prisoners, they are entitled to a mitigation of the punishment awarded by the Judge.

Looking at the terms of s. 149 of the Indian Penal Code, we find that, "if an offence is committed by any member of an unlawful assembly, in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence." Now, the facts of this case are not denied. It is proved that the prisoners did come to carry off Rupa Bibi; that they were at that time members of an unlawful assembly; that they came armed; and that one of their members did strike down and kill Ferman Bibi with a weapon similar to that with which all of them were armed. Nor can it be doubted that the members of this assembly knew that such a result would follow the attempt which they were about to make to carry off Rupa Bibi, and they were prepared to resist any attempt that might be made to prevent them from accomplishing their design, and they were prepared to use just such a lethal weapon as one of the members of that assembly did use, and thereby caused the death of Ferman Bibi. It appears to us, therefore, that the finding of the Judge is correct, and that the sentence passed upon the prisoners is a proper one, and that this appeal must be dismissed.

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<sup>1</sup> Appeal No. 72 of 1870, from a sentence passed by the Sessions Judge of Backergunge, dated the 26th November 1869.

Before Mr. Justice L. S. Jackson and Mr. Justice Markby.

QUEEN v. GAGALU MAGALU, AND OTHERS (PRISONERS).

1869.  
Dec. 21.

4 B. L. R.  
App. 50.

[12 W. B. 80.]

*Criminal Procedure Code, ss. 209, 210, 211, and (Act VIII. of 1869), s. 369—Deposition of Dead Witness—Tender of Pardon to prisoner.*

When it is proposed to read the deposition of a witness alleged to be dead, the death of the witness should first be strictly proved, unless it is admitted on the other side, and the reading of the deposition not objected to.

Procedure as to tendering a pardon to a prisoner before examining him as a witness, discussed.

Mr. Cowell for appellants.

The facts and the arguments in the case sufficiently appear in the judgment delivered by

JACKSON, J.—The appellants in this case have been convicted in a trial by jury, in Assam, of the offence of murder. The Judge, though entirely disapproving of the verdict, has passed sentence of transportation for life upon the prisoners, and the prisoners have now appealed upon the ground that the direction of the Judge to the jury contains both absolute errors in the way of misdirection, and also errors of omission, such as to invalidate that direction, and to make it the duty of this Court to set aside the proceedings, and order a new trial.

The learned counsel who appeared for the appellants set forth what he considered to be the errors both of omission and commission on the part of the Judge, and proposed to read to us the evidence on the trial, in order to show that the prisoners had been prejudiced by those errors, and that the case was one in which this Court ought to interfere. The case of *Elahi Buksh*<sup>1</sup> was very much referred to. The learned counsel read portions of the judgment of the Chief Justice as indicating the principles on which this Court would proceed in dealing with such cases. But it seems to me impossible to lay down with precision in what cases this Court may and ought, and in what cases it may not and ought not, to interfere with the direction of the Judge so as to set aside a trial by jury after verdict has been given. I do not think it necessary in this case to go *seriatim* into the grounds which the learned counsel has laid before us, because, I think, we must deal with each case upon its own merits; and taking, as we are bound to take, the charge of the Judge to the jury as a whole, say whether its tendency has been upon the whole to give a correct or incorrect direction to the mind of the jury. Applying that test to the case before us, I think I am bound to say that there is no such error in the charge of the Judge as ought to induce us to interfere with the proceedings. I think the Judge has in no way led the jury to attach undue weight to any portion of the evidence. On the contrary, I think that he has taken throughout a favourable and merciful view of the case towards the prisoners, and that it would be an altogether misplaced rule for us to apply to the direction of a Judge in a Mofussil Court the same criticisms which we would to a charge of a Judge in an English Court of Assizes. I think, therefore, that the grounds of appeal, as regards the whole of the prisoners in relation to the Judge's direction, must fail.

I have been reminded by my learned colleague, Mr. Justice Markby, of an objection to which I think I ought to advert separately. That is an objection taken to the admission of the evidence of a witness, named Oruna. It is objected in regard to this witness that he was not examined by the

<sup>1</sup> 5 W. R., Cr., 80.

Court of Session, but that his deposition was received and read at the trial upon its appearing to the Court that the witness was dead, when in fact there was nothing before the Court in the shape of proof to show that he was dead. By s. 369 of the Code of Criminal Procedure, it is provided that "the examination of a witness taken and attested by the Magistrate in the presence of the accused person may be given in evidence, if the witness be dead, or the Court be satisfied that, for any sufficient cause, his attendance cannot be procured." I think that, in order to make the evidence of a deceased witness legally admissible, provided that the admission of that evidence is questioned, it is necessary strictly to prove the death of the witness. I think it would be quite competent to the counsel for the prisoner at the time of the trial to admit the death of the witness, and to dispense the prosecution from proving that circumstance, and I think the Court might, upon such admission, allow the evidence to be read; and I do not think it would be for the prisoner upon appeal to complain that his counsel had made that admission improperly. Upon this point, therefore, I think no valid objection to the proceedings in appeal is made out.

There is another and separate objection which relates to the case of one of the prisoners, named Magalu. The point in question is that the Court of Session, acting under the powers contained in s. 210, Act VIII. of 1869, being the Act to amend the Code of Criminal Procedure, during the trial, tendered a pardon to this prisoner; that the prisoner made some statement to the Court; and that thereupon the Court, instead of ordering the commitment of the prisoner under s. 211, withdrew the tender of pardon, and ordered the trial to proceed as if no such tender had been made. It is contended that it was not open to the Court to take that course, but that the trial of Magalu ought to have stopped; and although it would proceed in regard to the remaining prisoners, that prisoner ought to have been re-committed, and proceedings taken in respect of him *de novo*.

I think that, under ss. 209, 210, and 211, the procedure, if properly and completely carried out, must be this. The Court, or Magistrate, must tender a pardon to the prisoner, explaining to him the conditions which accompany that tender. It is for the prisoner then either to accept or refuse the tender. If he refuse, the tender will have been abortive, and the trial would proceed as if no such tender had been made; if he accept, it is the duty of the Court, as pointed out in s. 209, to examine him as a witness in the case under the rules applicable to the examination of witnesses, and then, if after having so examined him, the Court be of opinion that he has not complied with the conditions, the Court may then commit or order him to be committed for trial upon the charge in respect of which pardon was tendered. Now, as to what took place on the present occasion, I confess I have some doubt—though a slender doubt—as to whether the prisoner did accept or refuse the pardon offered to him. I am inclined to think that he did refuse. It is clear, however, that if he did accept, the subsequent proceedings of the Court in respect to that prisoner were irregular, and the trial was probably void in regard to him. I think, therefore, that before we can make any further order in respect to this prisoner, it will be necessary to call upon the Judicial Commissioner; and I propose that he be called upon to state whether, upon the tender of pardon being made to Magalu, he accepted or refused the tender so made, that is, whether the words used by the prisoner, namely, that "he knew nothing of the case," amounted to an acceptance of the tender of pardon, and subsequent imperfect compliance with the conditions of it; or whether they were meant to be, and were looked upon, by the Judicial Commissioner, as a refusal to make any communication, and, there-

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MAGALU,  
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App. 50.

[12 W. R. 80.]

fore, a refusal of the tender of pardon. Upon the Judicial Commissioner making an answer to this question, and so completing the record, we shall be in a position to deal further with the case of this prisoner.

MARKBY, J.—I am of the same opinion. I think there was no misdirection, and that there was no error in admitting the deposition. Upon the other point, our opinion must await the result of the inquiries which have to be made.

The following order was passed on the prisoner Magalu on the 1st April 1870 :—

It appears from the proceeding submitted by the Judicial Commissioner that the prisoner Magalu refused the tender of pardon made to him. It is clear, therefore, that the point taken by the learned counsel for the prisoner does not arise, and the conviction being good in other respects it is affirmed.

*Before Mr. Justice Norman and Mr. Justice Bayley.*

QUEEN v. HARIDAS KUNDU AND OTHERS.<sup>1</sup>

*Registration of Document—Offence—Act XX. of 1866, s. 95.*

1870.  
Feb. 12.4 B. L. R.  
App. 69.

[13 W. R. 21.]

A Sub-Registrar under Act XX. of 1866 has no power to investigate regarding the committal of an offence committed before him in the registration of any document, but should cause the complainant to proceed, under s. 66 of the Code of Criminal Procedure, before the Magistrate, or before an officer authorized to receive such complaint.

The sanction of the Registrar, under s. 95, Act XX. of 1866, relates to a prosecution to be instituted by the Sub-Registrar for an offence under the Act.

THIS was a reference to the High Court, under s. 434 of the Criminal Procedure Code. The facts sufficiently appear in the judgment of the Court, which was delivered by

NORMAN, J.—A bond having been registered on the 28th of January 1869 before the Sub-Registrar of Madaripore, purporting to have been executed by Kamalakant Guho, four months afterwards, viz., on the 28th of May, Kamalakant presented a petition to the Magistrate, stating that the document was a forgery, and praying for an investigation.

On receiving this complaint, it would, no doubt, have been the proper course for the Sub-Registrar to have caused the complainant to proceed under the 66th section of the Code of Criminal Procedure, either before the Magistrate of the district, or before himself, if he is authorized to receive such complaints without reference from the Magistrate. However, he proceeded to investigate the allegation of Kamalakant, as Sub-Registrar; and after reference to the Registrar of Backergunge, drew up a rubakari, addressed to himself, as Deputy Magistrate, to whom he transferred the papers for judicial enquiry. This, again, was irregular. The sanction of the Registrar, under s. 95 of Act XX. of 1866, is to a prosecution to be instituted by the Sub-Registrar for an offence under the Act. The Sub-Registrar did not prosecute, but took up the case as Magistrate. His next step was to issue summonses against Umatar, the prisoners Radhanath Dey, Krishna Charan Banerjee, and three other persons. We think the proceeding can be sustained as one taken under the powers of s. 68 of the Code of Criminal Procedure, it having been brought to the notice of the Magistrate, though by the irregular enquiry which had taken place before him, that an offence had been committed. Witnesses were examined on the 10th and 28th of September,

<sup>1</sup> Reference under s. 434 of the Code of Criminal Procedure.

and the 26th and 30th of October, and the 9th November, and the prisoners Radhanath Dey and Krishna Charan Banerjee committed for trial on the 10th November. That commitment appears to us to be regular, and there are no sufficient grounds for quashing it.

But, on the 9th of November, Haridas Kundu was examined as an accused person, and committed for trial on the following day, the 10th, no charge having been previously made against him. The witnesses upon whose evidence he was committed for trial were not apparently examined in his presence, nor had he any opportunity of cross-examining them. It is clear that there is nothing to justify the commitment of Haridas Kundu, which must, accordingly, be quashed.

We desire that Kamalakant Guho be informed that he must proceed in the usual way by a complaint before the Magistrate against Haridas.

It will probably be desirable to stay the trial of the other prisoners until after Haridas shall have been committed, or discharged by the Magistrate, and if he is committed, that the Sessions Judge should try the cases of the three prisoners together.

*Before Mr. Justice L. S. Jackson and Mr. Justice Markby.*

**THE QUEEN v. MAHIMA CHANDRA CHUCKERBUTTY**  
(PRISONER).<sup>1</sup>

*Witness of the Accused—Act XXV. of 1861, s. 265.*

Conviction set aside on the ground of the Magistrate's irregularity in refusing, in a trial before him, under Chapter XV. of the Criminal Procedure Code, to allow the examination of a witness who had been tendered on behalf of the accused.

*Baboo Narsing Chandra Mitter for petitioner.*

The judgment of the Court was delivered by  
JACKSON, J.—In this case one Mahima Chandra Chuckerbutty was charged before the Cantonment Magistrate of Dun-Dum with criminal trespass. There were several other persons also charged with the same offence. These parties were convicted, and the Magistrate, considering that Mahima Chandra Chuckerbutty was the principal offender, sentenced him to rigorous imprisonment for one month, and the other parties concerned to less periods of imprisonment. Against these sentences, under s. 411 of the Code of Criminal Procedure, no appeal could lie. Mahima Chandra Chuckerbutty, accordingly, presented a petition to the Sessions Court of the 24-Pergunnas, praying that his case might be sent up for revision to the High Court, and the Sessions Judge accordingly referred the case to this Court by his letter No. 103, dated the 11th of December last. The substance of the Judge's letter was that he found no such irregularity in the proceedings as would necessitate a reference to the High Court, and that, although he considered the punishment awarded excessive, that, in his opinion, would not justify him in recommending a revision of the proceedings. "But," he said, "the appellant has set forth in his petition various facts with reference to which

<sup>1</sup> Criminal Reference, No. 103, from the Judge of 24-Pergunnas, dated the 11th December 1869.

<sup>1</sup> [Overruled by *Queen v. Narayan Naik* (5 B. L. R. 660; 14 W. R. 34). Approved in *Queen v. Grish Chandra Ghose* (7 B. L. R. 513; 16 W. R. 40). Distinguished in *Queen v. Unesh Chandra Chowdhry* (5 B. L. R. 160; 14 W. R. 1). Followed in *Iwar Chandra Koer v. Umesh Chandra Pal* (8 B. L. R. 19). Referred to in *Queen v. Surendra Nath Roy* (5 B. L. R. 274; 13 W. R. 27), *Queen v. Mahima Chandra Chuckerbutty* (7 B. L. R. 26; 15 W. R. 45), and *Queen v. Haru* (9 B. L. R. 146; 18 W. R. 18).

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KUNDU,

4 B. L. R.  
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[13 W. R. 21.]

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4 B. L. R.  
App. 77.

[12 W. R. 77.]

1869.

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CHUCKER-  
BUTTY,4 B. L. R.  
App. 77.

[12 W. R. 77.]

he alleges that the Cantonment Magistrate, actuated by a personal feeling, has treated him with great and unnecessary severity and injustice. This allegation, so far as the facts are concerned, is borne out by the record; and I think the excessive bail demanded by the Magistrate, and the subsequent detention of the appellant on a charge of this petty nature, is deserving of censure, and in the view of this treatment it appears to me that the High Court may be of opinion that the imprisonment which the defendant has already suffered is sufficient for the offence of which he has been convicted." Now, it appeared to me, and also to Mr. Justice Markby, that this was a recommendation of the Judge on which we could not possibly act. The Judge was of opinion that no such irregularity had taken place in the proceedings as to warrant an interference by this Court by way of revision; but on a consideration of certain allegations of misconduct against the Joint-Magistrate, he proposed to us to take such conduct into consideration, and upon that ground to mitigate the sentence passed upon the petitioner. This, as we intimated on a former occasion, it was impossible for us to do, because, in the first place, it would be impossible for us to make any order on such allegations of misconduct without hearing what the Joint-Magistrate had to say by way of explanation or defence; and, in the next place, such acts of misconduct, if made out, might be ground for the Lieutenant-Governor, or other proper authority, making such order as might be required in regard to the Joint-Magistrate, but would not be ground for our reversing a conviction legally arrived at.

But the vakeel, who appeared for the petitioner in this Court informed us that he was prepared to make a substantial application to the Court, and to show ground upon which the Court ought to interfere by way of revision, and set aside the conviction.

Accordingly we have heard him this morning. He has stated to us two grounds on which his application was to proceed. The first of these is, that the Magistrate has irregularly and illegally examined the defendant, or the accused person, in this case, although, as the trial before the Magistrate was one under the 15th chapter of the Code of Criminal Procedure, the law does not allow any such examination. He has pointed out, and I think correctly, that a Magistrate holding a preliminary investigation under the 12th chapter of the Code, and a Magistrate holding a trial of an offence within his jurisdiction under the 14th chapter of the Code, are distinctly empowered by ss. 202 and 250 to put questions to the accused and to examine him as they may consider necessary, and the Court of Session has similar power in regard to persons on trial before that Court; but the Procedure Code<sup>1</sup> makes no such provisions in respect of parties under trial under the 15th chapter.

It is not easy to say, owing to the mode in which the examination of the accused has been recorded, to what extent this examination was carried, nor, perhaps, is it easy to say how far he has been prejudiced by such examination. But I think it unnecessary to give any positive opinion upon this point, inasmuch as the next ground on which the application proceeds is in my opinion sufficient to enable us to dispose of this case. That ground is that set forth in the petition to the Court of Session, namely, that when the petitioner was under trial, the Magistrate, upon a witness of his, named Tiluck Singh, being tendered for examination, refused to examine that witness, or put him upon his oath, but merely put certain questions in an informal way to the witness, and deciding that the evidence he was likely to give was not material, refused to proceed further, or to examine him as a

<sup>1</sup> The omission is supplied by Act VIII. of 1869, s. 262A.

witness. It is quite manifest that such a refusal on the part of the Magistrate was altogether irregular, and was likely to prejudice the prisoner in a very serious degree. That the Magistrate did so, we are assured not merely by the affidavit annexed to a previous petition presented to this Court which came before the Chief Justice and Mr. Justice Mitter upon an application to remove the case during trial to another Magistrate's Court, but is also further stated by the vakeel himself, who is before us to-day, and who was present in Court during the proceedings before the Magistrate.

I attach the greatest importance to this statement made to us by the vakeel, because I consider that it is made under a sense of the responsibility which that gentleman must feel in making such a statement to us, knowing that we should feel bound to accept that statement on the guarantee of his character and of his responsibility to the Court; and, therefore, although we might hesitate in fully accepting such a statement made merely on the affidavit of an interested party, when that affidavit is corroborated by the statement of a gentleman practising in this Court, I think we are bound to act upon it. His statement is most clear and unequivocal. What he says is nearly in these words: "I myself was a witness to the fact, namely, of the Magistrate's refusal to examine that witness. On the 17th November the case for the prosecution closed. Next morning the Magistrate asked what was the defence, and the Magistrate proceeded to examine the defendant, though I protested against his doing so. He then called upon the Court Inspector to produce the list of witnesses filed by the defendant, and then said he was not going to waste his time by examining some 10 witnesses. I said I must exercise my right of examining such witnesses as I think proper; but, of course, I would not call witnesses I did not consider material. Tiluck Singh was the first witness produced. The Magistrate said, 'Let us see what this man knows.' He (the witness) said something I do not recollect. I asked the Magistrate to put the witness on his oath. The Magistrate said that was not material. I then said, 'The Court has a question of fact to consider, and a grain might turn the scales.' The Magistrate still refused to examine the witness."

It appears to me that this is an irregularity which is quite fatal to the conviction had upon the trial. It would be most unsafe for a Magistrate or Judge to attempt to ascertain by such a mode as this what the nature of a witness's testimony was likely to be, and it would also be impossible for a Magistrate to determine in this rough way, beforehand, what the effect of such testimony a witness was giving might be, when he came to consider the evidence on both sides, and to determine whether the prisoner was or was not guilty. The Magistrate was clearly bound, as provided in s. 266 of the Code of Criminal Procedure in such a case, to proceed to hear the accused person, and such witnesses as he might produce in his defence, and I think the refusal in this case was the less justifiable, inasmuch as the accused had the benefit of the advice of a pleader of this Court, who must be supposed to have understood what was necessary and right to be done for his client's defence, and also to act under a sense of his responsibility as such pleader. I think, therefore, that upon this ground, and without entering into the further questions which might be raised upon this application, we are bound to set aside the conviction, and to order the petitioner immediately to be discharged.

MARKBY, J.—I also think that this conviction must be quashed. It appears to me that the course taken by the Magistrate in refusing to examine a witness who was formally tendered on behalf of the accused, was absolutely illegal, and that no conviction, after such a course taken by the Magistrate,

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can be supported. I observe that the Magistrate suggests as a ground for taking the course he did, that the time of the Court would thereby be wasted. It is quite needless, I think, to point out that that would be no ground whatever for violating the law. It also seems to me that the ground does not exist, for, as has been already pointed out, the vakeel who was present pledged himself not to waste the time of the Court. Under any circumstances the Court ought to have accepted that undertaking. I also think that any Judge who conducts business with tact and patience will find little difficulty in preventing time being wasted by the examination of useless witnesses, without violating the established rules of procedure.

Before Mr. Justice L. S. Jackson and Mr. Justice Glover.

## THE QUEEN v. GOBARDHAN BHUYAN.

1870.

April 9.

4 B. L. R.  
App. 101.

[13 W. B. 55.]

*Private Defence, Right of—Penal Code—ss. 97, 99, 102—Charge, Altering after Accused pleads Guilty.*

The right of private defence as described in s. 97 of the Penal Code is subject to the restrictions mentioned in s. 99, that is, it should be exercised only in the defence of one's own body or that of another person against an offence affecting the human body. Under s. 102, the right commences only on a reasonable apprehension of danger to the body caused by an attempt or threat to commit an offence; and by s. 99, cl. 4, the right is restricted to not inflicting more harm than it is necessary to inflict for the purpose of defence.

When an accused pleads guilty to a charge already framed, the Sessions Judge has no power to alter the charge upon the evidence in the record. Upon a charge of murder the accused pleaded "guilty"—the Sessions Judge, taking into consideration the circumstances of the case, reduced the charge to homicide not amounting to murder. *Held*, that the proceeding was illegal.

JACKSON, J.—The prisoner in this case was charged with the murder of Jaguvo Bhuyan, and he pleaded "guilty." On that plea, the Judge, considering it unnecessary to hold a formal trial, proceeded to take into consideration the circumstances which appeared in the depositions taken by the Magistrate, and thereupon reduced the plea of "guilty," which he had recorded, to a plea of guilty of the offence of culpable homicide not amounting to murder; and for this purpose, he has, in favour of the prisoner, brought the case within the second exception appended to s. 300 of the Indian Penal Code, which defines the offence of murder. That exception is in these words: "Culpable homicide is not murder, if the offender, in the exercise, in good faith, of the right of private defence of person or property, exceeds the power given to him by law, and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence."

The facts, as they appear from the depositions, are, that the accused and the deceased, with a third person, met one day at a liquor shop, and there drank together; that they afterwards walked in company, the third person just mentioned being a little ahead of the other two; and that, while these two were walking together, an altercation took place in respect of the deceased person having, as alleged by the prisoner, caused the death of the prisoner's four children by his incantations. According to the prisoner's account, the deceased admitted that he had so caused their death, and added that he would also bring about the death of the prisoner; in short, that he would not allow him to quit that jungle, but would cause him to be taken by a tiger. Thereupon the prisoner states that he killed the deceased with several blows of a heavy *lati*.

The Judge, looking upon the accused as an ignorant savage, who probably believed that the deceased had the power of bringing about his death in

the way mentioned, considers the accused to have acted in the exercise of his right of private defence, but that, in the exercise of that right, he went further than the law allowed, and therefore brings him under the second exception of s. 300.

It seems to me that this view of the case is altogether untenable. The right of private defence is described in s. 97 of the Indian Penal Code, and it is there stated that "every person has a right, subject to the restrictions contained in s. 99, to defend his own body and the body of any other person against any offence affecting the human body." "Offence" denotes a thing made punishable by the Penal Code. And the third restriction contained in s. 99 is that "there is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities;" and s. 102 provides that "the right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence," though the offence may not have been committed. I think, making every allowance for the possible ignorance of the accused, it cannot be said that there was any reasonable apprehension of danger to the body from the idle words used by the deceased man when perhaps excited by drink.

Moreover, the fourth restriction contained in s. 99 provides that "the right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence." It seems to me, therefore, that in every point of view the plea gratuitously set up for the prisoner by the Judge is untenable, and that the exception relied on will not apply.

But, in any case, the proceedings of the Sessions Judge appear to have been irregular. Upon the prisoner pleading guilty, the Judge might, if he had thought fit, have convicted him upon his plea, and therefore he must have convicted him of the offence of murder to which he had pleaded guilty; but if he did not think fit to convict him upon that offence, he should have proceeded to try him, and thereupon he would have had to take all the evidence forthcoming, in order to determine whether the prisoner had committed the offence of murder, or any other offence with which he was charged.

There was, it seems, an eye-witness of what took place, and although that witness was not perhaps sufficiently near to have heard the words which passed between the accused and the deceased, he could have given very important testimony in the case; and at any rate, as he actually saw the accused inflict the blows which undoubtedly caused the death of the deceased, it would have lain open to the prisoner to bring himself within any exception which could reduce his offence from murder to a crime of less gravity.

I think, therefore, we have no choice but to quash the proceedings, and direct that the prisoner be again brought before the Court of Session, and that the Judge either convict him on his plea or proceed to try him on the several heads of charge.

GLOVER, J.—I concur. There can be no doubt that the Sessions Judge has taken an entirely wrong view of the law.

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# Bengal Law Reports.

## [APPELLATE CRIMINAL.]

Before Mr. Justice L. S. Jackson and Mr. Justice Glover.

THE QUEEN v. CHANDRA SEKHAR ROY.<sup>1</sup>

*Contempt of Court—Penal Code (Act XLV. of 1860), s. 174—Code of Criminal Procedure (Act XXV. of 1861), s. 171—Power of Subordinate Magistrate.*

1870.  
April 23.

5 B. L. R.  
100.

[18 W. R. 66.]

A Subordinate Magistrate has no power to try an offence punishable under s. 174 of the Penal Code committed against his own Court, but is bound, under s. 171 of the Code of Criminal Procedure, to send the case, if in his opinion there is sufficient ground for investigation, to a Magistrate having power to try or commit for trial.

*Baijoo Baul v. Gugin Misser* and *The Queen v. Gugin Misser*<sup>2</sup> overruled.

THE following point was referred, for the opinion of the High Court, by the Officiating Sessions Judge of East Burdwan, to whom it had been referred by the Magistrate :—

A Subordinate Magistrate, not in charge of a sub-division, and not empowered under Act X. of 1854 to receive complaints without reference from the Magistrate of the district, summons certain witnesses in a case which has been made over to him. The witnesses, notwithstanding that they have received the summons, fail to appear. Can the Subordinate Magistrate, under s. 171 of the Code of Criminal Procedure, proceed, without reference to the Magistrate of the district, to summon and try these witnesses on a charge of having committed an offence under s. 174 of the Penal Code; or must he make over the case to some Magistrate who (if not the Magistrate of the district himself) has power to try such cases, without reference from the Magistrate of district?

The Magistrate, in referring the point, said : “The only two High Court rulings on this point that I can find are *Baijoo Baul v. Gugin Misser*<sup>2</sup> and *Queen v. Tajumaddi Lahori*.<sup>3</sup> In the former of these rulings it is laid down that, as s. 171 authorizes a Magistrate to send such case to a Magistrate having jurisdiction, he may, of course, send the case to himself; but I understand this to mean that he can send the case to himself, only if he has jurisdiction to try it. There is nothing in the ruling quoted to show whether the Deputy Magistrate alluded to was or was not in charge of a sub-division, and specially empowered under Act X. of 1859. In the second ruling it was laid down that the Deputy Magistrate having referred the case of contempt to the Magistrate of the district, the Magistrate of the district could not refer the case back to the Deputy Magistrate for trial, but must try it himself. If this latter ruling be correct, it surely is inconsistent that a Subordinate Magistrate should have power, on his own motion, to take up a case which the Magistrate of the district has no power to refer to him. Lastly, I do not think it

<sup>1</sup> Reference, under s. 434 of the Code of Criminal Procedure, by the Officiating Sessions Judge of East Burdwan, under his letter No. 26, dated the 26th March 1870.

<sup>2</sup> [This case is distinguished in *Queen v. Heeralal Dass* (8 B. L. R. 422; 17 W. R. 39); followed in *Chutoorbhoj Bharthee v. Mr. Macnaghten* (15 W. R. 2); *Tarraprosad Sahoo, Reference in the Case of* (15 W. R. 88); and referred to in *In the Matter of the Petition of Government of Bengal* (9 B. L. R. 342).—Ed.]

<sup>3</sup> 8 W. R., Cr. E., 61.

<sup>4</sup> 1 B. L. R., A. Cr., 1. [See p. 1 of this book.]

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was ever the intention of the Legislature to confer on an inexperienced officer (say one who has only just arrived in the country) the power of taking up cases of contempt against his own Court and punishing the accused without the knowledge of the Magistrate of the district."

The Judge in his reference to the High Court said: "I do not agree with the Magistrate. I think that the Assistant Magistrate is empowered to enforce his authority in his own Court, and punish under s. 174 of the Indian Penal Code, any one who, being legally bound to appear under a summons or subpoena, intentionally omits to attend. In the schedule to Act VIII. of 1869 any Magistrate is authorized to try such cases. I consider that the ruling in *Baijoo Baul v. Gugun Misser*<sup>1</sup> confirms the above expressed opinion. The other ruling referred to by the Magistrate of *Queen v. Tajumaddi Lahori*<sup>2</sup> does not, in my judgment, apply to this case."

The following opinion of the High Court was delivered by

JACKSON, J.—It appears to me that the opinion expressed by the Magistrate in making this reference is correct, and that the Assistant Magistrate, against whose Court an offence punishable under s. 174 of the Indian Penal Code was committed, was not competent to take cognizance of that offence, but was bound, under s. 171 of the Code of Criminal Procedure, if he was of opinion that there was sufficient ground for investigating such charge, to send the case for investigation to a Magistrate having power to try or commit for trial; and it seems to me that the section just mentioned clearly contemplates the sending of such case before a Magistrate, not being the Magistrate against whose Court the offence was committed.

It is, undoubtedly, true that, in *Baijoo Baul v. Gugun Misser*,<sup>1</sup> I held a different opinion; but, on reconsidering the matter, I think that that opinion was incorrect; and having consulted Mr. Justice Hobhouse, who was the Judge sitting with me on that occasion, I have his authority for saying that he concurs with me in overruling that case. It appears to me now that the provisions of s. 171 recognize the general principle that no one should be a judge in a case in which he is himself interested. The only exceptions to that rule which are allowed are to be found in s. 163, where, from the necessity of the case, a Court, civil, criminal, or revenue, is empowered to take immediate and summary notice of offences of certain descriptions committed in view or in the presence of the Court itself; and in s. 172, where the Court of Session is empowered "to charge a person for any such offence," that is, offences of the kind specified in ss. 168, 169, and 170, "committed before it, or under its own cognizance, if the offence is triable by the Court of Session exclusively, and to commit or hold to bail and try such person upon its own charge," probably the exception in favour of the Court of Session is based upon the fact that that Court either acts with the aid of assessors or tries by jury.

The case of *Queen v. Tajumaddi Lahori*<sup>2</sup> has been referred to. It appears to me that there has been some misconception as to the ground on which that case was decided. I do not, therefore, refer to it as an authority; but for the reasons just stated, I am of opinion that the Assistant Magistrate was not competent himself to deal with the case, but he ought to have sent it for trial before another Magistrate.

<sup>1</sup> 8 W. R., Cr. R., 61.

<sup>2</sup> 1 B. L. R., A. Cr., 1. [See p. 1 of this book.]

## [APPELLATE CRIMINAL.]

*Before Mr. Justice Bayley and Mr. Justice Markby.*THE QUEEN v. RAM CHANDRA MOOKERJEE.<sup>1</sup>*Act XXV. of 1861, s. 62—Nuisance, Removal of—Power of Magistrate.*1870.  
May 14.5 B. L. R.  
131.

[13 W.B. 72.]

Under s. 62 of the Code of Criminal Procedure, a Magistrate has no power to issue an order, *ex parte*, to cut down trees, on the representation of a party, supported by the report of the police, that the existence of the trees was a nuisance.

THE following reference was made by the Judge of the 24-Pergunnas, under s. 434 of the Criminal Procedure Code:—

"I have the honor to submit the papers of a case in which Baboo Sama Charan Chatterjee, the Deputy Magistrate at Bashirhat, has sentenced one Ram Chandra Mookerjee to a fine of rupees 25, or simple imprisonment for one month, for disobeying an order issued under s. 62 of the Criminal Procedure Code. I cannot interfere with the sentence, as the Deputy Magistrate has full powers; but in my opinion the order should be set aside.

"It appears from the record of the case that, on the 4th December last, Utam Chandra Chatterjee complained to the Deputy Magistrate that some clumps of bamboos growing close to his house produced sickness by stopping ventilation, and were likely to cause injury to the house. The owner of the bamboos was Ram Chandra Mookerjee, and the petitioner produced a copy of an order passed by the Deputy Magistrate in September 1866, by which Ram Chandra was desired to remove certain bamboos growing near the house of the petitioner. On receipt of this petition, the Deputy Magistrate desired the police to examine the spot, and report the facts.

"On the following day the police reported that the bamboos ought to be removed for police as well as for sanitary purposes; and suggested that the owner might be directed to remove them, receiving compensation from Utam Chandra Chatterjee.

"On the 10th January, the Deputy Magistrate issued an order, purporting to be an order under s. 62 of the Criminal Procedure Code, directing Ram Chandra to remove the bamboos within a month; and threatening him with punishment in case of disobedience.

"On the 28th January, Dinabandhu, the son of Ram Chandra, presented a petition on the part of his father, stated to be sick, in which he prayed that the Deputy Magistrate would visit the spot, and ascertain from personal inspection whether Utam Chandra had any reasonable ground of complaint. The order on this petition is, that the Deputy Magistrate had already visited the spot, and that a second inspection was unnecessary.

"On the 11th February, the Deputy Magistrate held a proceeding, in which, setting forth the order issued a month previously under s. 62, and observing that it had not been obeyed, he directed that a charge should be preferred against Ram Chandra under s. 188 of the Penal Code.

"On the 4th February, that is, six days before the date of this proceeding, Dinabandhu had asked for the appointment of arbitrators, and the Deputy Magistrate, observing that the case could not legally be submitted to a jury, yet allowed him as a favour to name jurors. On the 14th he did name jurors, but it does not appear that any jury was appointed; and on the 7th

<sup>1</sup> Reference under s. 434, Act XXV. of 1861, from the Sessions Judge of 24-Pergunnas, by his letter No. 57, dated the 30th April 1870.

<sup>1</sup> [This case is referred to in *Gopi Mohun Moulík v. Taramoni Chowdhurani* (4 C. L. R. 309; I. L. R., 5 Cal. 7).—ED.]

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and 16th March, the Deputy Magistrate recorded evidence on the charge under s. 188, and on the 23rd March passed sentence.

"The Deputy Magistrate had no legal power to order the removal of the bamboos, and therefore he had no power to punish Ram Chandra for disobedience to it. It may be that the bamboos amount to a public nuisance, for I am satisfied that the bamboos do injuriously affect the atmosphere under certain circumstances; but it is evident from the order of the 4th February that the Deputy Magistrate did not consider them to come within the provisions of Chap. XX. of the Criminal Procedure Code. On the case, as it appears from this record, the Deputy Magistrate, when he issued the order under s. 62, could not have been satisfied that Utam Chandra had reasonable ground for asking for the removal of the bamboos; and might have left it to Utam Chandra to remove his own house, if he found the situation unhealthy. If one man erects a building which intercepts light and air from the dwelling of another, the latter has his remedy in the Civil Court, and not under s. 62. S. 62 is a wide and dangerous provision of the law; necessary it may be, but requiring to be watched, that it may not become an engine of oppression. It appears to me that the proceedings of the Deputy Magistrate in this case have been arbitrary and unjust, and I recommend that they be set aside *ab initio*."

The following was the opinion of the High Court:

MARKBY, J.—In this case the Deputy Magistrate, having the full powers of a Magistrate, directed one Ram Chandra to cause the removal of certain bamboos, because (as we gather), in the opinion of the Deputy Magistrate, they were injurious to the health of a neighbour who had complained to the Deputy Magistrate. The bamboos were growing on Ram Chandra's own land. Some attempt was subsequently made to induce the Deputy Magistrate to proceed, not under s. 62, but under s. 308, and to appoint a jury. It is not very clear what steps the Deputy Magistrate took upon that application, but a jury was, in fact, never appointed. Subsequently, the bamboos not having been removed, proceedings for disobedience to the order of the Deputy Magistrate were taken against Ram Chandra, and he was sentenced to pay a fine of rupees 25. The case has been sent up to us by the Sessions Judge for consideration, with a view to its being set aside. The operation of s. 62 has already been greatly restricted by the construction which this Court has put upon it in the case of *In the Matter of Hari Mohun Malo v. Jai Krishna Mookerjee*.<sup>1</sup> It was there held that, in any of the cases specified in s. 308, the Magistrate had no discretion, but was bound to follow the more special directions of that section, which gave to the owner of the property an opportunity of showing cause before it can be removed or affected. The case before us is not one of those specified in s. 308; this decision, therefore, does not apply.

It is impossible, however, to suppose that the Legislature intended to give to a Magistrate summary power to issue, without hearing the party concerned, an order such as that issued in this case, by which a man's property would be greatly injured, and could not be restored to its original condition, should it afterwards turn out that the Magistrate was wrongly informed, or that he had acted under a wrong impression. We think that the Magistrate has no power, under s. 62, to issue any order which is by its very nature irrevocable. All that he has power to compel the owner of property to do is "to take certain order" with it. That does not appear to us to extend to an order to cut down a large quantity of trees. We find that a somewhat similar view has been taken by this Court in the case of *Queen v. Sheik Golam Durbesh*.<sup>2</sup>

<sup>1</sup> 1 B. L. R., A. Cr., 20. [See p. 13 of this book.]

<sup>2</sup> 1 B. L. R., S. N., 27. [See p. 46 of this book.]

We, therefore, consider the conviction was founded on an illegal order ; and that the conviction as well as the original order of the Deputy Magistrate ought to be set aside, and the fine, if paid, restored.

[APPELLATE CRIMINAL]

*Before Mr. Justice Kemp and Mr. Justice E. Jackson.*

THE QUEEN v. UMESH CHANDRA CHOWDHRY.<sup>1</sup>

*Act XXV. of 1861, ss. 66, 273, 439—Complaint to be reduced to Writing—Irregularity in the Commencement.*

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On receipt of a petition from the complainant, the Magistrate, without examining him and reducing his examination into writing, and obtaining his signature thereto, or appending his own signature as Magistrate, referred the petition to a Deputy Magistrate for trial. The Deputy Magistrate tried and convicted the accused. [14 W. R. 1.]

On a reference from the Sessions Judge, on the ground that the proceedings were irregular under s. 66, Act XXV. of 1861, and that, therefore, the order of the Deputy Magistrate was without jurisdiction, *held*, that the petition was sufficient, and that the Magistrate was justified in making over the petition to a Deputy Magistrate, who had the full powers of a Magistrate, for enquiry and trial.

*The Queen v. Mahim Chandra Chuckerbutty*<sup>2</sup> distinguished.

THIS was a reference to the High Court from the Sessions Judge of Beerbhoom, under s. 434 of the Criminal Procedure Code. It was as follows :—

“The parties in each case presented petitions to the Magistrate of the district, who, without examining the parties, and reducing the examination into writing, and without obtaining the signatures of the complainants, or appending his own signature as Magistrate, referred the petitions to the Deputy Magistrate for trial, the said proceeding being contrary to the provisions of s. 66,<sup>3</sup> Act XXV. of 1861. The Deputy Magistrate proceeded to the trial of the cases, and in one case convicted the defendants of rioting under s. 147 of the Indian Penal Code, and sentenced them to pay fines varying in amount, and in default to undergo rigorous imprisonment for one month. In the other case he convicted the defendant under s. 379 of the Indian Penal Code, and passed a sentence on the defendant of one month's simple imprisonment.

“Under s. 411, Act XXV. of 1861, neither of these orders are open to appeal. It is, however, quite clear that the Magistrate acted irregularly in not recording the examination of the complainants as provided for under the provisions of s. 66, Act XXV. of 1861 ; nor is it apparent that the Magistrate acted under the provisions of s. 66B, Act VIII. of 1869. A ruling of the High Court has also been quoted by the pleader who has requested the reference under s. 434, and in which similar proceedings were held to be irregular,

<sup>1</sup> Reference under s. 434, Act XXV. of 1861, from the Sessions Judge of Beerbhoom, dated the 16th May 1869.

<sup>2</sup> 5 B. L. R., A. Cr. 67 ; but see the case (p. 131 of this book).

<sup>3</sup> *Act XXV. of 1861, s. 66.*—“When, in order to the issuing of a summons or a warrant against any person for any offence, a complaint is made before the Magistrate of the district, or a Magistrate who is authorized to receive such complaint without reference from the Magistrate of the district, such Magistrate shall examine the complainant. The examination shall be reduced into writing, and shall be signed by the complainant and also by the Magistrate.”



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viz., the *Queen v. Mahim Chandra Chuckerbutty*.<sup>1</sup> According to this precedent, no complaint in either of the cases submitted having been made within the meaning of s. 66, the reference of the cases under s. 273,<sup>2</sup> Criminal Procedure Code, by the Magistrate to the Subordinate Magistrate for trial, appears to be illegal, and consequently the proceedings of the Deputy Magistrate being without jurisdiction are, therefore, liable to be quashed, and the defendants discharged. In looking also into the evidence adduced on behalf of the prosecution in either case before the Deputy Magistrate, it can hardly be considered sufficient to substantiate the charge and support the conviction.

"I am well aware that, under s. 439 of the Criminal Procedure Code, no trial is liable to be set aside merely for irregularity of procedure, but, under the precedent quoted above, and which appears to be directly in point, I have no alternative but to submit the two cases in question for the consideration and orders of the High Court."

The opinion of the High Court was delivered by

KEMP, J.—In the case referred to by the Judge, there was a statement, but it was not such a statement as to amount to the complaint contemplated by s. 66 of the Code of Criminal Procedure.

In the case referred to us, the Magistrate sent the petition presented by the complainant to the Deputy Magistrate who exercises the full powers of a Magistrate. We think that, under s. 66 of the Procedure Code, and the Circular Order No. 6, dated 16th May 1864,<sup>3</sup> the Magistrate of the district was justified in making over the petition to the Deputy Magistrate for inquiry and trial.

<sup>1</sup> 3 B. L. R., A. Cr., 67; but see the case (p. 131 of this book).

<sup>2</sup> *Act XXV. of 1861, s. 273*.—"Criminal cases brought before the Magistrate of the district, or a Magistrate in charge of a division of a district, either on complaint preferred directly to such Magistrate, or on the report of a police officer, may be referred by such Magistrate to any Magistrate subordinate to him."

<sup>3</sup> The Circular Order contained the following rules:

2.—"A Judge shall not be engaged in any other business whilst the examination of a witness is going on, or whilst any documentary evidence is being read.

3.—"If, after the examination of a witness has commenced, the Judge be compelled to attend to any other business, the examination of the witness shall be suspended as long as such other business is being attended to.

4.—"The examination of a witness shall not be interrupted for the purpose of enabling the Judge to attend to other business, unless such business be of an urgent nature.

5.—"If the evidence be not taken down by the Judge, he shall, at the time that the evidence is being given by the deponent, make a memorandum in his own hand-writing of the substance of what each witness deposes. Such memorandum shall be written legibly in the vernacular language of the Judge, or in English, at the option of the Judge, if he is sufficiently acquainted with that language, and it shall be signed by the Judge, and dated, and shall form part of the record, and be always sent up with the record to the Appellate Court in the event of an appeal."

## [APPELLATE CRIMINAL]

*Before Mr. Justice Phear and Mr. Justice Mitter.*IN THE MATTER OF THE PETITION OF SURENDRA NATH ROY  
AND OTHERS.<sup>1</sup>1870.  
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[13 W. R. 27.]

THE QUEEN v. SURENDRA NATH ROY AND OTHERS.

*Magistrate—Arrest—Warrant—Complaint—Remand—Commitment—Bail—Criminal  
Procedure Code (Acts XXV. of 1861 and VIII of 1869), ss. 68, 77.*

S. 68 of the Criminal Procedure Code applies only to cases in which the private individual injured or aggrieved does not come forward to make a formal complaint. That section is intended for the purpose of enabling a Magistrate to take care that justice may be vindicated, notwithstanding that the persons individually aggrieved are unwilling or unable to prosecute; and even in such cases the jurisdiction to arrest requires, for its foundation, knowledge of the fact of an offence having been committed, and that knowledge must be either personal or derived from testimony legally given. The report of the police, or any statement which falls short of an actual formal complaint, or of a statement made on oath, is not sufficient in law to give a Magistrate jurisdiction to issue his warrant.

Under s. 77 of the Criminal Procedure Code, a Magistrate ought not to issue a warrant to an unofficial person, except when he is without the assistance of competent police officers, and unless the urgency is imminent.

The force of a warrant of arrest is at an end when the prisoner is brought before the Magistrate; and the prisoner cannot lawfully be committed to prison or remanded without sufficient grounds; and in the absence of evidence, there can be no grounds.

In this case, although the Magistrate had acted illegally before evidence was recorded, and had shown a want of discretion in some of the stages, the High Court refused to quash the Magistrate's order directing the prisoners to be put upon their defence, on the ground that the order had been made by a competent officer after hearing evidence which was judicially received and recorded.

Mr. Ghose (with him Baboos Mahendra Lal Shome and Grish Chandra Mookerjee) moved to make absolute a rule nisi, which had been issued, on the 24th of January 1870, by PHEAR and E. JACKSON, JJ., on the petition of Surendra Nath Roy and others.

The following order was made by the Court, while granting the rule nisi, on the 24th January :

PHEAR, J.—Let the record of this case be sent up without delay, and let the rule nisi issue to the prosecutor, Nabin Roy, to show cause, within fifteen days after the service upon him of the rule, why the orders of the Magistrate of the 15th and 17th instant should not be quashed upon the grounds mentioned in the petition, or why the case should not be transferred to some other Magistrate for investigation, as prayed; and, in the meantime, let all further proceedings before the Magistrate be stayed. A copy of the order and petition must be forwarded to the Magistrate with the intimation that, if he wishes it, he will be heard at the hearing of the rule, and that he may send to this Court any explanation of the matters of the petition which he thinks fit.

<sup>1</sup> Miscellaneous Criminal Case, No. 6 of 1870, from Nuddea.

<sup>1</sup> [This case is distinguished in *Queen v. Omesh Chunder Chowdhry* (14 W. R. 1) and referred to in *Muthoora Nath Chuckerbutty v. Heera Lal Doss* (17 W. R. 39; 9 B. L. R. 354) and *Panna Lall Mookerjee, Petitioners* (19 W. R. 4).—ED.]

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The following is the petition, with the material portions of the written explanation on it, submitted by Mr. Monro, the Magistrate :

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TION OF  
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## PETITION.

EXPLANATION BY THE  
MAGISTRATE.

RESPECTFULLY SHEWETH,

That your petitioners are defendants in the above-named case, at present pending in the Court of Mr. J. Monro, Officiating Magistrate of the Nuddea District.

[13 W. R. 27.]

1. That your petitioners have been informed that, on or about the 18th of August last, a petition was presented to the Joint-Magistrate of Nuddea, by one Gopal Roy, alleging that one Nabin Roy had been attacked, on August 14th, 1869, by some of the defendants in the above-named case, and others, at Kamalhati, in the district of Nuddea, and thence carried away by force ; and praying that steps might be taken for the release of the said Nabin Roy, who was then missing.

2. That the said Gopal Roy presented another petition on the 28th of August last, praying for an inquiry into the circumstances detailed in his former petition, but to the knowledge of your petitioners neither Gopal Roy nor any one else was examined, either by the Magistrate or Joint-Magistrate of Nuddea, on the matter of the petition of the said Gopal Roy, before the 2nd of November last.

3. That, about the 24th of September last, Mr. J. Monro, the Officiating Magistrate of Nuddea, issued a warrant, directing one of your petitioners, Surendra Nath Roy, now one of the defendants in the above-named case, to arrest and forward, to the said Officiating Magistrate, your petitioners, Mahesh Hari, Paika Hari, Harish Ghose, and Dwarik Ghose, some of the defendants named above.

4. That, in obedience to the said warrant, your petitioner, Surendra Nath Roy, arrested and made over your petitioners, Mahesh Hari, Paika Hari, and Harish Ghose, to Mr. Monro, at Muragacha, on or about the 27th September last.

5. That Mr. Monro then directed your petitioners, Paika Hari, Mahesh Hari, and Harish Ghose to be sent to *hajut* (jail), refusing a verbal application which was then made on behalf of your petitioners to have them released on bail.

6. That, on or about the 7th of October last, your petitioner, Surendra Nath Roy, in obedience to the warrant aforesaid, forwarded one of your petitioners, Dwarik Ghose, to Mr. Monro, who was then at Krishnaghur.

*Paras. 1 to 8 of the Petition.*—The facts are, on the whole, not incorrectly stated, although some modifications are necessary. The action taken by me was not based on any proceedings held before the Joint-Magistrate, of the existence of which I was not aware till recently, when I went into camp. On the 14th of August, a complaint was made at the Nakaspara Station, by one Trailakhanah Roy, alleging that a dacoity had been committed in the Kamalhati Catcherry, and his brother Nabin Roy carried off. Police investigation followed, and went on without any trace of the missing Nabin Roy for a long time.

When I was in camp, in September, at Muragacha, the police reported to me that although they had tried every means in their power they could not arrest any of the accused, Mahesh Hari, Dwarik Ghose, Paika Hari, Harish Ghose, &c., as they were concealing themselves.

The man Nabin was still missing, and upon the police report and the statement of the missing man's brother, who appeared before me at Muragacha, I issued an order to Surendra Nath Roy, whose ryots the accused were, forwarding a warrant for their arrest, and directing him to produce them as persons accused of dacoity, &c.

Three of the men were produced as stated, and were remanded to *hajut* on the 22nd September, their production within fifteen days being ordered.

I am not aware that any application for their release on bail was then made. The fourth man, Dwarik Ghose, was produced on the 7th October, and on that day an application for the release on bail of the men previously remanded was made, and refused for reasons recorded.

Up to the 2nd November, the police had not been able to find any trace of the missing Nabin Roy, and until they did so find him, they sent up no evidence against the accused.

I was not aware of the petition made by Gopal Roy. I had before me the fact of the man Nabin Roy having been missing for some months, and of the accused being implicated in the crime of having made away with him. The case being of

## Petition—(contd.).

## Explanation—(contd.).

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7. That another application was made to Mr. Monro at Krishnaghur, for the release, on bail, of one of your petitioners, Dwarik Ghose, as well as of your petitioners who were committed to custody at Muragacha as aforesaid, but this application was also rejected.<sup>1</sup>

8. That your petitioners, Mahesh Hari, Paika Hari, Harish Ghose, and Dwarik Ghose, were kept in *ajam* until the 2nd of November last, i.e., the first three for about 34 days, and the fourth for about 26 days, merely on suspicion, and without any evidence being recorded against your petitioners in the presence of your petitioners.

9. That, on the 2nd of November last, your petitioners and other defendants were ordered to appear before Mr. Monro, at Krishnaghur, and on that day a portion of the deposition of the said Nabin Roy, who, it was alleged, had been missing, was taken by Mr. Monro.

10. On the same day, i.e., the 2nd of November, your petitioner, Surendra Nath Roy, of Sonadanga, was made a defendant, and was committed to custody, after only a portion of Nabin Roy's evidence had been recorded. That an application for the release on bail of your petitioner, Surendra Nath Roy, was made on that day, but it was rejected by Mr. Monro, on the ground that a strong *prima facie* case had already been established against your petitioners, under ss. 365 and 368 of the Indian Penal Code, for offences which were not bailable.

11. That, on the 3rd of November, the application for bail on behalf of your petitioner, Surendra Nath Roy, was renewed, but Mr. Monro refused to reconsider the order he had made the day before.

such a serious nature, I did not think myself justified in accepting bail.

The men were constantly brought up before me, and I remanded them formally as entered in the Magistrate's *Ajam* book. It would, undoubtedly, have been more regular if the police had sent up evidence sooner. But as the whole case turned on the finding of Nabin Roy, and their whole exertions were directed to finding him out, their failure to send up witnesses is intelligible.

It would also have been more regular if I had examined witnesses, but I did not know what witnesses from among those mentioned in the police reports the police intended to produce. As above stated, I did not think myself justified in letting the accused out on bail, until some tidings had been received of the missing man.

*Paras. 9 to 14.*—The facts are correctly stated, and I am not aware that any illegality is alleged to have been committed, or any bias shewn by me at this stage of the proceedings. I declined to release the accused Surendra Nath on bail, as I considered the deposition of Nabin Roy afforded grounds for believing in the existence of a *prima facie* case against him under ss. 365-8 of the Penal Code in addition to other charges.

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<sup>1</sup> The order passed by Mr. Monro on this petition was as follows: "The four men, Dwarik Ghose, Paika Hari, Harish Ghose, and Mahesh Hari, have been arrested in a case which is at present pending inquiry before the police. The case is one of kidnapping and illegally confining a *tehsildar*; the kidnapped man has not been found; there is no knowing what has become of him. It is quite possible that he has been murdered. I do not, therefore, feel justified in accepting bail for the accused, who may, at any time, find themselves on their trial for murder, until it is clearly shown that Nabin is alive, and that they had nothing to do with his being abducted with the intention that he should be unlawfully confined (s. 368). At present there seems sufficient grounds to implicate them in such an unbailable offence. Bail is, therefore, refused."

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*Petition—(contd.).**Explanation—(contd.).*

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12. That, on the 4th of November last, the evidence of the said Nabin Roy was concluded, and after the examination on the same day of three or four more witnesses, the hearing of the case was adjourned for about a week by Mr. Monro, who gave your petitioners to understand that the investigation into the case was then going on, and that it was quite uncertain what length of time that investigation might occupy.

13. That, on the order for adjournment, as aforesaid, being given, an application for the release of your petitioner, Surendra Nath Roy, on bail, was made, but it was rejected by Mr. Monro.

14. That, in the meantime, that is, on the 4th November last, an application for bail on behalf of your petitioner, Surendra Nath Roy, was made to the Sessions Judge of Nuddea, but that officer having declined to interfere with the Officiating Magistrate's order at that stage of the proceedings, your petitioner, Surendra Nath Roy, applied to this Honorable Court, and was by this Court ordered to be released on bail.

15. That your petitioner, Surendra Nath Roy, has been informed that the said order of this Honorable Court reached Mr. Monro at about 3 P.M. of the 10th of November last, while he was in Court, but he went away to his house without ordering the release of your petitioner, Surendra Nath Roy, who was, consequently, not let out on bail until the next day. Your petitioner, Surendra Nath Roy, has been further informed that a mooktear on behalf of your petitioner, Surendra Nath Roy, went to Mr. Monro at his house, on the afternoon of the 10th of November, to remind him of the said order of this Honorable Court, but Mr. Monro declined to receive any application on the subject in his house.

*Para. 15. —* The statement is untrue, and is an attempt to insinuate that I have shown disrespect to the order of the High Court, which I would not do; and that I have tried to manifest a petty piece of spite towards the accused, which I am confident the High Court will consider me incapable of committing.

I received the order in Cutcherry at 3-45 P.M. I left Cutcherry at the usual time, and before I left Cutcherry I sent the order to the District Superintendent, who received my order at 4-10 P.M.

I am not aware that any mooktears came to my house to remind me of the order; if they did, it is not improbable that my chaprasis refused them admittance, as I do not do Cutcherry work at my house. Admitting that they did come, I had already issued orders, and needed no reminder.

It would have been such a contemptible abuse of power to detain a man ordered to be released, a few hours in prison, that I can only express my indignant repudiation of the possibility of any such conduct on my part. The only reason why Surendra Nath Roy was not released on that day was, so far as I know, the non-production of sureties. As soon as they appeared, his release was imme-

*Petition—(contd.).*

16. That, on the 2nd of November last, after the first portion of the evidence of the said Nabin Roy was recorded, Mr. Monro directed that the witnesses who had then been sent by the police should be kept in custody in Mr. Monro's house. Among the witnesses so kept, was one Kristo Charal, who was made a defendant the next day, but who, on the 3rd day, sat with the witnesses, and not with the defendants, although afterwards she was treated as a prisoner.

17. That your petitioners have been informed that some of the witnesses for the prosecution were also ordered to be detained in the Magistrate's house during the night of the 3rd November last.

18. That the case was again taken up by Mr. Monro, at Krishnaghur, about the 9th of November last, when about seven witnesses for the prosecution were examined, and that one of those witnesses stated, in cross-examination, that he had previously told Mr. Monro in private what he had deposed that day.

19. That the case was then adjourned to the 18th of November, but no witnesses were examined on that day, and it was again adjourned to the 25th of November, on which day also the case was not taken up, but the defendants were ordered to appear at Ranaghat on the 9th of December last.

20. That, on the 9th of December, the defendants appeared at Ranaghat, but were told on the 10th to appear again on the 23rd December at Kanchrapara (a distance of about 40 miles from Krishnaghur), where Mr. Monro was expected to be on that day during his cold weather tour.

*Explanation—(contd.).*

diately ordered, and his release would have been ordered sooner had they arrived sooner.

*Paras. 16, 17.*—The facts are correct to a certain extent. Along with Nabin Roy were sent in certain persons. As above stated, I was willing to go on with the case on the first night, to which the defendant's counsel objected. In the interest of both parties, it was of the highest importance that the witnesses should be subjected to no undue influence of both parties. I, therefore, ordered them to be kept in a bungalow beside my house, recording the fact. *Vide* order of 2nd November.

That, in so doing, I acted with impartiality, and with no disfavour to the accused, may be inferred from the fact that the vakeels of the accused requested me to keep the witnesses during the night of the 3rd in the same place, and to allow no access to them, which I did. The witnesses cheerfully consented to stay.

It is needless to say that, as I prevented others from communicating with the witnesses, I held no communication with them myself.

Kristo Charal was with them. I knew nothing against him one way or another. He remained with them till their depositions were recorded, and on my discovering who he was, he was treated as a prisoner.

*Para. 18.*—The private communication made to me by the witness referred to was this: The Inspector brought before me one evening three men, who he said were witnesses. The District Superintendent was then, I believe, absent. I asked the men, who, on seeing me, began to clamour for *khoraiki*, where they had come from, and they said from Gobindpore in Moorsshedabad; that Nabin Roy had been brought to their house; that Tarak Roy had brought him.

On hearing this, I told the Inspector to take them away, and produce them next day for regular examination in Court. The men were accordingly produced. I leave it to the Court to judge whether I sought to receive private information; whether I did not see the men casually; whether on casual mention of their having a statement to make bearing on the case, I directed their production and open examination, and whether I was in any way unfavorably to the accused influenced by any thing said to me by witnesses on

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21. That, on the 22nd of December, the defendants, having learned that Mr. Monro was then at Chakda, appeared before him there, on the 22nd and 23rd, but the case was taken up on the 24th, when about six witnesses for the prosecution were examined.

22. That the case was next taken up on the 3rd of January last, at Kanchrapara, when about five more witnesses were examined.

23. That, on the next day, some more witnesses were examined, and the defendants were then ordered to appear before Mr. Monro on the 15th of January, at the village of Sharsha, a distance of about 50 miles from Krishnaghur, and about 28 miles from the nearest railway station at Chakda.

24. That, in the meantime, and after the examination of the principal witnesses, Nabin Roy, and some other witnesses, had been concluded, about ten persons were arrested, and made defendants in the case, but those witnesses who had been examined previously were not recalled.

25. That the Magistrate, Mr. Monro, having refused to let out on bail some of the defendants arrested after the examination of Nabin Roy, although a petition was presented on behalf of those defendants, pointing out the impropriety of making them defendants at that stage of the proceedings, an application was made on their behalf to the present Officiating Sessions Judge, who directed them, on the 22nd November, to be enlarged on bail.

26. That defendants, Kristo Charal, Matabbar Sheik, and Ujjulla, were kept in the Kotwali Thanna for several days, while the rest remained in jail, before they were let out on bail.

27. That although your petitioner, Surendra Nath Roy, was let out on bail by this Hon'ble Court, he was ordered by Mr. Monro not to go to his own house, but to show himself daily to the Court Inspector.

whose testimony no charge has been framed. The Inspector came to me as head of the police to know what to do with the men. In heavy cases, which the Magistrate of the District is expected and ordered to take up himself in Court, he cannot help being cognizant of the action of the police. In the present instance, such was the case as regards the witnesses referred to ; but that such cognizance, under the circumstances unavoidable, operated in any way unfavorably to the accused, I emphatically deny.

*Para. 26.*—It is true that three accused were kept in the thanna. I am not aware that there was any illegality in their being kept there. The prosecution having represented that the three prisoners had confessed, and that, after their confession being recorded, it was advisable to keep them apart from the other accused, I granted the request, and ordered them to be kept separate.

*Para. 27.*—I ordered the accused Surendra Nath and others to remain in Krishnaghur.

It was uncertain whether witnesses might not, on any day in addition to the fixed days, be produced by the police (as actually happened).

The case was being conducted at a great distance from Krishnaghur by the police, and it was quite possible that witnesses might be produced on other than

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28. That the case was again taken up at Bongong on Saturday, the 15th of January, when one more new witness was examined on behalf of the prosecution, and the case for the prosecution was then closed.

29. That Mr. Monro then directed defendants, Kailas Sircar, Rakhal Roy, Braja Bhattacharji, Baboo Sheikh, Huboo Ghose, and Ujjulla Bewa, to be discharged; and framed two charges, under ss. 342 and 109 of the Indian Penal Code, against your petitioner, Surendra Nath Roy, and directed him to be put upon his defence, as Mr. Monro did not intend to commit any of the prisoners to the Sessions.

30. That the case was then fixed for the 27th instant at Bongong, and Mr. Monro then said that he would draw up charges against the other prisoners on Monday, the 17th.

31. That, on Monday, the 17th, Mr. Monro framed certain charges (copies of which your petitioners have not received) against five other defendants, and directed the discharge of two defendants.

32. That, on Tuesday the 18th, Mr. Monro sent for one of the witnesses cited by one of your petitioners, Harish Ghose, and examined him, declining to receive a written petition which your petitioner Harish Ghose presented, praying that the examination of the said witness might be postponed. The said witness was not examined in the presence of any of the other defendants or their counsel.

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the fixed days. To allow of such witnesses being speedily examined in presence of the accused, the restriction was imposed. On occasion shewn, I was quite ready to withdraw it, as may be inferred from the fact that when the accused Surendra Nath Roy asked to be allowed to go to his home for some religious ceremony, I granted the request at once.

*Paras. 28, 29, 30.*—The facts are correct. I may add that no charge was drawn up against the other prisoners, simply because there was no time. I worked all day at the case, in order that the counsel for the accused might get away, as he expressed a wish to do so; and as, after drawing up the charge against Surendra Nath Roy, the said counsel, on my asking him, declared that the delaying to draw up the charges against the other accused did not matter, I postponed the case at a late hour to the 17th, the 16th being Sunday. The counsel for the accused publicly acknowledged his obligation to me for working so late to allow of his departure.

*Paras. 31 and 32.*—On the 17th, after drawing up the charge against Harish Ghose, and hearing his reply, I noticed that one of his witnesses was a zemindar, whom I knew to be in the neighbourhood. I consider that it would be advisable to secure the attendance of that witness, while he was in the neighbourhood, knowing that he was not residing there, and thinking it not improbable that there might be some difficulty in serving a summons on him afterwards. I consequently explained this to Harish Ghose and his mooktear, and ordered a summons to be issued for the appearance. On the following day, and on the 18th, the deposition of the zemindar was recorded in the presence of Harish Ghose and his mooktear, by whom the witness was cross-examined.

The statement that I declined to receive a petition asking for the postponement of the examination of this witness, is untrue. No such petition was presented, and no such petition was refused. Had such an application been made, I would have considered it as I considered an application of the vakeels of the accused on a previous occasion at Chakda, when they

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33. That while your petitioner Surendra Nath Roy's case is fixed for the 27th instant, other defendants are directed to produce their witnesses on the 25th.

34. That the Officiating Magistrate, Mr. Monro, had all along given the defendants to understand that he would commit the case to the Sessions.

35. That your petitioners have cited about forty witnesses, who will have to be brought from long distances, some from the district of Moorshedabad, where Nabin Roy alleges he was confined.

36. That, in addition to the physical discomfort of following the Magistrate from place to place, and having to stay in villages where there is no suitable accommodation, your petitioners have already incurred considerable expense in having had to take their counsel and agents along with them.

37. That your petitioners have been much harassed by the repeated adjournments, as detailed above, and as Mr. Monro has declined to take up the case at Krishnaghur, your petitioners will find very great difficulty in producing their witnesses at Bongong, or any other place in the interior of the Nuddea district.

. . . . .

requested certain witnesses, namely, Ainnuddin and others, to be recalled, and I granted the request as fair and reasonable. There was no reason why I should have acted differently on the present occasion, and I declare the statement to be untrue.

The witness was not examined in the presence of any of the accused, except Harish Ghose, because none but Harish Ghose had called him.

*Para. 33.*—This is correct. I purposely selected the 25th, knowing that the 27th had been fixed for the hearing of the witnesses of Surendra Nath, and I did so for this reason. I was aware that Surendra Nath Roy had summoned a large number of witnesses, whose examination would probably take more than one day. If to these witnesses were to be added the witnesses summoned by the remaining accused, there was a probability of the counsel of the accused being detained three days at Bongong. As the counsel had expressed a wish to have the case disposed of, if possible, without further delay, I thought I might consult his convenience by having the witnesses for some of the defendants heard on the 25th, reserving them for further examination by the counsel on the 27th, when he arrived. I regret to find that my good intentions towards the counsel have been distorted into a manifestation of unfairness to his clients. I can only say that such were my intentions as above described, as would have been shown had the witnesses appeared on the 25th, or the counsel on the 27th.

I regret the necessity for the repeated adjournments, not one of which has been without cause. I regret the necessity of taking up the case while on tour, and to reduce the inconvenience to all parties to a minimum. I have, as above stated, kept my camp close to the rail, or in places easy of access. I have, in short, done every thing I could to facilitate the appearance of counsel and the accused.

I had intended making over the case to the Joint-Magistrate when I went on tour, but found I could not do so under s. 68. I declined to take up the case at Krishnaghur, while at Sarsa, as I could not make arrangements consistently with my other duties to be present at Krishnaghur, and, as a matter of fact, it is quite as easy for counsel to appear at Bongong as at Krishnaghur, the journey in the former case consisting of 34 miles

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40. That there was further pending, in the Court of Mr. Monro, a complaint preferred by the police against one of your petitioners, Surendra Nath Roy and another, for having, as alleged, obstructed the police in their investigation into the case of Nabin Roy, and for having caused disappearance of evidence; that your petitioner, Surendra Nath Roy, was arrested in the first instance under a warrant in September last.

41. That the inquiry into the case was commenced by Mr. Monro in September last, and the last witness was examined about the beginning of October, and although no postponement was necessary, he left the case undecided until last week, when, as your petitioner, Surendra Nath Roy, was informed yesterday, the case was decided in his favour.

42. That Mr. Monro having promised to the defendant's counsel to grant them copies of the proceedings and evidence in the case, your petitioners sent, at much expense, two copyists to Bongong to get copies of the proceedings, but your petitioner, Surendra Nath Roy, has just been informed that Mr. Monro, after having insisted on learning the reason for which your petitioners wanted to have copies, and after having taken the deposition of one of the said copyists on that point, has refused to give your petitioners copies of Mr. Monro's proceedings in the case.

43. That your petitioners submit that Mr. Monro, having expressed from the beginning his opinion that a strong *prima facie* case had been established against your petitioners, and also that he would commit the case to the Sessions,<sup>1</sup> he is not competent to try your petitioners himself; nor is he, on account of the bias he has all along displayed on behalf of the prosecution, as evident from the circumstances detailed above, and from his being influenced by private information, a proper person to be entrusted with the trial of your petitioners.

That your petitioners, therefore, pray, *firstly*, that taking into consideration the grounds set forth above, your Lordships

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by rail, and 20 on horseback; in the latter of above 50 by rail, and 12 by horse ghari.

*Paras. 40 and 41.*—The fact of the other case being instituted is correct. The fact of the last witness having been examined about the beginning of October is also correct. The statement that no postponement was necessary is not correct. The case remained pending at the beginning of October, at the request of the prosecution. I took it up immediately after the opening of the Court, and decided, I imagined, with the consent of the vakeels, to finish it in connection with and at the same time as the original case of Nabin Roy. I recorded an order to this effect, and the case remained pending in consequence. As soon as the case for the prosecution in Nabin Roy's case closed, I took up the second case, and disposed of it.

The evidence for the prosecution in the second case, as regards the charge under s. 201, being really the same as that for the prosecution in Nabin Roy's case, and that evidence being insufficient to frame a charge under s. 201 against Krishna Nath Roy, I discharged him immediately on the case for the prosecution being closed.

I acted in the above case, so far as I am aware, legally and properly.

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<sup>1</sup> On the 4th November, Mr. Monro recorded the following as his opinion: "The statement of Nabin Roy, if true, does raise a strong presumption of the guilt of the accused, and would, if the question of committal were at the present stage of the proceedings raised, require the committal of the accused."

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will be pleased to send for the record in the case mentioned above, and quash the order of Mr. Monro, dated the 15th and 17th instant, whereby he directed your petitioners to be put upon their defence before him.

*2ndly.*—That should there be, in the opinion of your Lordships, any evidence against your petitioners, they may be tried by the Magistrate of Moorshedabad, in which district many of the witnesses for the prosecution, as well as for the defence, reside, or by the Joint-Magistrate of Nuddea, at Krishnaghur, or by any other Court that your Lordships may think proper.

Mr. Paul (with him Baboo Ambika Charan Banerjee), for the prosecutor, now showed cause :—I rely on the explanation of Mr. Monro, which is quite satisfactory, and absolves him from any bias or improper feeling. S. 68 of the Criminal Procedure Code gives the Magistrate jurisdiction to proceed under the circumstances of this case. Mr. Monro acted in good faith throughout. It would be a bad precedent if this rule were made absolute.

Baboo Anukul Chandra Mookerjee did not wish to address the Court on behalf of the Crown.

Mr. Monro said that, in doing what he had done in this case, he had simply followed the practice which prevailed in the Mofussil, and that all his acts were done in good faith. He also added that, being about to leave the country, he would not take up the case himself, whatever might be the result of the rule, and that he had no desire to try the petitioners himself. He would, however, ask the Court to acquit him of the imputations made in the petition against his character as a judicial officer.

Mr. Ghose in support of the rule : It is evident from Mr. Monro's own explanation that he had prejudged the case. All important allegations in the petition are admitted. The reasons given by Mr. Monro for refusing bail on the 7th October show that, before taking any evidence whatever in support of the prosecution, he wanted the defendants to establish their innocence. The warrant issued by him, before any evidence was taken, specified a bailable offence, and yet bail was refused. To refuse bail when a person ought to be bailed is a misdemeanour—*Osborne v. Gough*.<sup>2</sup> A Magistrate cannot issue a warrant without evidence, nor can he commit a person to *hajut* before evidence is recorded against him—*In the Matter of Mahesh Chandra Banerjee*.<sup>3</sup> In this case the Magistrate acted upon hearsay information communicated to him privately. S. 68, Criminal Procedure Code, does not give the Magistrate jurisdiction in such a case. The word "knowledge" in that section must be held to be either judicial or personal knowledge—*In the Matter of Mahesh Chandra Banerjee*.<sup>3</sup> S. 68 only applies to cases where no complainants come

<sup>1</sup> Act XXV. of 1861, s. 68.—"Except as is otherwise provided in Chap. XI. of this Act, the Magistrate of the district, or a Magistrate in charge of the division of a district, may, without any complaint, take cognizance of any offence which may come to his knowledge, and may issue a summons, or, in cases where a warrant may issue, a warrant of arrest against a person known or suspected to have committed such offence, in the same manner as if a complaint had been made against such person."

<sup>2</sup> 3 B. & P. 550.

<sup>3</sup> 4 B. L. R., App., 1. [See p. 166 of this book.]

forward. All the proceedings ought to be set aside as being based upon an illegal foundation. [MITTER, J.—Do you contend that the subsequent proceedings ought to be quashed on account of prior illegalities?] Yes; they vitiate the whole proceedings—*The Queen v. Mahima Chandra Chuckerbutty*;<sup>1</sup> and they are evidence of bias on the part of the Magistrate. He received information on the subject of the case privately, and conferred with the witnesses in the absence of the accused; this disqualifies him from trying the prisoners. A Judge or a Magistrate is not competent to take upon himself to say, as Mr. Monro does, that such private information had no influence on his mind—*Dobson v. Groves*.<sup>2</sup> The commitments were void *ab initio*, being illegal, and for an indefinite and unreasonable period—*Davis v. Capper*;<sup>3</sup> and *Rex v. Gooding* cited in Burns's *Justices of the Peace*.<sup>4</sup> A Magistrate does not act in good faith, who does not act carefully, circumspectly, and with due diligence—*Vithoba Malkhari v. Corfield*.<sup>5</sup> No remand without a hearing can last for more than a fortnight—*Reg. v. Surkia*.<sup>6</sup> In this case the adjournments were for an unreasonable time, and without any reasonable cause. Under Chap. XII. of the Criminal Procedure Code, the Magistrate could not direct a police investigation into the case after it had been taken up by him, but he might have done so before issuing process (s. 180). The order to Surendra Nath Roy to show himself daily to the Court Inspector was wholly void, and showed improper feeling on the part of the Magistrate, and the reason assigned by Mr. Monro for that order—*viz.*, the convenience of the witnesses who might be forwarded by the police at any time—could not be regarded as satisfactory, when the same order was repeated by him at Bongong, after the charges had been framed on the close of the prosecution. The order which Mr. Monro gave to detain three defendants in the thanna, while the others were in jail, was wholly illegal, for, under s. 222, a warrant of commitment could be directed only to the jailor or some person having authority. This order, being to induce the prisoners to confess, was wholly illegal and improper. Mr. Monro acted improperly and illegally by sending for one of Harish Ghose's witnesses, and examining him himself in the absence of the other defendants. Not one of the witnesses for the prosecution was summoned, but all were arrested and brought by the police, contrary to the provisions of the Code of Criminal Procedure. The whole conduct of Mr. Monro shows clearly that he is not a fit person to try the petitioners himself.

PHEAR, J.—It seems to me clear from Mr. Monro's own explanation of the course of this case that he has committed in it serious deviations from the procedure laid down by the Criminal Procedure Code, and that he has, in some of the stages of the case, shown a want of discretion, which is to be lamented; but, on the whole, I think that the rule ought to be discharged, because I entirely acquit Mr. Monro of having, in any part of this protracted inquiry, been actuated by any improper feeling towards the prisoners, or by any other desire than that of doing his duty as a judicial officer.

It is very much to be deplored that the practice which Mr. Monro has taken to be accordant with the provisions of the Criminal Procedure Code should, at this day, obtain, as we are told it does, in a zilla so close to the capital as Nuddea.

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<sup>1</sup> 3 B. L. R., A. Cr., 67. [See p. 181 of this book.]

<sup>2</sup> 6 Q. B. 637.

<sup>3</sup> 10 B. & C. 28.

<sup>4</sup> 24th Edn., Vol. 1, 1001, note.

<sup>5</sup> 3 Bom. H. C., App., 1.

<sup>6</sup> 5 Bom. H. C., Cr., 24.

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It cannot be questioned, I think, that the custody of the prisoners was, from the time of the first arrest up to the 2nd of November, illegal. Mr. Monro says he supposed that the step he took in causing their arrest was sanctioned by s. 68, Criminal Procedure Code; but I am very distinctly of opinion that that section applies only to cases in which the private individual, who is injured or aggrieved, or some one on his part, does not come forward to make a formal complaint. It is a provision of the law for enabling a public official to take care that justice may be vindicated, notwithstanding that the persons individually aggrieved are unwilling or unable to prosecute; and even in such cases, the jurisdiction of the Magistrate to arrest requires, for its foundation, knowledge of the fact of an offence having been committed, and that knowledge, I apprehend, must be either personal or derived from testimony legally given.

But here Mr. Monro commences his explanation by stating not only that the brother of Nabin Roy had made a complaint in the first place to the Joint-Magistrate, but that Mr. Monro's own subsequent proceedings were in effect instituted upon information given by this man to the police and to himself. That being so, the case obviously might, and ought to, have been conducted upon one or other of the bases afforded by s. 66 and by s. 135. There was no occasion whatever for Mr. Monro to take upon himself the character of a public prosecutor.

There is, in my judgment, no doubt that the law is just as jealous of personal liberty in India as it is in England, and that liberty cannot rightly be taken away except under circumstances which are clearly prescribed by positive law. Now, the warrant of arrest which Mr. Monro issued, and under which the petitioners were taken into custody, was grounded upon the information informally given by the brother of the missing man. "The man Nabin was still missing, and upon the police report and the statement of the missing man's brother, who appeared before me at Muragacha, I issued an order to Surendra Nath Roy, whose ryots the accused were, forwarding a warrant for their arrest, and directing him to produce them as persons accused of dacoity." This is Mr. Monro's own statement.

As at present advised, I don't think that the report of the police, or any statement of the missing man's brother, which falls short of an actual formal complaint, or of a statement made on oath, is sufficient in law to give the Magistrate jurisdiction to issue his warrant. I need not point out the mischief that would be likely to ensue if a Magistrate were justified on the mere report of the police in arresting any person whom they wished to incriminate. In a particular case, namely, when an offence is committed in his presence, a Magistrate may, no doubt, without complaint or sworn testimony, order the arrest of the offender; but this is by virtue of s. 110, and the separate specification of this power in the Code goes far to show that s. 68 does not bear the construction which Mr. Monro has put upon it. The cases in which the police may arrest without a warrant are prescribed with minuteness in the Criminal Procedure Code, and it appears to me that the more extensive power conveyed by a warrant must proceed from the exercise of a judicial discretion, either on the Magistrate's own view, or upon materials furnished by some other person, under such circumstances as will render the person responsible for putting the law in motion, *i. e.*, furnished by him either in the capacity of prosecutor or by statement on oath.

Again, the address of the warrant in this case is unfortunate. It is directed, not to any police-officer, but to Surendra Nath Roy, the person at whose instigation, according to the theory of the police, the alleged kidnapping originated, and even if the Magistrate did not take the police view on

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this point, Surendra Nath was clearly a person so closely connected with the parties who were supposed to be implicated that he was soon arrested as an accomplice. Doubtless, s. 77 of the Criminal Procedure Code<sup>1</sup> and the corresponding section of the amended Act<sup>2</sup> do give the Magistrate power to issue a warrant to an unofficial person. But in the enactment itself is to be found an indication of the circumstances under which the Legislature intended that power to be exercised, namely, when the Magistrate is without the assistance and services of competent persons charged with ordinary police duties, and responsible, by virtue of their offices, for the proper execution of a process of this sort; and, above all, when the urgency is imminent.

But, whether or not the first arrest was made without legal foundation, unquestionably the subsequent commitment to *hajut*, and the remands, based, as these were, on no evidence whatever, were entirely invalid. The force of the warrant of arrest is at an end when the prisoner is brought before the Magistrate. The Magistrate cannot lawfully commit to prison, or remand a prisoner who is before him, without sufficient grounds; and in the complete absence of evidence there can be no grounds.

I regret, as I have already mentioned during the hearing of the case, that Mr. Monro, on receiving the order of the High Court with regard to releasing the prisoner on bail, which order reached him while he was presiding in Court, did not at once make it public; even if it be supposed, as suggested by Mr. Paul, that none of the parties concerned were present in the Magistrate's Court at the time. I say, I regret it, because publicity in these cases is the highest safeguard which the Magistrate has for preventing any misconception as to his motives and conduct.

After the 2nd of November, the case changed. At that time evidence was produced before the Magistrate, on which he could rightly, in the exercise of his judicial discretion, hold that the persons charged ought to be committed to prison, either to await trial, or for safe custody, during the adjournment of the inquiry. And it is because I think that this is the case, that I feel the strongest ground taken up by the petitioners fails them. For I am not prepared to say that because the arrest and custody previous to the 2nd of November was, in my opinion, illegal, therefore all the subsequent proceedings are void, and ought to be quashed. It appears to me that the petitioners now stand committed for trial, under orders of a competent officer, made after hearing evidence, which was judicially received and recorded. I cannot, therefore, say that they ought not to be tried on the charge on which he has so committed them.

There are other matters which have been referred to in the argument before us, and which have, I don't say unnecessarily, occupied a considerable time in discussion; but I don't think that we are required to direct our attention to them in detail now.

It does seem to me, however, that a very unduly lengthened period did elapse in this case between the first apprehension of the prisoners and their commitment for trial, and I am disposed to think that an officer in Mr. Monro's position would have exercised the better discretion if he had taken care not to drag the parties stage after stage, as he did, following him in his tour through the Mofussil. It was surely open to him in more ways than one to

<sup>1</sup> Act XXV. of 1861, s. 77.—“A warrant shall ordinarily be directed to a police-officer, but the Magistrate issuing a warrant may, if immediate service be necessary, and no police-officer immediately available, direct the warrant to any other person.”

<sup>2</sup> Act VIII. of 1869, s. 77.—“A warrant shall ordinarily be directed to a police-officer, but the Magistrate issuing a warrant may, if he see fit, direct it to any other persons.”

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have provided that the case should have been heard and decided promptly at Krishnaghur. Even if he had been right, as I think he is not, in the supposition that the proceeding was one based on s. 68, and that the case could not therefore be made over to any Subordinate Magistrate for investigation, still there was no sort of obstruction in his way to prevent him from taking it up himself at the principal town or at any other convenient spot in the district, and completely disposing of it in the same place. The movements of a Magistrate during his cold-weather tour are not so strictly prescribed by an inexorable rule of necessity that Mr. Monro could not have reasonably managed, in this case, to take all the evidence at one station.

The detention of the prisoners in the thanna was certainly, under the circumstances of the case, to say the least of it, not judicious; and the direction to Surendra Nath, while he was out on bail, to remain in Krishnaghur, was absolutely without authority, and should not have been made.

I also cannot think that the examination of Harish Ghose's witness was conducted in such a way, and under such circumstances, as to give complete confidence to the minds of the petitioners in the Magistrate's fairness and impartiality, with reference to the investigation.

And, on the whole, I cannot avoid the conclusion, after a full consideration of the facts of this case, that although there is nothing now imputable to Mr. Monro such as to disqualify him from trying the case between the Crown and the prisoners, there was still very much before the explanation which he has submitted to this Court was made public to render the prisoners justly apprehensive that they would not receive an unbiassed and impartial trial at his hands. Therefore, although I have said that I think the rule ought to be discharged, I also think, under the circumstances, that it should be discharged without costs.

MITTER, J.—I am of the same opinion.

*Rule discharged.*

# Bengal Law Reports.

## [ORIGINAL CRIMINAL.]

*Before Mr. Justice Phear.*

THE QUEEN v. VAUGHAN AND ANOTHER.<sup>1</sup>

IN THE MATTER OF S. M. GANESH SUNDARI DEBI, *alias* MANI.

*Habeas Corpus—Minor—Discretion—Return—Affidavit—Amendment.*

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The return to a writ of *habeas corpus* must be taken to be true, and cannot be controverted by affidavit. In England, 56 Geo. III., c. 100, s. 4, allows affidavits to be used to controvert the return in criminal matters, but that statute does not apply to this country.

The return to a writ of *habeas corpus* can, however, be amended.

A girl, under sixteen years of age, has not such discretion as enables her, by giving her consent, to protect any one from the criminal consequences of inducing her to leave the protection of a lawful guardian; but where the return to the writ of *habeas corpus* stated that a girl was above the age of sixteen (though her mother stated her to be of the age of thirteen years and nine months), the Court *held* that she was of years of discretion to choose for herself under whose protection she would remain.

Mr. *Ghose* in this case had applied for a writ of *habeas corpus* directed to J. M. Hazra and the Rev. J. Vaughan, ordering them to bring up the body of S. M. Ganesh Sundari Debi, alleged to be a minor under the age of sixteen years. The writ was applied for at the instance of the girl's mother, who, with Chandra Sekhar Sen and Dinanath Sen, the girl's two elder brothers, filed a joint affidavit, which stated that the said S. M. Ganesh Sundari Debi was an infant of the age of about thirteen years and nine months; that since her birth she had been living in the same house with them during the life-time of her father under his control and guardianship, and since his death, about two years ago, under the joint guardianship of her mother and brothers; that she was married according to Hindu law when she was about nine years of age, but her husband died a few months after the marriage, and she never lived in her husband's family, or under the protection of any of his kinsmen, either before or after she became a widow, as they had not sufficient means to enable them to take her under their guardianship and protection; that she was under the guardianship and protection of her mother and brothers until the evening of the 29th April 1870, when she was induced by one Martha, a native Christian, belonging to the Church Missionary Society, to leave her mother's and brothers' house and protection, and had not since returned; that they had found that she was in the custody of J. M. Hazra, a native convert, and of the Rev. J. Vaughan, at the Church Mission premises, at Amherst street, in Calcutta, and had applied to them to return her to her house; but that J. M. Hazra and the Rev. J. Vaughan had refused to allow her to be removed, and still detained her from their custody and guardianship against their consent and against the consent of her husband's kinsmen; that they were informed and believed that J. M. Hazra and the Rev. J. Vaughan had induced her to abjure the Hindu religion, and made her a convert to Christianity, although she was still a minor, and incapable of forming a correct judgment in matters of religion; that they were informed and believe that it was

<sup>1</sup> [This case is referred to in *Reade v. Krishna* (I. L. R., 9 Mad. 395).—ED.]



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the intention of J. M. Hazra and the Rev. J. Vaughan to marry her forthwith to some person professing the Christian faith ; although, being a minor, she was incapable of exercising a proper discretion as regards her marriage ; and that they were desirous that the girl should remain under their care and guardianship until she attained her majority, and not in the custody of any person without their consent.

A writ of *habeas corpus* was therefore issued, to which the following return was made :—

“ John Mathuramohan Hazra, and James Vaughan, a clerk in holy orders, employed in the Ohurch Missionary Society, at Ainherst street, in Calcutta, the persons to whom the writ hitherto annexed and marked A, subscribed with our initials, is directed, do severally hereby certify and return to our sovereign lady the Queen in her High Court of Judicature at Fort William in Bengal, that, before coming to us of the said writ, to wit, on the evening of Friday, the 29th April last, S. M. Ganesh Sundari Debi, *alias* Mani, in the said writ named, of her own free will and accord, and without any force, threat, persuasion, or inducement used, offered, held out by us, or either of us, or by any person or persons employed by us, or acting under the authority or direction of us, or either of us, to our or either of our knowledge or belief, came to the mission premises at Amherst street aforesaid, and then, being of an age and condition at which she lawfully might and could choose and determine her own place of residence, did, in the exercise of her own discretion, thenceforth remain and reside without any restraint whatsoever ; that the age of the said S. M. Ganesh Sundari Debi on the said 29th of April last was (as she herself avers)<sup>1</sup> upwards of sixteen years, that is to say, of the age of seventeen years or thereabouts ; that the condition of the said S. M. Ganesh Sundari Debi was that of widowhood ; her husband, to whom she was married at the age of nine years, having died about eight years ago ; that she was and is childless, and had not, previous to the said 29th April, at any time lived with the family of her deceased husband or under their protection ; that her father being dead she resided with her widowed mother ; that after the said S. M. Ganesh Sundari Debi came to the said mission premises, and whilst so residing therein as aforesaid, her said mother and her brothers and friends had free access to her, and saw and conversed with her frequently, and we have in the presence of her said relatives and friends, or some of them, repeatedly informed the said S. M. Ganesh Sundari Debi that she was at perfect liberty to return to her mother's house, as she was by her said relatives and friends required to do, if she felt so inclined, but she invariably refused so to return ; and in answer to the various threats urged against her remaining at the said mission premises, and the various promises and inducements held out to her on condition of her quitting the same, by her said relatives and friends, she constantly expressed her determination to remain at the mission premises, and there be admitted by baptism into the Christian religion, which, after upwards of three years' study and instruction therein, with the knowledge of her said mother, she had resolved to embrace ; that among the inducements so held out to her as aforesaid by her said relatives and friends was marriage ; and that the mother and elder brother, Chandra Sekhar Sen, in the presence of the said John Mathuramohan Hazra and my wife, assured her that a wealthy zemindar was most anxious to marry her ; but to this, as to all other inducements held out by them, she turned a deaf ear ; that we, nor either of us, nor any person employed by or acting under the authority of us or either of us, have or has not ever designed to marry the said S. M. Ganesh Sundari

<sup>1</sup> The Court at the hearing allowed these words to be struck out.

Debi to any person, either with or without the consent of her mother, nor, save as aforesaid, was the subject of marriage ever mentioned to our knowledge or belief to her, the said S. M. Ganesh Sundari Debi ; that on the afternoon of Tuesday, the 3rd of May instant, the mother of the said S. M. Ganesh Sundari Debi came to the mission premises, and there saw and conversed with me, the said J. M. Hazra, and my wife, and entreated us not to permit the said S. M. Ganesh Sundari Debi's elder brother (who had, within the day or two preceding the said 3rd of May, become almost beside himself with rage) to approach her, alleging that he had vowed that, rather than let her be baptized, he would conceal a knife in his clothes, and stab his sister ; that on the same evening, at her urgent request, the said S. M. Ganesh Sundari Debi was admitted by me, James Vaughan, into Christ's religion by baptism ; that on the following morning, the said S. M. Ganesh Sundari Debi's mother, who had been informed of her daughter's said baptism by a Bengali letter written by me, James Vaughan, and addressed and sent to her, came to the said mission premises accompanied by the brother of the said Ganesh Sundari Debi, and a number of influential members of the Brahma Somaj, with the leader of which somaj the said S. M. Ganesh Sundari Debi is connected, and her mother and brother endeavoured to persuade her to return with them ; that the said S. M. Ganesh Sundari Debi refused to do so, and again and again positively declined to accompany her said mother and brother to their house, although she was at perfect liberty so to do, and has since remained and resided of her own free will at the said mission premises ; that on Saturday, the 7th May, the mother of the said Ganesh Sundari Debi, in the presence of me, J. M. Hazra, and my wife and mother, again saw her said daughter, and urged her to say that she was only fourteen ; but the said S. M. Ganesh Sundari Debi replied, "Mother, I cannot and will not tell this lie," and again expressed her determination not to return to her mother's said house ; that we nor either of us, nor any persons employed by us or either of us, or acting under our or either of our authority or direction, to our knowledge or belief, have not nor has detained, nor do we, nor any person so employed or acting as aforesaid, now detain, in our or either of our or his or her custody, the said S. M. Ganesh Sundari Debi ; but being of such age and condition as aforesaid, she of her own free will and unbiassed discretion lives and resides at the said mission premises, which are under the care and superintendence of Mr. James Vaughan, in and with the family of Mr. J. M. Hazra, which consists of myself, my wife, and one child of the age of seven years, as a member thereof in my J. M. Hazra's house, situate within the said mission premises ; and that, having requested the said S. M. Ganesh Sundari Debi to accompany us, and she having consented to do so, we have here now the body of the said S. M. Ganesh Sundari Debi before our sovereign lady the Queen's said Justices, as by the said writ hereto annexed, and the order enlarging the time for making this our return we are commanded. Dated this 10th May in the year of our Lord 1870.

(Sd.) J. VAUGHAN.  
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In obedience to the writ, Ganesh Sundari Debi was brought into Court, and the present application was that she should be delivered over to the custody of her mother.

Mr. Kennedy, Mr. Ghose, Mr. Evans, and Mr. Mendes, in support of the application, contended that the mother was by law entitled to the custody of her child, and that she had been properly brought up under a writ of

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*habeas corpus*; and, being a minor, should be delivered into the custody of her parents—*Queen v. Nesbitt*,<sup>1</sup> *King v. De Manneville*.<sup>2</sup> In that case it seems to have been thought that eighteen was the age at which a person was entitled to be of discretion—*In re Alicia Race*; <sup>3</sup> that the return was insufficient in merely stating her age; the time and place of birth should be clearly stated; that affidavits might be admitted to controvert it—*In re Hakevill*,<sup>4</sup> per Jervis, O.J.; *In re Dims*.<sup>5</sup> [PHEAR, J.—*In re Leonard Watson*,<sup>6</sup> Lord Denman refused to admit affidavits to controvert the truth of any part of the return.] *In re Alicia Race*,<sup>3</sup> affidavits were used. [PHEAR, J.—That was on a rule; the affidavits came before the Court as part of the rule.] The parties making the return cannot be able to judge of the age of the girl so well as her mother. The return is ambiguous; it should have been supported by affidavits to clear the ambiguity; and it cannot now be amended—*Reg v. Roberts*.<sup>7</sup> The girl should properly be in the custody of her parents. The age of discretion of a Hindu is sixteen years. The criminal law makes it a penal offence to take a child from the custody of her guardians under a certain age, and the guardians may claim her back if so taken under that age—*O'Connor's case*,<sup>8</sup> *Queen v. Howes*,<sup>9</sup> which last case was decided on the Statute 4 & 5 Phil. and Mary, c. 8, s. 3.

Mr. Ghose on the same side: A girl under sixteen ought to be made over to her guardians—see *Brejonath Bose's case*,<sup>10</sup> where a boy was ordered to be given up to his guardians against his own wishes. A decision to the same effect was made in *Queen v. Nesbitt*.<sup>11</sup> *Queen v. Ogilvie*<sup>12</sup> decided the contrary, but that case has been overruled, and it is the only authority of the kind in this Court. *In re Hemnauth Bose*<sup>13</sup> extended the principle to boys of sixteen, and we have in our favour also a Madras case—*In re Culloor Narain Swamy*.<sup>14</sup> The English authorities are also in our favour—*King v. De Manneville*,<sup>2</sup> *In re Hakevill*,<sup>4</sup> *In re Clarke*,<sup>15</sup> *In re Elizabeth Daley*,<sup>16</sup> *Queen v. Howes*.<sup>9</sup> In *King v. Greenhill*<sup>17</sup> it was held that age, and not discretion, was the criterion. By Hindu law the guardianship of the girl is in the mother.—*Vyavashta Darpana*, 216. "If the husband's family become extinct, or contain no male, or be helpless, the kin of the widow's father are her guardians."—2 Colebrooke, page 384. "The rights of Hindu parents are not to be "invaded."—21 Geo. III., c. 70, s. 18. The sex of the child is an additional reason why she should be handed over to her parents. Of a woman it is said: "Their fathers protect them in childhood; their husbands protect them in youth; their sons protect them in age; a woman is never fit for independence."—Menu, ch. v., s. 148. Under Act XL. of 1858, the girl is a minor until the age of eighteen. See the Full Bench decision in *Madhusudan Manji v. Debogobinda Newgi*.<sup>18</sup>

Mr. Woodroffe, *contra*.—The Court cannot go behind the return, which must be taken to be true. The statements therein are quite sufficient. As to vagueness, their own affidavits are much more ambiguous than our return. They state the age of the girl to be about thirteen years and nine months, but

<sup>1</sup> Perry's Or. Cas. 108 and 108, note.

<sup>2</sup> 5 East, 220.

<sup>3</sup> 26 L. J., Q. B., 169.

<sup>4</sup> 12 C. B. 223.

<sup>5</sup> 14 Q. B., N. S., 554.

<sup>6</sup> 9 A. & E. 781.

<sup>7</sup> 2 F. & F. 272.

<sup>8</sup> 16 Ir. Com. Law Rep. 112.

<sup>9</sup> 30 L. J. M. C. 47.

<sup>10</sup> Unreported. Cited in 1 Taylor, 139.

<sup>11</sup> Perry's Or. Cas. 104.

<sup>12</sup> 1 Taylor, 137.

<sup>13</sup> 1 Hyde, 111.

<sup>14</sup> Unreported. Cited in Mayne's Penal Code, s. 361.

<sup>15</sup> 7 E. & B. 186.

<sup>16</sup> 2 F. & F. 266.

<sup>17</sup> 4 A. & E. 624.

<sup>18</sup> 1 B. L. R., F. B., 49.

nothing further is said. No horoscope is produced ; and no time and place of birth stated. The return says she is above the age of sixteen years, and this must be taken to be so—2 Hawkins' Pleas of the Crown, 169 ; *Rex v. Rogers* ;<sup>1</sup> *In re Leonard Watson* ;<sup>2</sup> *R. v. Delaval* ;<sup>3</sup> *R. v. Clarkson* ;<sup>4</sup> *King v. Greenhill*<sup>5</sup> per Lord Denman. A *habeas corpus* is not the proper mode of procedure to obtain a decision as to who is the proper guardian for a child ; it is granted as a remedy for the invasion of personal liberty. There is no allegation here of want of her consent. [PHEAR, J.—That would be immaterial if she is a minor.] My contention is she is not a minor ; and her want of consent ought to have been stated—*King v. Wiseman*,<sup>6</sup> *Ex parte Landsdown*,<sup>7</sup> *Queen v. Clarke*.<sup>8</sup> In *Queen v. Howes*<sup>9</sup> the Judges had an interview with the girl, and they found she had not discretion to choose for herself, and gave their decision accordingly, and she was delivered up to her father. The cases decided on the Statute 4 & 5 Phillip and Mary, c. 8, s. 3, and 9 Geo. IV., c. 31, s. 20, are immaterial here, as those Statutes apply to unmarried girls. The decision in *Queen v. Howes*<sup>9</sup> fixes sixteen as the age of discretion ; but it has not been fixed by any case in this country. Cases under the Penal Code must be decided according to the circumstances of each case, and not by what the age of the girl is. To come to the decisions in this country, the first is *Brojo-nath Bose's* case,<sup>10</sup> but there is nothing to show that this case actually occurred ; it is not reported. *Queen v. Nesbitt*<sup>11</sup> was decided on the ground that religious differences ought not to be interfered with. But the only question is whether this girl has a discretion to choose where she will go ; it is no question of religion. *In re Hemnauth Bose*<sup>12</sup> is an unreliable decision ; it was not followed in a late case in Bombay by Arnould, C.J., see Mayne's Penal Code, s. 361. *Queen v. Ogilvie*<sup>13</sup> decides the point in our favour on the authority of *King v. Greenhill*,<sup>14</sup> and that case was approved of in the case of *Alicia Race*.<sup>15</sup> By Hindu law, a father is bound to provide his daughter with a husband ; if he fails to do so, she may choose one for herself after waiting three years from the time of puberty. The passage from Menu, Chap. V., that woman is never fit to be independent, is of doubtful authority as is shown by its being in italics. Nareda is not an authority in Bengal—Dayabhaga, Ch. XI., s. 1. The girl here is above the age of sixteen, and, therefore, at age of discretion. The period of majority is not necessarily co-extensive with the period of discretion. There is no English case in which this has been decided or even considered. The age of majority by Act XL of 1858 is eighteen, but that is no reason why eighteen is the age before which a person may be said to have arrived at years of discretion. But I contend that eighteen is not the age of majority in this Court, as Act XL of 1858 does not apply to this Court, but only to the mofussil—see s. 29 of that Act and *In the goods of Gangaprasad Gosain*.<sup>16</sup> See also *Mangala Debi v. Dinanath Bose*,<sup>17</sup> in which this seems to be allowed by the Court, as after it had been argued that a person between sixteen and eighteen was a minor, the Court called for no reply on that point. This girl should be allowed to use her own discretion as to where she will go. She has received religious instruction for some time,

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<sup>1</sup> 3 Dow. & Ry. 607.<sup>2</sup> 9 A. & E. 731.<sup>3</sup> 3 Burr. 1435.<sup>4</sup> 1 Stra. 444.<sup>5</sup> 4 A. & E. 624.<sup>6</sup> 2 Smith, 617.<sup>7</sup> 5 East, 38.<sup>8</sup> 7 E. & B. 186.<sup>9</sup> 30 L. J. M. C. 47.<sup>10</sup> Unreported. Cited in 1 Taylor, 139.<sup>11</sup> Perry's Or. Cas. 104.<sup>12</sup> 1 Hyde, 111.<sup>13</sup> 1 Taylor, 137.<sup>14</sup> 4 A. & E. 640.<sup>15</sup> 26 L. J., Q. B., 169.<sup>16</sup> 4 B. L. R., App., 48 ; S. C., on appeal,

5 B. L. R. 80.

<sup>17</sup> 4 B. L. R., O. C., 72.

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and the Court will not interfere in those matters, or to unsettle any impressions that may have been formed—*In re Moore*.<sup>1</sup> All religions should be alike in the view of the law—*Reg. v. Roberts*.<sup>2</sup> On Mr. Kennedy's rising to reply, Mr. Woodroffe objected, and referred to *In re Leonard Watson*,<sup>3</sup> where there appeared to have been no reply, but the Court disallowed the objection. Mr. Kennedy in reply: The return is not binding, and need not be taken as true—2 Hawkins' Pleas of the Crown; *Goldswain's case*.<sup>4</sup> The period of majority has been decided to be eighteen years—*Madhusudan Manji v. Debigobinda Newgi*,<sup>5</sup> and the contrary does not appear to be decided, with respect to this Court, by *In the goods of Gangaprasad Gosain*.<sup>6</sup> On the contrary, MAOPHERSON, J., says expressly he does not decide it, and it is not decided on appeal, nor is the point referred to in *Mangala Debi v. Dinanath Bose*.<sup>7</sup> The Court will not fix itself to any particular age, but will look at the capacity—*King v. Greenhill*.<sup>8</sup> For the forms of return in other cases, *Brejonath Bose's case*,<sup>9</sup> *Queen v. Howes*,<sup>10</sup> *O'Connor's case*.<sup>11</sup> The Statute of Geo. III. may be taken to be declaratory of the Common Law, and thus might be applicable here—Broom's Constitutional Law, 82; *Queen v. Ogilvie*.<sup>12</sup> The effect of admitting that the girl could change her religion, and had discretion to do so, would be to make Hindu law inapplicable to her, and, therefore, twenty-one years would be her period of majority—2 Colebrooke's Digest, 284.

Mr. Macrae appeared for Ganesh Sundari Debi, but was not heard.

PHEAR, J.—On Friday last, at the instance of Bamasundari Debi, the mother, and Chandra Sikhar Sen and Dinanath Sen, the brothers of one Ganesh Sundari Debi, a writ of *habeas corpus* issued out of this Court, directed to two persons, named Hazra and Vaughan, commanding them to bring before the Court the said Ganesh Sundari Debi, who was said to be illegally detained by them. Ganesh Sundari Debi is now, I believe, in Court, and Messrs. Hazra and Vaughan have made a return to the writ substantially to the effect that they have not detained and do not detain her in their custody; that she is of full age; that she is still with them of her own free will; that they exert no control over her; and that she comes to Court of her own accord, in pursuance of advice given by them. The case is one involving elements which cause it to be a subject of remarkable public interest. In some sense, as the learned counsel for the defendants has mentioned, it necessarily represents a contest between creed and creed, and perhaps race and race; and no thinking man, I suppose, can avoid regretting exceedingly that this event should have occurred. I can readily believe that those gentlemen who are here placed in the unenviable position of appearing to encourage a young Hindu girl, in the determination to sever herself from her mother, her brothers, and the home of her childhood, are deeply conscious of the misfortune into which circumstances have placed them, for I can conceive no greater disaster than this is likely to befall the cause to which they are devoted, and I will say, the yet broader and higher cause which the intelligent proportion of the European community has at heart. But with considerations of this sort, I have nothing to do.

<sup>1</sup> 11 Ir. Com. Law Rep. 1.

<sup>2</sup> 2 F. & F. 272.

<sup>3</sup> 9 A. & E. 731.

<sup>4</sup> 2 W. Bl. 1207; 5 Coke, 71.

<sup>5</sup> 1 B. L. R., F. B., 49.

<sup>6</sup> 4 B. L. R., App., 48; S. C. on appeal, 5 B. L. R. 80.

<sup>7</sup> 4 B. L. R., O. C., 72.

<sup>8</sup> 4 A. & E. 624.

<sup>9</sup> Unreported. Cited in 1 Taylor, 139.

<sup>10</sup> 30 L. J. M. C. 47.

<sup>11</sup> 16 Ir. Com. Law Rep. 112.

<sup>12</sup> 1 Taylor, 137.

The writ of *habeas corpus ad subjiciendum* is in its aim single. It has for its object the vindication of the right of personal liberty. It is issued for the purpose of taking care that no subjects of the Queen shall be illegally confined against his will. It is issued on behalf of the right of the person said to be illegally confined. It is not issued for the purpose of lending the arm of the law to any person claiming to have authority over him. It is only where the person confined is under any personal disqualification that the guardian or protector is looked to in the inquiry; and in such a case, the Court considers that it sets the person confined at liberty by handing him over to the charge of his rightful guardian. Therefore, in the matter now before me, I can have no concern with what the mother and brothers of Ganesh Sundari Debi think or desire, until I have ascertained if the fact be so, that she is not of age or discretion to judge for herself. Then what are the facts before me bearing on this point, I must look to the return, and so far as the facts there appear, I must take them as true.

Mr. Kennedy was correct in urging that there are authorities in support of the position that the truth of the return to the writ may be controverted by affidavits; but so far as I am able to discover, and so far as my own experience has gone, those authorities are of very early date, and are not now binding. Later decisions have all gone the other way. In Comyn's Digest<sup>1</sup> it is laid down that the Court must remand a prisoner if the return be sufficient, though false; and in Hawkins' Pleas of the Crown, Book II., Chap. 15, s. 78, it is said that "it seems to be agreed that no one can in any case controvert the truth of the return to a *habeas corpus*, or plead or suggest any matter repugnant to it; yet it hath been holden that a man may confess and avoid such return by admitting the truth of the matters contained in it, and suggesting others, not repugnant, which take off the effect of them." In *Ex parte Beeching*<sup>2</sup> upon the return to the writ of *habeas corpus*, it appeared that the person making the return had apprehended and detained Beeching and several other persons, under the provisions of 24 Geo. III., c. 47, and 45 Geo. III., c. 121, on a charge of smuggling; and Abbott, C.J. (than whom no more learned Judge has presided over the Queen's Bench at Westminster), allowed affidavits controverting the truth of the facts as stated for reasons which he gave as follows: "The object of the *Habeas Corpus* Act, 31 Car. II., c. 2, was to provide against delays in bringing persons to trial who were committed for criminal matters. The person making this return is not a person to whom the prisoners have been committed for any such matter. The *habeas corpus* in this case was therefore a writ issuing by virtue of the Common Law, and I think that, under the circumstances, the 56 Geo. III., c. 100, s. 4, gives the prisoner a right to controvert the return." Lord Tenderden thus placed the right to controvert the truth of the return upon the Act of Geo. III. The distinction in the cases seems to turn on this, namely, that, unless the 56 Geo. III., c. 100, applies (and it does not apply to this country), the return to the *habeas corpus* cannot be questioned on the occasion of determining the validity of the detention.

I think that all the cases cited by Mr. Kennedy and Mr. Ghose tend to confirm that view. If there had been the power at Common Law, the very learned Judges who determined those cases would certainly not have been ignorant of it, and could hardly have felt the hesitation which they expressed in regard to the question whether or not affidavits, repugnant to the return, could, under any circumstances, be admitted. I pointed out, however, during the argument, several modes in which the person making the return may

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be made responsible for it, and in more than one of these courses of procedure, affidavits are, no doubt, admissible for the purpose of proving falsehood in the return. In one stage of *In re Leonard Watson*<sup>1</sup> for instance, affidavits were, I believe, used for such a purpose. But while the truth of the statements in the return cannot, as I think, be questioned, it is certainly clear that the return may be amended. It is unnecessary to quote authorities in support of this last position. At the commencement of the case, I allowed this return to be amended, and it is enough to say now that I have more than one decision before me to show I had authority to do so. Then, looking at this return, among other things I find it thus stated: "On the evening of Friday, the 29th day of April last, S. M. Ganesh Sundari Debi, *alias* Mani, in the said suit named, of her own free will and accord, and without any force, threat, persuasion, or inducement, came to the mission premises at Amherst street aforesaid, and then, being of an age and condition at which she lawfully might and could choose and determine her own place of residence, did, in the exercise of her own discretion, thenceforth remain and reside without any restraint whatsoever; that the age of the said S. M. Ganesh Sundari Debi on the said 29th day of April last was upwards of sixteen years, that is to say, of the age of seventeen years or thereabouts."

I have also had an interview with the young lady, in which she told me that she was under no restraint, and that she preferred to remain where she was, rather than go back to her mother. If then by law Ganesh Sundari is possessed of a personal discretion in this matter, I have no alternative but to dismiss Mr. Kennedy's motion. There is no doubt that, in England, the discretion, in regard to the matter of personal freedom, does not involve directly the element of minority. A large number of well known cases have been discussed by counsel on both sides, and, I think, in all of them, it is held that the discretion for this purpose is a matter to be judged of by reference to the circumstances of each case, with, however, this limitation, namely, that in England it has of late been determined by inference from the criminal enactments that, below a certain age, the law does not allow a discretion on the matter to a female infant. The latest case on that point is *Queen v. Howe*.<sup>2</sup> In that case the Chief Justice says that the enactment to which he refers points out the age of sixteen as the age up to which a child ought to remain under parental control. His words are: "By the Statute 9 Geo. IV. c. 31, s. 20, the unlawfully taking away an unmarried girl, under the age of sixteen, out of the possession, and against the will, of her father, is a misdemeanor, notwithstanding the consent of the child." We may safely act by the guidance of the light thus thrown on the subject, and say that, until the age of sixteen years, a young woman cannot choose to act for herself. The decision given by the Chief Justice apparently was not limited to the case of a female, but his argument was so. I entirely adopt the reasoning which the Court followed in that case. In this country we have the Penal Code, s. 361 of which makes it an offence to take or entice a female child under sixteen years of age out of the keeping of her lawful guardian. The words lawful guardian in this section include any person lawfully entrusted with the care or custody of such minor.

I understand by the words of the section that the Legislature here contemplated a case where the abductor had obtained the consent of the girl. It follows then that, in this country, as in England, a girl under sixteen has not a discretion such as enables her by giving her consent to protect any one from the criminal consequences of inducing her to leave the keeping of a lawful guardian; in other words, she is not allowed by law to chose for herself. But this young lady I must take to be above sixteen years of age; the return to

<sup>1</sup> 9 A & E. 731.<sup>2</sup> 30 L. J. M. C. 47.

the *habeas corpus* says she is seventeen. She is therefore outside that class of minors whom the Penal Code impliedly deprives of all choice in this matter, and I have not been shown any authority in support of the contention that a girl of upwards of sixteen years of age has no discretion with regard to her personal freedom. It is true that Mr. Ghose referred me to some venerable and venerated precepts of Hindu sages which have the effect, as he himself said, of placing a woman in a legal dependence on the males of her family for her whole life. If on the occasion of this return (where I may remark I am not trying and adjudicating upon a question of civil rights as between party and party), I am bound to give weight to this class of authorities, this consequence must follow, namely, that no woman of any age could be liberated from restraint placed on her by the head of her family, notwithstanding it was completely against her will, and such a result would, in truth, amount to a suspension of the *Habeas Corpus* Act for all female members of the Hindu community. It is sufficient to state the necessary consequence of such an argument to show that I ought not now to allow myself to be influenced by it. While this case has lasted (now some days), I have thought over carefully and anxiously this last issue, i.e., what amount or kind of personal disqualification or infirmity ought to lead this Court to refuse discretion to a female who is upwards of sixteen years of age. From the beginning I felt no doubt on any other matter brought before me, but on this I confess my mind has at times wavered, and my hesitation was not a little increased by my interview with the girl. I have no reason, from my own observation, for supposing that the return in the matter of age is incorrect, and indeed, if I had such reason, it would be in such a shape that I could give it effect. But I am bound to say that I could not avoid drawing the conclusion that the young lady is, as far as my judgment goes, exceedingly ignorant on matters of general information, and very ill-informed on that particular subject which, she says, has engaged her attention, and has been the particular purpose of her masters to instruct her in for the last two years. It appeared to me, from that undoubtedly very short interview, that she does not possess in regard to it any very tangible idea which can be termed accurate. Her ignorance of the structure of the one Sacred Book seemed to me something in itself marvellous, considering that (as I understood her) it has of late been almost the sole object of her studies. I cannot blind myself to the dangers which must be incurred when a person so young, ignorant, and uninstructed as this person appears to be, takes the perilous step of leaving the society of those who have been about her all her life, and goes to strangers whose very names she does not know. Still I could see nothing in her to indicate that she has not sufficient capacity of mind to choose in the matter of her own freedom: for nothing, I apprehend, can be clearer than that personal discretion of that sort does not, in the eye of the law, depend on the mental culture or state of instruction of the individual. If it were so, there would be an end to the liberty of the poor and ignorant. On the whole, I think that Ganesh Sundari Debi is a young woman who has attained an age when the law will allow her to speak for herself. I can perceive no such special disqualification as would justify me in keeping from her that liberty to which all alike, without regard to sex, are entitled. I only trust she will exercise that power of choice as may be best for her welfare. I must dismiss Mr. Kennedy's application. Ganesh Sundari must be brought before me into Court, when I will tell her that she may go where she likes.<sup>1</sup>

*Application refused.*

Attorney for the applicants: *Baboo N. N. Sen.*

1870.

QUEEN  
v.  
VAUGHAN

IN THE  
MATTER OF  
S. M.  
GANESH  
SUNDARI  
DEBI  
alias  
MANI,  
5 B. L. R.  
418.

<sup>1</sup> The girl was then brought into Court; and after being told by the Judge that she might go where she pleased, and having had an interview with her mother, she chooses to remain with the defendants.



# Bengal Law Reports.

## [FULL BENCH.]

*Before Sir Richard Couch, Kt., Chief Justice, Mr. Justice Bayley, Mr. Justice Kemp,  
Mr. Justice L. S. Jackson, and Mr. Justice Phear.*

### THE QUEEN v. DHONA BHOOYA AND OTHERS. <sup>1</sup>

*(Criminal Procedure Code) Act VIII. of 1869, ss. 445A, 445C—Deputy  
Commissioner—Appeal.*

1870.  
Aug. 23.

5 B. L. R.  
658.

[14 W. E. 33.]

The right of appeal to the High Court given by s. 445C of the Criminal Procedure Code to persons convicted on a trial held by an officer invested with the power described in s. 445A, is confined to cases in which the officer has exercised that power.

THIS case was referred to a Full Bench under the following orders by  
L. S. JACKSON, J.—This is an appeal against a conviction before the Deputy Commissioner of Singbhoom. The prisoners having been found guilty of committing house-trespass by night, in order to the commission of theft, under s. 457 of the Indian Penal Code, were sentenced respectively to one year and two years' rigorous imprisonment; in the latter case, corporal punishment was superadded. The appeal of the prisoners has been transmitted to this Court apparently on the ground that the Deputy Commissioner is an officer invested with the powers conferred by s. 445A of the Code of Criminal Procedure amended by Act VIII. of 1869.

There is nothing upon the record that I can find to show that the particular Deputy Commissioner is invested with the powers in question, but, assuming that he is so, it appears to me, for more than one reason, that the appeal does not lie to the High Court. In the first place, in deciding the case of the prisoners, the Deputy Commissioner does not appear to have exercised those powers at all. The case was referred to him by a subordinate Magistrate under s. 277 of the Code of Criminal Procedure, which directs that when a subordinate "Magistrate shall consider the offence established against the accused person to call for a more severe punishment than he is competent to adjudge, he shall record the finding and submit the proceedings to the Magistrate to whom he is subordinate, and such Magistrate shall pass such sentence or order in the case as he may deem proper, and as shall be according to law." I apprehend, therefore, that this conviction was made by the Deputy Commissioner in the course of his ordinary jurisdiction and duties as a Magistrate, and that, accordingly, the appeal would lie to the Court of Session.

But, even if it appeared that he had, in dealing with this case, exercised the jurisdiction specified in s. 445A, I should still think that the appeal would not lie to the High Court. S. 445B provides that "such chief officer shall try, as a Court of Session, offences which, under the schedule hereto annexed, are triable by a Court of Session only, and in such trial shall be guided by the rules contained in Chap. XXV. of this Code;" and immediately following that is the s. 445C, which declares that "any person convicted on a trial held by any officer invested with the power described in s. 445A may appeal to the High Court, and no appeal against such conviction shall lie to the Court of Session."

<sup>1</sup> Criminal Appeal, No. 438 of 1870, from an order passed by the Deputy Commissioner of Singbhoom, dated the 6th July 1870.

The result of these provisions is that two procedures are provided for for an officer exercising the powers in question—one in respect of offences which are triable by a Court of Session only, and in respect of which offences he is required to try the accused as a Court of Session; but in regard to offences in which the Magistrate has concurrent jurisdiction with the Court of Session, apparently he has to try them as a Magistrate, but with the increased powers conferred by s. 445A. I incline to think that the words, "convicted on a trial," in s. 445C, refer, if not to trials held by such officer as a Court of Session, at all events exclusively to cases in which he has exercised the powers conferred by s. 445A; and that where he has not acted in the exercise of those powers, but merely in the exercise of his jurisdiction as a Magistrate, the appeal will lie, as in the case of other Magistrates, to the Court of Session.

I am also of opinion that the word "trial" refers to the trials mentioned in the preceding clause, and that "any person convicted on a trial" held by such officer means on a trial held by the officer as a Court of Session.

It appears that, in other cases of like appeals, several Division Benches of this Court have entertained the appeal, and therefore it seems to be necessary to refer the point for the decision of a Full Bench. It is a matter of importance, because if the High Court be required to hear appeals from Magistrates who are invested with this jurisdiction, no matter what the nature of the offence or the amount of punishment may be, a very considerable amount of additional business will be thrown upon the Court.

MITTER, J.—I concur in the order of reference, but I express no opinion on the point referred.

The opinion of the Full Bench was delivered by

JACKSON, J.—We are of opinion that an appeal lies to the High Court, only when the conviction has been come to under the powers specified in s. 445A, Act VIII. of 1869.

*Before Sir Richard Couch, Kt., Chief Justice, Mr. Justice Bayley, Mr. Justice Kemp, Mr. Justice L. S. Jackson, and Mr. Justice Phear.*

### THE QUEEN v. NARAYAN NAIK AND ANOTHER.<sup>1</sup>

*Code of Criminal Procedure (Act XXV. of 1861), Chap. XI.—Complaint, Irregularity in recording—Power of the Court of Session.*

A Court of Session is competent to proceed to the trial of a prisoner brought before it upon a charge by a Magistrate authorized to make a commitment, though the complaint or authorization be contained only in a letter from the Judge of that Court to the Magistrate of the district, sent with the record of the case, notwithstanding an irregularity or defect of form in recording the complaint.

The complaint or authorization of the Court before which, or against the authority of which, an offence mentioned in Chap. XI. of the Code of Criminal Procedure is alleged to have been committed, is a sufficient warrant for commencement of criminal proceedings.

*The Queen v. Mahim Chandra Chuckerbutty*<sup>2</sup> overruled.

<sup>1</sup> Case called for from the Sessions Judge of Cuttack, on revision of the Jail Delivery Statements of his district for the month of May last.

<sup>2</sup> [This case is referred to in *Bhugobut Churn Sein v. Siam Ali* (18 W. R. 18); *Imperatrix v. Lakshman Saksharam* (I. L. R., 2 Bom. 481); *Queen v. Amir Khan* (9 B. L. R. 86; 17 W. R. 15).—ED.]

<sup>3</sup> 3 B. L. R., A. Cr., 67. [See p. 181 of this book.]

1870.

QUEEN  
v.  
DHONA  
BHOYA,  
5 B. L. R.  
658.

[14 W. R. 83.]

1870.

Aug. 23.

5 B. L. R.  
660.

[14 W. R. 34.]

1870.

THE following questions were referred to a Full Bench by L. S. JACKSON and MITTER, JJ. :—

QUEEN

v.

NARAYAN  
NAIK,5 B. L. R.  
660.

[14 W. R. 34.]

1st.—Whether a Court of Session is not competent to proceed to the trial of a prisoner brought before it upon the charge of a Magistrate who is authorized to make a commitment, although it should be objected that there has been some irregularity or defect of form in recording the complaint.

2nd.—Whether in the class of cases to which the 11th chapter of the Code of Criminal Procedure relates, the complaint or authorization of the Court, before which or against the authority of which such offence is alleged to have been committed, is not sufficient warrant for commencement of criminal proceedings.

The questions were referred under the following remarks by

L. S. JACKSON, J.—The case of Narayan Naik and Ram Naik was called for by this Court on a review of the abstract statements of the Court of Session of Zilla Cuttack. The proceedings having come up, it appears that these persons were severally charged with having given false evidence in a judicial proceeding under s. 193, Indian Penal Code, and that the Court of Session, without proceeding to trial, has discharged the accused persons on the ground of certain irregularities set forth fully in the case of Narayan Naik, on reference to the judgment in which case that of Ram Naik has been disposed of.

It seems that these persons gave the evidence which was charged as being false before the Deputy Magistrate, who, after disposing of the case in which the evidence was given, sent the record to the Magistrate of the district with a letter saying that he charged the prisoners with giving false evidence. Thereupon, the Magistrate made an order referring the case to another Deputy Magistrate, who thereupon summoned the parties, and, after taking evidence, committed the prisoners to the Sessions.

The Judge is of opinion that, as no formal complaint was made under s. 66, Code of Criminal Procedure, nor charge preferred under s. 135 before the police, the Deputy Magistrate or the Magistrate of the district was not authorized to take up the case, and, consequently, the preliminary proceedings were illegal and void, and the commitment also illegal. He comes to this conclusion on the authority of the case of *The Queen v. Mahim Chandra Chuckerbutty*,<sup>1</sup> in which the prisoners, who had been convicted under the 183rd and other sections of the Indian Penal Code, had their conviction quashed, and were discharged.

The decision in question was one of Justices Kemp and Markby. It has, undoubtedly, gone the length of holding that no trial in a Court of Session can be properly held, in which the proceedings had not commenced in one of the three modes described in ss. 66, 68, and 135, Code of Criminal Procedure.

With great respect to the learned Judges who held this opinion, it seems to me that Courts of Session are required to take cognizance of offences upon a charge preferred by a Magistrate empowered under the Code to make commitments to such Courts, and that, if such commitment has been made, and the trial in the Court of Session has been properly held, the accused person should not be allowed to have the trial and conviction quashed upon the ground of any defect in the mode of recording the original complaint; and it also appears to me that, in the class of cases referred to in s. 169, the letter of the Deputy Magistrate, before whom the alleged false evidence was

<sup>1</sup> 3 B. L. R., A. Cr., 67. [See p. 131 of this book].

given, was an amply sufficient ground for the commencement of the proceedings. I should have thought, if it had not been for the decision already cited, that in the case of offences specified in s. 168 of the Code of Criminal Procedure, the letter of the Judge of the Court of Small Causes, which was the foundation of the proceedings in that case, was still more abundantly sufficient, because the Code says that "a charge of contempt of the lawful authority of any Court or public servant shall not be entertained in any Criminal Court, except with the sanction or on the complaint of the Court or public servant concerned." It appears to me that when that Court addresses a public proceeding to the Magistrate complaining of the offence described, that that is a sufficient foundation for criminal proceedings, and that the Judge of that Court is not bound to come before the Magistrate and lodge a complaint and sign it in the ordinary manner, though it might be necessary for him to give evidence.

But, even if the recording of a complaint were prescribed, it seems to me that the omission to record such a complaint through the usual forms would not be a ground on which the prisoner would be entitled to have the conviction set aside. If this case had come before me, and the case of *The Queen v. Mahim Chandra Chuckerbutty*<sup>1</sup> had not occurred, I should certainly have been disposed to set aside the order of the Sessions Judge, and to direct the prisoners to be tried. It appears to me that we cannot make that order without coming in direct conflict with the ruling referred to; and therefore it is necessary to make a reference in this case to a Full Bench.

The opinion of the Full Bench was delivered by

L. S. JACKSON, J.—We are of opinion that the Court of Session is competent and ought to proceed to the trial of a prisoner who is brought before it upon a charge exhibited by a Magistrate who is authorized to make a commitment, notwithstanding any irregularity or defect of form in recording the complaint.

Also that, in the class of cases specified in the second question referred, the complaint or authorization of the Court concerned is a sufficient warrant for the commencement of criminal proceedings.

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<sup>1</sup> 3 B. L. R., A. Cr., 67. [See p. 181 of this book.]

1870.

QUEEN  
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5 B. L. R.  
660.

[14 W. R. 34.]

# Appendix.

*Before Mr. Justice Phear and Mr. Justice Mitter.*

1870.

May 28.

## THE QUEEN v. MAHENDRANATH CHATTERJEE AND ANOTHER.<sup>1</sup>

*Code of Criminal Procedure (Act XXV. of 1861), ss. 407, 426.*

5 B. L. R.

App. 39.

[13 W. R. 78.]

A was charged with the offence of voluntarily causing hurt to C, and B was charged with the same offence, and also with the offence of abetting A. The Magistrate found A guilty of the offence, and sentenced him to three months' rigorous imprisonment. The Magistrate also found B guilty of abetment of the offence of voluntarily causing hurt to C, and sentenced him to one month's rigorous imprisonment and a fine.

On appeal, the Sessions Judge held that there was no evidence to convict A, and he accordingly released the prisoner. The appeal of B, however, was rejected, on the ground that the evidence, though it did not prove him guilty of abetment, proved him guilty of voluntarily causing hurt, and therefore, under s. 426 of the Code of Criminal Procedure, the sentence could not be reversed. No "error or defect either in the charge or in the proceedings on trial" was alleged.

*Held* (by MITTER, J.) that s. 426 of the Code of Criminal Procedure did not apply.

MAHENDRANATH CHATTERJEE was charged before the Cantonment Magistrate of Barrackpore of voluntarily causing hurt to one Gaurmohan Ghose, and abetting one Jan Bax in causing hurt to the said Gaurmohan; and Jan Bax was charged with the offence of voluntarily causing hurt to the said Gaurmohan.

The Magistrate found Mahendranath Chatterjee guilty of abetment of the offence of voluntarily causing hurt to Gaurmohan under ss. 109 and 323 of the Indian Penal Code, and Mahendranath was sentenced to one month's rigorous imprisonment, and a fine of Rs. 200, or, in default, to one month's rigorous imprisonment.

The Magistrate also found Jan Bax guilty of voluntarily causing hurt to Gaurmohan, and thereby punishable under s. 323 of the Indian Penal Code, and Jan Bax was sentenced to three months' rigorous imprisonment.

On appeal by Jan Bax and Mahendranath, the Sessions Judge of the 24-Pergunnas passed the following order:—

The finding and sentence as regards the appellant, Jan Bax, are reversed, and he will be immediately released. The appeal of Mahendranath is rejected, but the conviction will be held to be of the offence of causing hurt.

In passing the order, he said:—

"It has been urged in appeal for Mahendranath that he is entitled to acquittal, as he has been convicted against the evidence; but in the first place, he was charged with causing hurt, as well as abetting it; and in the next place, s. 426 of the Procedure Code forbids the reversion of a sentence on the ground that the evidence proves a different offence. It appears to me impossible to say that Mahendranath has been prejudiced by the conviction of abetment, instead of the substantive offence. Moreover, as it appears on the evidence that both appellants were present at the time, the guilt of both was the same; the finding must depend on the same evidence, both for the prosecution and for the defence; and Mahendranath has pleaded to the charge of the substantive offence."

Mahendranath applied to the High Court for revision.

Baboo *Amirindar Nath Chatterjee* for the prosecutor.

<sup>1</sup> Reference No. 59 of 1870, from the Sessions Judge of 24-Pergunnas, dated the 17th May 1870.

Mr. Montrion (Baboo Inwarchandra Chuckerbutty with him) for the petitioner.

PHEAR, J.—In this case the record has been brought up before us on an application for revision, and we are asked to quash the conviction, substantially on the ground that there was no legal evidence upon which the conviction could properly be made to rest.

The case came before the Sessions Judge on appeal; and the Judge was clearly of opinion that the evidence did not support the conviction which the first Court had made. He thought, however, that the evidence did establish the offence laid in the alternative charge; and inasmuch as the punishment which had been awarded was not an improper punishment for that offence, he allowed the conviction to stand. I must add that this is my interpretation of what the Sessions Judge in effect did, for he states in the judgment that the conviction will be held to be for the offence of causing hurt.

The Judge acted, as he says, under the provisions of s. 426, Criminal Procedure Code.

It appears to me that, under that section, supposing that section to apply, the learned Judge, being of opinion that the prisoner ought to have been found guilty of an offence other than that of which he was really found guilty, had no power to alter either the finding or sentence, and ought therefore to have confined himself simply to dismissing the appeal; I take it therefore that, in law, that is the effect of his judgment.

Mr. Montrion for the prisoner has argued very forcibly that, inasmuch as the prisoner had been substantially, though not in express terms, acquitted by the first Court of the offence of which the Sessions Judge considered the evidence to prove him to be guilty, therefore, even under s. 426, the lower Appellate Court could not rightly allow the conviction to stand, for obviously the result of doing so would be, at any rate, so far as the opinion of the lower Appellate Court is concerned, that the prisoner would be convicted and punished for an offence of which he had been acquitted by the first Court, and thus the prosecutor would indirectly obtain all the advantage of a successful appeal against an acquittal, notwithstanding that the Criminal Procedure Code expressly forbids an appeal in such case. It appears to me that this argument is very strong; but having regard to the matter on this record, I do not find it necessary to pass a judicial opinion upon it.

During the discussion of the case, I threw it out, as the inclination of my opinion, that this section is in terms confined in its operation to the cases where error or defect, either in the charge or in the proceedings, is the foundation on which the alteration of the finding or sentence is sought; and I still feel very great difficulty in coming to the conclusion that the finding of a prisoner guilty without evidence upon one charge, and acquitting him of another charge to which the evidence is really directed (that which has happened here), is either an error or defect in the charge or in the proceedings. It appears to me to be an error in the exercise of judicial discretion, and I could not bring myself without more consideration than I have been able to give to this case to say that an error of that kind, when the proceedings are otherwise regular, is covered by the words of this section. I believe, however, there is no doubt that some Division Benches of this Court, and certainly some of the other High Courts in India, have given a larger construction to the words of this section. But, as I have already said, I don't think that, on the facts of this case, I am obliged to give a judicial opinion with regard to this point.

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MAHENDRANATH CHATTERJEE,

5 B. L. R. App. 39.

[13 W. R. 78.]

1870.

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v.MAHENDRANATH  
CHATTERJEE,5 B. L. R.  
App. 39.

[13 W. B. 78.]

The prisoner stands convicted of a charge which there is no evidence, according to the judgment of the Appellate Court, to support; and in that judgment so far I entirely concur.

It is clear, on looking through the depositions, that, if the witnesses are to be believed at all, the offence committed by the prisoner was an assault on the prosecutor with his (the prisoner's) own hand. There is literally no evidence to support the second charge of abetment. Therefore, the record being now before us on revision, and it appearing therefrom that the prisoner has been acquitted of the assault, and convicted of the abetment, I think there is such an error in the record as to vitiate the conviction, and such that we ought to reverse that conviction, unless s. 426 intervenes, and we are of opinion that the evidence makes out that the accused person ought to have been found guilty of another offence for which the sentence passed is appropriate.

Now, on looking into this evidence (assuming that s. 426 applies), I think that it is entirely unworthy of credit, and it appears to me also not difficult to discover how the first Court came to this, at first sight, extraordinary conclusion, namely, that, notwithstanding the testimony of the eye-witnesses, it was safer to find the prisoner guilty of abetment, than to find him guilty of the actual assault.

\* \* \* \* \*

Without going further into the details of their depositions, I will at once state that I feel the evidence to be utterly untrustworthy with regard to this point. The first Court certainly disbelieved the evidence of the three women with respect to the assault being committed by the hand of Mahendranath Chatterjee; and I think the first Court was right.

I therefore agree with the Appellate Court that there was no evidence upon which the prisoner could be found guilty of the offence of which he was, in fact, found guilty, and I also agree with the first Court that the evidence which went to support the other charge ought not to be believed; it follows, therefore, that even if this case falls within the scope of s. 426, there exists no ground upon which the conviction can be upheld; consequently the conviction must be quashed; and as the prisoner is out on bail, the bail-bond or other security must be cancelled.

MITTER, J.—I concur in the order proposed by my learned and honorable colleague; but I would prefer to rest my judgment on the ground that this case is not governed by the provisions of s. 426 of the Criminal Procedure Code.

The petitioner, Mahendranath Chatterjee, and one Jan Bax, a Cabuli, were tried before the Cantonment Magistrate of Barrackpore on the following charges: namely, first, that they had voluntarily caused hurt to one Gaurmohun Ghose; and secondly, that he, Mahendranath, had abetted the commission of that offence.

The evidence for the prosecution went to show that the blow which caused the hurt had been struck by the prisoner, Mahendranath, himself. The Cantonment Magistrate was of opinion that this evidence was not worthy of credit. But, instead of releasing the prisoners then and there, as he ought to have done, upon this view of the evidence, the Cantonment Magistrate went upon some conjectural grounds set fourth in his judgment to find the Cabuli guilty of the offence of voluntarily causing hurt to Gaurmohan Ghose, and the prisoner, Mahendranath, of having abetted the commission of that offence. Against this decision, both the prisoners appealed to the Sessions

Judge of the 24-Pergunnas; the ground of appeal in both cases being that there was no evidence to support the conviction of the prisoners on the charges of which they had been respectively convicted.

The Sessions Judge has acquitted the Cabuli, on the ground that there is no evidence to prove that the Cabuli had caused the hurt complained of. With reference to Mahendranath Chatterjee, the Sessions Judge was of opinion that the evidence on the record was sufficient to prove that he had struck the blow by which the hurt was caused; and, being of that opinion, the Sessions Judge has refused to interfere with the sentence passed on Mahendranath under s. 426.

I am not quite prepared to say whether this Court, sitting as a Court of revision under s. 404, has any right to enter into the question whether the view of the evidence taken by the lower Appellate Court is correct or not. But I express no opinion on this point, because I think that the application of s. 426 to this case by the Sessions Judge was not legal.

It has been contended before us that, although the Cantonment Magistrate of Barrackpore disbelieved the evidence of the witnesses for the prosecution, no formal verdict of acquittal has been recorded by him in favour of Mahendranath on the first charge, namely, that he, Mahendranath, had voluntarily caused hurt to Gaurmohan Ghose.

This circumstance does not, in my opinion, affect this case one way or the other. If the Magistrate was of opinion that the evidence against the prisoners was not sufficient to support the charge, he was legally bound to record a verdict of acquittal. But his omission to do so cannot affect the interests of the prisoner in any manner whatever. This point has been ruled by a Full Bench of this Court in the case of *Queen v. Toyab Sheikh*.<sup>1</sup> In that case the prisoner was tried by the Sessions Judge for two distinct offences, namely, for the offence of murder, as well as for culpable homicide not amounting to murder. The Sessions Judge convicted the prisoner of the last offence; and it was held by this Court that, although a formal verdict of acquittal had not been recorded to the offence of murder, the Sessions Judge had substantially acquitted the prisoner of that offence. It being clear, therefore, that the Magistrate had substantially acquitted the prisoner of the offence of causing hurt to Gaurmohan, we will now proceed to see whether s. 426 applies to this case. The words of that section have already been quoted by my learned and honorable colleague; and so far as I can understand them, I am bound to say that they have no bearing upon this case.

The prisoner did not appeal to the Sessions Judge, on the ground that there was "any error or defect in the charge," or on that of any irregularity in the proceedings held at the trial. If he had done so, the Sessions Judge might have, under s. 426, declined to interfere if he found from the record that the punishment awarded by the Magistrate was not an improper punishment for the offence of which the accused person ought to have been convicted. But if he found that there was no evidence to support the charge of abetment, which was the only charge of which the prisoner had been convicted by the Magistrate, the Sessions Judge should have set aside the conviction, and acquitted the prisoner. There was no error or defect in the charge, and consequently the prisoner did not complain of any.

The proceedings had been conducted regularly throughout, and consequently the prisoners did not and could not complain of any irregularity in those proceedings. But the prisoner had a substantial ground of complaint,

1870.

QUEEN  
v.  
MAHENDRANATH  
CHATTERJEE,

5 B. L. R.  
App. 39.

[18 W. R. 78.]

<sup>1</sup> 5 W. R., Cr. Bul., 2.



1870.

QUEEN

v.

MAHEN-  
DRANATH  
CHATTER-  
JEE,5 B. L. R.  
App. 39.

[18 W. R. 78.]

namely, that the offence of which he had been convicted was not supported by any evidence on the record, and the Sessions Judge himself admits that this ground was valid.

To allow the Sessions Judge, in a case of this description, to exercise the discretion vested in him by s. 426, would be to act directly contrary to the provision of s. 407. That section says that "there shall be no appeal against a judgment of acquittal," and the appeal in the present case being restricted to a judgment of conviction for a particular offence, all that the Sessions Judge had to do was to see whether that conviction was supported by the evidence or not: for he had no power to inquire whether the prisoner had been properly or improperly acquitted of the other charge for which he was tried by the Magistrate.

I do not think that the provisions of s. 426 were ever intended by the Legislature to override that great principle of Criminal Jurisprudence which says that no man's life or liberty ought to be jeopardized twice for the same offence. In the Full Bench case already cited by me, it has been held that this Court has no power, either as a Court of revision or as a Court of appeal, to convict a prisoner of an offence for which he has been already tried and acquitted by a Court of competent jurisdiction; and I do not think that the Sessions Judge had any power to do that indirectly which he is not competent to do directly according to the principle laid down in that case.

*Before Mr. Justice Kemp and Mr. Justice E. Jackson.*

1870.

July 2.

5 P. L. R.  
App. 45.

[14 W. R. 12.]

IN THE MATTER OF THE PETITION OF NABA KUMAR BANERJEE.<sup>1</sup>

*Code of Criminal Procedure (Act XXV. of 1861), s. 36—Removal of a Case by the Magistrate from the File of a Subordinate Magistrate.*

Interference by the High Court in a case where the Magistrate had improperly exercised his discretion in removing a case from the file of a Deputy Magistrate.

Baboo Hem Chandra Banerjee for petitioner.

KEMP, J.—The prisoner in this case is one Naba Kumar Banerjee, a late stamp-vendor of the Moonsiff's Court of Serampore. It appears that the Nazir of the Sub-Division of Serampore had absconded with certain property and moneys in his charge, in respect of which a charge was laid against him. There were also, it appears, two register books of stamps missing; and the prisoner, Naba Kumar Banerjee, being suspected of having something to do with the books being missing, is charged with the theft of the said registers by the Deputy Collector of Serampore. The case was made over for trial to the Deputy Magistrate of Serampore. The Deputy Magistrate, after taking the evidence for the prosecution, recorded his opinion that the discrepancies in the evidence for the prosecution were of so glaring a nature that it was impossible to sustain the charge brought by the prosecution against the prisoner, Naba Kumar Banerjee; but as the mooktear for the prosecution had asked the Court to postpone the case to enable him to procure copies of the evidence, stating that he would then be able to show to the Deputy Magistrate that the prisoner ought not to be discharged, he appears to have acceded to the request of the mooktear, and admitted the accused to bail. On

<sup>1</sup> Miscellaneous Criminal Appeal, No. 47 of 1870, from an order of the Deputy Magistrate of Serampore, dated the 13th April 1870.

<sup>2</sup> [This case is followed in *Queen v. Girish Chandra Ghose* (7 B. L. R. 573; 16 W. R. 40).—Ed.]

another occasion, the mooktear for the prosecution appears to have made a similar application, and the case was again postponed. After the Deputy Magistrate had given the above expression of opinion, the case, it appears, was suddenly removed from his file by the Officiating Magistrate of Hooghly.

1870.

IN THE  
MATTER OF  
THE PETI-  
TION OF  
NABA-  
KUMAR  
BANERJEE,  
5 B. L. R.  
App. 45.

[14 W. R. 12.]

In the order removing the case, no reasons whatever have been given for doing so. The transfer is made under s. 36 of the Code of Criminal Procedure; and although that section does not say that the Magistrate is bound to give any reasons, and enacts that the Magistrate is competent to withdraw any criminal case from any Court subordinate to such Magistrate within his district or division, and to try the case himself, or to refer it for trial to any other such Court competent to try the same, we think that, under the circumstances of this case, considering that the case was complete, and that the Deputy Magistrate had expressed an opinion that the evidence for the prosecution was not sufficient to support the charge, the Magistrate has not exercised a wise or proper discretion in removing this case from the file of the Deputy Magistrate of Serampore to that of the Joint-Magistrate of Hooghly. When the case came up on a former occasion, before the Chief Justice and myself, we thought it necessary to call upon the Magistrate to show cause why he had acted in this manner, and he has now submitted an explanation. He refers, first, to the fact of the Deputy Magistrate being to a certain extent subordinate to the prosecutor; secondly, to a rumour that the Deputy Magistrate had made improper remarks to a mooktear in the case; thirdly, that the Deputy Magistrate, residing in a small place like Serampore, and being in a position to hear much talk and rumour about the case, was unfit to try it; and, fourthly, that his amlas were related to parties in the case. These reasons, we think, are wholly insufficient for removing the case from the Deputy Magistrate's file at the late stage at which it was so removed. They may be very good reasons for not making the case over to the Deputy Magistrate, but not sufficient reasons after he had expressed an opinion unfavourable to the prosecution to suddenly withdraw it from his file. We think, therefore, that the Magistrate has not acted wisely in removing this case from the file of the Deputy Magistrate to that of the Joint-Magistrate of Hooghly. It will therefore be replaced on the file of the Deputy Magistrate, who will dispose of it in due course.

*Before Mr. Justice L. S. Jackson and Mr. Justice Glover.*

### THE QUEEN v. HIRALAL SING AND OTHERS (PRISONERS).<sup>1</sup>

*Code of Criminal Procedure (Act VIII. of 1869), s. 435—Power of a Magistrate in dealing with a case when dismissed without full and sufficient inquiry.*

1870.  
June 25.

5 B. L. R.  
App. 48.

*Semle.*—When a charge is dismissed by a Subordinate Magistrate without inquiry, a Magistrate has no power, under s. 435 of Act VIII. of 1869, to order a trial before another Magistrate, but can only order a commitment to the Court of Session. [14 W. R. 8.]

Mr. Hyde (with him Baboo Jadab Chandra Seal) for the prisoners.

JACKSON, J.—The petitioners were charged with an offence under s. 148, Indian Penal Code, which is an offence triable before the Court of Session, or the Magistrate of a district. The charge in the first instance was preferred before Mr. Fisher, who seems to be a Subordinate Magistrate. This officer,

<sup>1</sup> Criminal Miscellaneous Appeal, No. 69 of 1870, against the order of the Sessions Judge of Moorshedabad, dated the 7th March 1870, affirming an order of the Deputy Magistrate of that district, dated the 12th February 1870.

1870.

QUEEN

v.

HIRALAL

SING,

5 B. L. R.

App. 48.

[14 W. R. 8.]

after examining certain witnesses, discharged the accused. The case, however, being brought to the notice of the Magistrate of the district, Mr. Hankey, he was of opinion that the proceedings of the Subordinate Magistrate had been hurriedly and carelessly taken, and observed that the complainant was entitled to have his witnesses examined; and he, therefore, acting under the powers conferred by s. 435, Act VIII. of 1860, ordered a further inquiry into the complaint, and directed that the case be made over for trial to another Magistrate, who, as I understand, exercises the full powers of a Magistrate. That Magistrate convicted the accused, and sentenced them to imprisonment and fine. The accused appealed to the Court of Session, objecting, amongst other things, to the proceedings, on the ground that they were not warranted by s. 435 of the Code of Criminal Procedure. The Sessions Judge, however, overruled this objection; and, going into the merits of the case, confirmed the conviction and sentence. The case is now brought before this Court under s. 404 of the Code of Criminal Procedure, and we are asked to set aside the proceedings of the Magistrate on the ground of their being contrary to law. It is contended that the Magistrate of the district was not warranted in dealing with this case as one which had been dismissed without inquiry. It is further contended that, supposing the Magistrate to have been authorized to deal with the case, the only order that he could make was an order of commitment to the Court of Session.

The Magistrate, under the amended s. 435, has, like the Court of Session, power of dealing with cases in which an accused has been discharged by any Magistrate, and also cases in which a complaint has been dismissed without inquiry, always under the condition that the Magistrate, whose proceedings are the subject of notice, is a Subordinate Magistrate. The Magistrate of the district has dealt with the case as if the complaint had been dismissed without inquiry; and the Sessions Judge takes the same view of the case.

There is authority in a ruling<sup>1</sup> (which, though, perhaps, not a judicial ruling of this Court, is contained in a letter written by way of direction to a Sessions Judge), dated August 15th, 1865, for saying that a complaint, dismissed without sufficient and full inquiry, may be considered as dismissed without inquiry. I am inclined to think that this authority warranted the Magistrate of the district in dealing with the case as he did. If not, however, it is clear that he would still have authority to order a commitment, or do whatever is implied in the term "like powers," and a question may arise what precisely is contemplated by those words, namely, whether it is intended expressly to limit the Magistrate of the district to order a commitment to the Court of Session, or to enable him, by analogy, to take order for the trial of the case before some competent Court of criminal jurisdiction. I incline, upon the whole, to the construction that a Magistrate is bound to order a commitment, and is not authorized to order a trial before another Magistrate.

But, whatever view may be taken of the previous part of the section, I think we are precluded from disturbing the proceedings of the Court below by reference to ss. 426 and 439 of the same Act. S. 426 says: "No finding or sentence passed by a Court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error or defect, either in the charge or in the proceedings on trial, unless the accused person shall have been sentenced to a larger amount of punishment than could be awarded for the offence of which, in the judgment of the Appellate Court, the accused person ought, upon the evidence, to have been found guilty, or unless, in the judgment of

<sup>1</sup> 3 W. R., Criminal Letters, 21.

the Appellate Court, the accused person shall have been prejudiced by such error or defect ;” and s. 439 provides: “ No trial in any Criminal Court shall be set aside, and no judgment passed by any Criminal Court shall be reversed, either on appeal or otherwise, for any irregularity in the proceedings of the trial, unless such irregularity have occasioned a failure of justice.”

In this case, the parties appear to have been tried and convicted by a Court of competent jurisdiction. It seems to me that, unless we are of opinion that the irregularity, supposing an irregularity to have occurred, has been productive of failure of justice, we ought not to set aside the trial, or to reverse the sentence by way of revision.

It is not shown that anything of the sort has occurred, and I think, therefore, that this application must be disallowed.

1870.

QUEEN  
v.  
HIRALAL  
SING,

5 B. L. R.  
App. 48.  
[14 W. R. 6.]

*Before Mr. Justice L. S. Jackson and Mr. Justice Glover.*

IN THE MATTER OF CHANDI CHARAN CHATTERJEE v.  
CHANDRA KUMAR GHOSE AND ANOTHER.<sup>1</sup>

*Criminal Procedure Code—Act XXV. of 1861 and VIII. of 1869—  
Counsel—Pleader—Prosecution.*

1870.  
July 23.

5 B. L. R.  
App. 70.

A counsel or pleader is entitled to appear and act on behalf of the prosecution in the Criminal Courts.

The Sessions Judge of the 24-Pergunnas referred the following case for the opinion of the High Court :

“ In a criminal case, which has come before me in appeal, I find that the Deputy Magistrate has ruled that, in consequence of the repeal of Act XXXVIII. of 1850, he cannot allow the complainant, in a case before him, to employ a pleader or a mooktear to conduct the prosecution.

“ The law which regulated the employment of agents in the prosecution of criminal cases was s. 3, Reg. III. of 1812 ; but that has also been repealed, and there is now no specific law on the subject. But I am not aware of any law or practice which is intended to deprive the complainant and the Court of the aid which may be given by the employment of a professional agent ; and it appears clear to me that every facility ought to be given for the employment of such persons by the complainant as well as by the accused person. The employment of a pleader to conduct the prosecution would not, of course, excuse the presence of the complainant as a witness in support of his complaint, but it ought to assist the Court materially, and to ensure the production of all the evidence requisite for the due elucidation of the facts. Moreover, it is unjust to permit the employment of counsel on one side, and not on the other side ; and in the case now before me, I might have felt that the refusal to allow the complainant's vakeel to examine the witnesses would sufficiently explain the absence of evidence or other defects in the prosecution.

<sup>1</sup> Reference from the Sessions Judge of the 24-Pergunnas, by his letter No. 66, dated the 26th of May 1870.

1870.

IN THE  
MATTER OF  
CHANDI  
CHARAN  
CHATTER-  
JEE  
v.  
CHANDRA  
KUMAR  
GHOSE,  
5 B. L. R.  
App. 79.

It appears to me unnecessary to argue the point at any length. But as it has been raised, I have the honor to suggest that the High Court should issue a rule regulating the practice."

The judgment of the Court was delivered by

JACKSON, J.—It seems to me quite clear that pleaders are empowered by Act XVIII. of 1865 to appear, plead, and act in the Criminal Courts, and they may so plead and act as well on behalf of prosecutors as on behalf of accused persons.

S. 419 of the Code of Criminal Procedure expressly recognizes the right of the counsel or agent of the complainant to be heard upon appeal. We can see no reason for supposing that the right varies in the case of appeals from what it is in the case of proceedings in the Court of the Magistrate. S. 432, Act VIII. of 1869, in my opinion, is merely intended to limit the right of an accused to be defended by a barrister or attorney of the High Court, or pleader, or otherwise by other persons with the leave of the Court.

We think, therefore, that the order of the Deputy Magistrate ruling that a pleader was not entitled to appear on behalf of a private prosecutor is erroneous, and ought to be set aside.<sup>1</sup>

*Before Mr. Justice Lock and Mr. Justice Glover.*

### THE QUEEN v. RAI LACHMIPAT SING.<sup>2</sup>

*Code of Criminal Procedure (Act XXV. of 1861), s. 62—Prohibitory Order.*

1870.

July 9.

5 B. L. R.  
App. 81.

Under s. 62 of the Code of Criminal Procedure, a Magistrate cannot pass a prohibitory order without having previously issued a rule to show cause why the order should not be passed.

THIS case was submitted, for the opinion of the High Court, by the Sessions Judge of Rungpore.

In the district of Bogra, a dispute arose between two zemindars about two neighbouring *hâts*. A serious breach of the peace occurred, and a Deputy Magistrate investigated the case on the spot. The Magistrate of the district afterwards took up the matter, and bound down certain of the parties under recognizances to keep the peace. On the same day, without giving the parties any formal notice, or any opportunity of showing cause against the order, he passed an order under s. 62, directing that the market-day in one *hât* should be changed.

The Magistrate's order was: "I direct, under s. 62, Criminal Procedure Code, that a written order be served upon the defendants, prohibiting them from holding the *hât* at Muradpur on Mondays and Thursdays."

<sup>1</sup> See also *Act XXV. of 1861, s. 376*.—"If any evidence is adduced on behalf of the accused person, or if he answers any question put to him by the Court, the prosecutor, or the counsel or agent for the prosecution, shall be entitled to a reply."

<sup>2</sup> Reference, under s. 434 of the Code of Criminal Procedure, by the Sessions Judge of Rungpore, in his letter No. 361, dated 17th June 1870.

<sup>3</sup> [This case is referred to in *In the Matter of the Petition of Bykuntram Laha* (10 B. L. E. 434; 18 W. E. 47).—ED.]

In support of his opinion, that the Magistrate's order was illegal, the Sessions Judge cited *The Queen v. Kalika Prasad*,<sup>1</sup> *In the Matter of Hari Mohan Malo*,<sup>2</sup> *The Queen v. Bhyro Dayal Singh and others*,<sup>3</sup> and *In the Matter of the Petition of Kalidas Bhattacharjee*.<sup>4</sup>

<sup>1</sup> Before Mr. Justice L. S. Jackson and Mr. Justice Markby.

THE QUEEN v. KALIKA PRASAD.\*

26th January 1869.

JACKSON, J.—It seems to me that we are not called upon to set aside the order of the Magistrate as being contrary to law. I think that the order made in this case was strictly within the provisions of s. 64 of the Code of Criminal Procedure. The terms of this section have been made—and apparently intentionally made—extremely wide. They enable the Magistrate to direct any person to abstain from any act, or to take certain order with certain property in his possession or under his management, whenever such Magistrate shall consider such direction is likely to prevent obstruction, annoyance, or injury, or risk of obstruction, to any person lawfully employed, or is likely to prevent a riot or an affray. The Magistrate considered in this case (whether rightly or wrongly, we are not called upon to say) that the continuance of these two *hatts* held on the same day upon adjacent pieces of ground was certain to lead, as it had already led, to riots and affrays, and also to annoyance or injury to persons lawfully employed; and that, by directing the parties to abstain from holding the *hatts* on the same day, he was likely to prevent those injurious results. It appears to me that it is precisely such a case as is contemplated by the section. Several cases have been cited to us, in which it is contended that the Judges have held an opposite opinion. The only case, however, precisely bearing on the present point is the case of *Sheeb Chunder Bhattacharjee v. Saadut Ally Khan*.† We have not got the facts of that case before us; but, so far as we can judge, the case was not precisely on all fours with the present. Mr. Justice Trevor observes: “I am clearly of opinion that these words do not authorize a Magistrate to interfere with the exercise of any of his ordinary rights by a landholder, merely because such exercise may require vigilance on the part of the police, and may, in the absence of such vigilance, lead to an affray.”

I suppose that the words used here are the words which the Magistrate employed in drawing up his order. It may very well be that the circumstances did not justify the order made on that particular occasion. As the present case is presented before us, it appears to me that the order is strictly within the Magistrate's competence.

MARKBY, J.—I am of the same opinion. Of course, no one would doubt that, in cases of this kind, a Magistrate ought to be most careful that he does not do more than is absolutely necessary, in order to preserve the peace, or to prevent the nuisance which is brought before him; but if it has been, as it was in this case, made out that, by the exercise of the strict legal rights of the parties, a breach of the peace has several times occurred, and the Magistrate is of opinion that, by the continuance of the parties to exercise those rights, further breaches will occur, I think he is perfectly justified in making such an order.

<sup>1</sup> 1 B. L. R., A. Cr., 20. [See p. 13 of this book.]

<sup>2</sup> 3 B. L. R., A. Cr., 4. [See p. 91 of this book.]

<sup>4</sup> Before Mr. Justice Kemp and Mr. Justice Markby.

IN THE MATTER OF THE PETITION OF KALIDAS BHUTTACHARJEE.†

3rd August 1869.

KEMP, J.—This was a reference, under s. 434 of the Code of Criminal Procedure, by the Sessions Judge of the 24-Pergunnas, in a case in which he is of opinion that the order of the Cantonment Magistrate of Barrackpore is illegal, and ought to be quashed.

\* [This case is referred to in *Abbas Ali Chowdhry v. Illim Meah* (6 B. L. R. 74; 14 W. R. 46); and *Rai Luchmasept Singh, Appellant* (14 W. R. 17; 5 B. L. R. Ap. 81).—Ed.]

† 4 W. R., Cr., 12.

‡ [See *Rai Luchmasept Singh, Appellant* (14 W. R. 17; 5 B. L. R. Ap. 81). Referred to in *Gopi Mohun Moulik v. Taramoni Chowdharani* (4 C. L. R. 309; 1 L. R., 5 Cal. 7, Civ. Bul.); and *Queen v. Abbas Ali Chowdhry* (6 B. L. R. 74; 14 W. R. 46).—Ed.]

1870:

QUEEN  
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RAJ

LACHMIPAT

SING,

5 B. L. R.

App. 81.

Baboo Rasbehari Ghose for Lachmipat Sing.

Baboo Jogadaman Mookerjee for Government.

The judgment of the Court was delivered by

LOOH, J.—After reading the report of the Judge, we think that the order passed by the Magistrate under s. 62 of the Criminal Procedure Code must be set aside. Of course, as the Judge says, this will not prevent the Magistrate from passing a fresh order, after hearing evidence, and giving the parties opportunity to show cause, but he cannot pass an order without first issuing a rule to show cause.

It appears that in this case, Kalidas Bhattacharjee petitioned the Magistrate that the defendant, Mahendranath Chuttopadhyaya, was erecting a wall, which obstructed the drain of his (the plaintiff's) house. His petition was presented on the 8th June, and Kalidas was examined briefly. He stated that the drain was an old one, and that Mahendranath, in erecting a wall, was obstructing that drain. The Magistrate directed the police to stop the erection of the wall, and intimated his intention of visiting the spot in person. This was on the 8th June; and on the 11th June, the Magistrate took up the case, and held that s. 308 of the Criminal Procedure Code did not apply to the case; but as there was no apprehension of a breach of the peace, he referred the plaintiff to a Civil Court for redress. On the same date, the Magistrate states that, after writing the above order, s. 62 of the Code of Criminal Procedure Code was brought to his notice as one under which he could dispose of the case; and that as he was of opinion that the plaintiff was in possession of the drain, and the defendant's building a wall would cause an obstruction of the drain, and an inconvenience and annoyance to the persons living in the house, he should be prevented from doing so. He, therefore, made an order under s. 62, that the defendant was to leave the drain open, and to cease building the wall. It has been contended before us that, having passed the first order, the Magistrate was not competent to pass any orders at all under s. 62; and that, even if he was competent to do so, he ought to have given the defendant an opportunity of being present, and of being heard, so as to enable him to shew cause why such an order should not be passed. We think that, on the first contention, the Magistrate was competent, when he found that the plaintiff's case did not come under the section under which he had put it, *viz.*, s. 308, to apply any other section of the Code of Criminal Procedure which applied to that case: but we think that, before proceeding to apply s. 62, the Magistrate ought to have given the defendant, Mahendranath, an opportunity for showing cause either by giving evidence or shewing in any way in his power why the provisions of s. 62 should not be applied to this case. Not having done so, we think that the decisions of the Magistrate are irregular, and that they must be set aside. This order will not prevent the Magistrate from taking up the case again on a formal application from Kalidas Bhattacharjee; and after hearing both parties, and making necessary inquiries, from passing such orders as he may deem right and proper.

MARKBY, J.—I am of the same opinion. There is a good deal of what was said by the Sessions Judge in his order of reference with which I am not at present prepared to concur; nor am I at present prepared to say that this was not a case in which the Magistrate could pass an order under s. 62, or that there was not evidence before him sufficient for that purpose. Moreover, my opinion at present is that a Magistrate is not bound to adhere to any particular section which may happen to be mentioned by the complainant in his complaint, but he may apply any section of the law which he thinks applicable to the case, as long as the parties are not misled, and as long as the proper procedure prescribed for the purpose has been observed. Nor do I doubt that a Magistrate who has made an order which he finds to be wrong may re-call that order, and in its stead substitute any other order he may think right under the law. But my ground in concurring to set aside the orders of the Magistrate in this case, is that the alteration made by the Magistrate was made in the absence of the parties after they had left the Court, and there is nothing in this record which could satisfy us that it was brought to the notice of the parties that that order was about to be re-called, or that they had any opportunity of showing cause why it should not be so re-called and altered. The order passed under s. 62 is thus illegal, being passed *ex parte* by the Magistrate, without the knowledge of the parties, and in a manner behind their backs after they had left the Court, thinking that the case had been finally disposed of by the Magistrate under another section, and having no idea that the first order passed by the Magistrate was going to be set aside. On that ground, and on that ground alone, I think that the Magistrate's orders should be set aside.

*Before Mr. Justice Lush and Mr. Justice Markby.*

IN THE MATTER OF RAMDYAL SING.<sup>1</sup>

1870.  
Nov. 9.

*Act XX. of 1865, s. 84—Conviction by a Magistrate for practising as a Mookhtar in the Revenue Court without a Certificate—Jurisdiction.*

5 B. L. R.  
App. 89.

*Reference.*—Mr. D. M. Testro, Assistant Magistrate of Khoordah, has fined the appellant, under s. 34 of Act XX. of 1865, for practising as a revenue-agent in the office of the Assistant Collector of Khoordah, without having the certificate required by the Act.

This order appears to me to be illegal, as such a fine could only be imposed by the Revenue Officer in whose Court the appellant practised. I therefore forward the papers of the case, in order that the sentence may be set aside as illegal.

*Order of the High Court.*

LOCH. J.—We think that there has been a formal error on the part of the Assistant Magistrate in transferring this case from the revenue to the criminal side of his Court, and trying it in his capacity of Assistant Magistrate, and not in that of Assistant Collector. This error, however, does not appear to be material, as Mr. Testro is both Assistant Collector and Assistant Magistrate, and the offence was committed before him in the former capacity, and as Assistant Collector he might have disposed of the case. The error, we think, may be rectified by his drawing up a fresh order in his capacity of Assistant Collector, and filing the proceedings in the revenue side of his office.

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<sup>1</sup> Reference to the High Court under s. 434 of the Code of Criminal Procedure, by the Sessions Judge of Cuttack, under his letter No. 251, dated 28th September 1870.





# Bengal Law Reports.

## [FULL BENCH.]

Before Sir Richard Couch, Kt., Chief Justice, Mr. Justice Bayley, Mr. Justice Kemp,  
Mr. Justice L. S. Jackson, and Mr. Justice Phear.

### THE QUEEN v. ABBAS ALI CHOWDHRY (PETITIONER).<sup>1</sup>

*Criminal Procedure Code (Act XXV. of 1861), ss. 62 & 404—Judicial Power of  
Magistrate—Obstruction, Annoyance, and Injury—Nuisance.*

1870.  
Aug. 17.

6 B. L. R. 74.  
[14 W.R. 46.]

An order of a Magistrate, under s. 62, Criminal Procedure Code, *e.g.*, prohibiting one of two rival proprietors of two different hauts on holding his haut on certain days of the week in order to prevent obstruction, annoyance, and injury, is not a judicial order; and is, therefore, not open to revision by the High Court under s. 404, Criminal Procedure Code.

*Per PHEAR, J. (dissenting).*—The power conferred by s. 62, Criminal Procedure Code, is of a judicial character within the meaning of the word “judicial” in s. 404; and an order of a Magistrate in exercise of that power is in the nature of an injunction, and is therefore subject to revision by the High Court under s. 404, Criminal Procedure Code.

THE question in this case argued before the Full Bench was, as to the effect of an order by a Magistrate under s. 62<sup>2</sup> of the Criminal Procedure Code, whether it is a judicial order, and therefore open to revision by the High Court under s. 404.<sup>3</sup> It arose under the following reference:—

HOBHOUSE, J. (LOCH, J., concurring).—We think this case must be submitted to the Full Bench for a decision upon the point material. It appears that a market had, for a long time, been held by certain persons on Tuesdays and Fridays, at a place called Fulhar, on one side of the river Barak, in Cachar; it appears also that the petitioners before us, at some time within a year previous to this application, established a similar market at a distance of about a mile from the first market, and on the opposite side of the same river, and held their market there on Tuesdays and Fridays also; it appears also that the police reported various disturbances arising from the efforts of

<sup>1</sup> Miscellaneous Criminal Appeal, No. 85 of 1870, against an order of the Officiating Deputy Commissioner of Cachar, dated the 10th September 1869.

<sup>2</sup> [This case is approved in *Sheikh Laboo v. Adam Sircar* (17 W. R. 37); followed in *Lalla Mitterjeet Singh v. Rajcoomer Sircar* (18 W. R. 22); and referred to in *In the matter of the petition of Bykuntam Shaha Roy* (10 B. L. R. 434; 18 W. R. 47); *Governor v. Mozuffer Khalifa* (18 W. R. 21; 9 B. L. R. Ap. 36); *Gopi Mohun Moulik v. Taramone Chowdhrawi* (4 C. L. R. 309; 1 L. R., 5 Cal. 7 Civ. Rul.); *Queen v. Kali Chandra Shah* (7 B. L. R. 322; 16 W. R. 13).—Ed.]

<sup>3</sup> *Act XXV. of 1861, s. 62.*—“It shall be lawful for any Magistrate, by a written order, to direct any person to abstain from a certain act, or to take certain order with certain property in his possession or under his management, whenever such Magistrate shall consider that such direction is likely to prevent, or tends to prevent, obstruction, annoyance, or injury, or risk of obstruction, annoyance, or injury, to any persons lawfully employed, or is likely to prevent, or tends to prevent, danger to human life, health, or safety, or is likely to prevent, or tends to prevent, a riot or an affray.”

<sup>4</sup> *Act XXV. of 1861, s. 404.*—“The Sudder Court may, on the report of a Court of Session, or of a Magistrate, or whenever it thinks fit, call for the record of any criminal trial, or the record of any judicial proceeding of a Criminal Court other than a criminal trial in any Court within its jurisdiction, in which it shall appear to it that there has been error in the decision on a point of law, or that a point of law should be considered by the Sudder Court, and may determine any point of law arising out of the case, and thereupon pass such order as to the Sudder Court shall seem right.”

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the rival market-keepers to induce the villagers to go either to the one market or to the other, and that boats, in which persons were lawfully employed in carrying their produce for sale, were intercepted by either the one party or the other party; it appears also that complaints were made of violence committed either on the one side or on the other side in the attempt to prevent villagers from taking their produce either to the one market or to the other; the Magistrate also was of opinion that this disturbance and annoyance was likely to continue unless the two rival markets were held on different days; and as the market in Fulhar had been established ever since the time of the British rule, and, therefore, long before the market which the present petitioners set up on the opposite side of the river, and as also there were empty days on which the present petitioners could very easily hold their market without interference from any one else, so the Magistrate, under the provisions of s. 62 of the Code of Criminal Procedure, directed the present petitioners to abstain from holding their market in Panchgram, in Oachar, on Tuesdays and Fridays.

The Magistrate further explains in his letter that the order upon the present petitioner was passed after evidence taken. And it is admitted by the pleaders on either side, i.e., the pleader on the side of the petitioners, and the pleader on behalf of the Government, that there was such evidence taken, and that it resulted in the Magistrate's convicting certain persons of the offence of wrongful restraint in connection with the rival market, a conviction which was afterwards modified by this Court into a conviction against those persons of assault or hurt.

It would seem, therefore, that when the Magistrate in this instance directed the petitioner to abstain from the act in question, namely, the act of holding the market in Panchgram on Tuesdays and Fridays, he had legal evidence before him that such direction was likely to prevent obstruction, or risk of obstruction, annoyance, or injury to persons lawfully employed. And it seems probable also that he had evidence before him to show that such direction was likely to prevent riot or affray. But at any rate he had legal evidence before him to show that such direction was likely to prevent obstruction or annoyance to persons lawfully employed.

Under these circumstances, the question before us is whether the Magistrate had jurisdiction, under s. 62 of the Code of Criminal Procedure, to pass the order in question upon the petitioner?

In *Sheeb Chunder Bhattacharjee v. Saadut Ally Khan*,<sup>1</sup> the Judges seem to have held that, in a case very similar to the one before us, the Magistrate had not authority to direct the discontinuance of any such market as the one in question. But in *The Queen v. Kalikaprasad*,<sup>2</sup> the Judges seem to us to have held what to us appears to be the contrary of this.

In this state of things we think it proper to refer the question for the decision of a Full Bench, and the question is whether, under the circumstances stated by us, the Magistrate had authority to direct the petitioners in question to abstain from the act of holding their market of Panchgram on Tuesdays and Fridays?

We may as well mention that Baboo Jagadanand Mookerjee, on behalf of the Government, has contended that the order passed by the Magistrate in this instance is not an order of the nature of a judicial proceeding such as is

<sup>1</sup> 4 W. R., Cr. Rul., 12.

<sup>2</sup> 5 B. L. R., App., 82, note. [See p. 235 of this book.]

contemplated by s. 404 of the Code of Criminal Procedure; and that, consequently, we have not jurisdiction to interfere with the order in question. We are of opinion that the order is of the nature of a judicial proceeding, and that, in fact, it has been directly so treated by the Magistrate in this instance. But we state the point in order that when the Full Bench shall have to consider the question which we have now submitted to them, they may consider also, if they think proper so to do, this further question, whether the order in question is of the nature of a judicial proceeding, and is, therefore, an order which it is within the province of this Court to revise under Chap. XXIX. of the Code of Criminal Procedure.

Baboo *Bhawani Charan Dutt* for petitioner.

Baboo *Jaggadanand Mookerjee* contra.

The judgments of the Full Bench were as follow :—

**PHEAR, J.**—With regard to the last question put to us by the Division Bench, namely, whether or not the order of the Magistrate in this case is of the nature of a judicial proceeding, such as to give us jurisdiction to entertain the reference, I have the misfortune to differ from the rest of my colleagues, and this fact alone renders me, necessarily, distrustful of my own judgment.

Still I am bound to say that the little opportunity which I have just now had of considering the matter leaves me of opinion that the power which is given to the Magistrate under s. 62 of the Criminal Procedure Code is of a judicial character within the meaning of the word judicial as it is used in s. 404. The Magistrate, by s. 62, is directed to act when he considers that any person, by the course of his conduct, “is likely to cause obstruction, annoyance, or injury, or risk of obstruction, annoyance, or injury to any other person lawfully employed.” Thus, the Magistrate, in a case falling under this section, has, in the first place, to arrive at a conclusion of fact between the offender on one side, and the person who is likely to be injured or annoyed on the other side, and the order which he passes, if he does pass an order under this section, is not merely (to use a word very familiar to us on this side of the Court) a ministerial act, nor is it such an order as a policeman makes in his capacity of peace-officer, when he directs a person to pass on or to go to the other side of the street with the view to prevent or provide against the occurrence of any immediate obstruction, annoyance, or breach of the peace, but it is truly an injunction which, if it has been properly and duly made, will legally affect the person against whom it is issued in the enjoyment of his property as long as the order endures. I find that a Division Bench of this Court, in *The Queen v. Amiruddin*,\* took, as far as I can see, precisely this view of the

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\* Before Mr. Justice Norman and Mr. Justice E. Jackson.

THE QUEEN v. AMIRUDDIN AND OTHERS.†

The 26th July 1869.

6 B.L.R. 78N.

[S.C. 3 B.L.R.  
A. CR. 45.]

[S. C. 12 W.R. 36]

**NORMAN, J.**—These cases have been sent up by the Judicial Commissioner of Assam.

It appears that the Deputy Commissioner of Seeksangor, finding that great inconvenience and mischief were caused by cattle found straying on the high roads about the station and in the bazar, on the 13th of March last, issued an order warning owners of cattle to take proper care of them, and that, if they let loose their cattle without any one

† Reference by the Judicial Commissioner of Assam to the High Court under s. 434 of the Code of Criminal Procedure.

† [This case is followed in *Government v. Moxffer Khalifa* (18 W. R. 21; 9 B. L. R. Ap. 36).—ED.]

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force of the section. Mr. Justice Norman there says: "It is clear that the order contemplated by s. 62 is a particular and specific order addressed to a particular person or particular persons to do or abstain from a particular act or particular acts—an act, in short, of the nature of an injunction or command which the Magistrate is to make in a judicial capacity as the judge in a Criminal Court: not a regulation or bye-law." No doubt, many of these orders, whether rightly or wrongly, are passed very summarily indeed, and with the slightest possible show of proceeding; but I do not think that this circumstance alters the character of the power or the nature of the jurisdiction under which the Magistrate makes them, though I can easily conceive it to be a special reason why such orders should be rendered subject, by the Legislature, to the revision of this Court, rather than exempted from it. To say the least of it, I think it strange, having regard to the very extensive powers of revision which this Court undoubtedly does possess under the Criminal Procedure Code, that a person aggrieved by an injunction of this particular kind should be forced to disobey it, and so to run the risk of being convicted of a serious criminal offence before he can question its legality.

to look after them, and caused such mischief, they would be punished under Act V. of 1861, and other laws and regulations relative to contempt of orders. Notwithstanding this order, people continued to allow cattle and horses to run at large on the road. The Deputy Commissioner ordered that such cattle should be seized and impounded, and, on the owners claiming their cattle, caused proceedings to be taken against them for disobedience of the order of the 18th of March. The parties now before the Court have been fined in divers small sums from one rupee to five rupees.

The Judicial Commissioner, there being no appeal, sent the proceedings before this Court under s. 434.

The main questions appear to be, first, whether that order was one which, under s. 62 of the Code of Criminal Procedure, the Magistrate was competent to pass; and, secondly, whether the parties now before the Court can legally be punished under s. 188 of the Indian Penal Code for disobedience of that order.

The Judicial Commissioner supposes that the defendants were punishable under Act III. of 1857. But that is not so. The preamble of that Act recites that "loss or injury is suffered by cultivators and occupiers of land for damage done to crops and other produce by the trespass of cattle, and that damage is done to the side and slopes of public roads and embankments by cattle trespassing thereon, and that it is expedient to make provision for the disposal of cattle found straying," and it makes provision for such cases. But it contains no enactment providing for the punishment of persons causing nuisance to the public and interruption of traffic by allowing cattle to stray in public roads and bazars.

On careful consideration of the 62nd section, we have come to the conclusion that the order of the 18th of March is not one which a Magistrate is competent to make under the provisions contained in it.

The order in question is of the nature of a bye-law, an attempted exercise of a supposed power of legislation on the part of the Deputy Commissioner. The Code of Criminal Procedure was passed, as appears by its preamble, to simplify the procedure of certain Courts of Criminal Judicature. It certainly would be very extraordinary to find in such a Code powers given to a Magistrate to make regulations or bye-laws for the government of municipalities. It is clear that the order contemplated by s. 62 is a particular and specific order addressed to a particular person or particular persons to do or abstain from a particular act or particular acts—an act, in short, of the nature of an injunction or command which the Magistrate is to make in a judicial capacity as the Judge in a Criminal Court; not a regulation or bye-law.

We think, therefore, that the parties in question could not be convicted under s. 188 of the Indian Penal Code of disobedience of the order of the Deputy Commissioner by allowing their cattle to stray about the roads.

We, therefore, quash the conviction.

The Deputy Commissioner seems to have supposed that he could have proceeded against the offenders under s. 34, Act V. of 1861. That seems to be a mistake. But probably some of them might have been properly punished under s. 283 of the Indian Penal Code.

I cannot myself at present avoid the conclusion that an order passed under this section is one which falls within the scope of s. 404 of the Criminal Procedure Code, *viz.*, that it is, within the meaning of that section, "a judicial proceeding of a Criminal Court other than a criminal trial," which we have authority to call up to this Court.

JACKSON, J.—The question whether the order made by a Magistrate under s. 62 of the Code of Criminal Procedure is judicial in its nature, is one which has not been raised before in any Division Bench in which I have sat, and therefore I have not had an opportunity of considering it. In the case of *The Queen v. Kalikaprasad*,\* which has been cited by the Magistrate, and also in the case referred to us, this question was not raised; but the question whether an order of the kind which has been made in this instance could be lawfully made by the Magistrate under that section was considered, and we were of opinion that the order was one within the Magistrate's competency to make. But now that the question has been fairly raised, I confess the inclination of my mind is to the opinion that the order is not one of a judicial character.

There are certain chapters and sections of the Procedure Code in which a specific procedure is laid down for the Magistrate in cases which might appear to be such as would come under s. 62. In cases which did come precisely within the scope of those sections, in which a specific procedure is laid down, I think the Magistrate would be bound to act according to that procedure; and where that procedure requires the hearing of the parties and the arriving at a conclusion upon the evidence, or the decision of any contested point, no doubt the inquiry becomes judicial, and the order is judicial. But it seems to me that, in regard to a great number of orders which come to be made under s. 62, the Magistrate has to decide, not between a person who is taking some order with his property, or omitting to take certain order with his property, and another person to be affected by such act or omission, but he has in reality to provide for the safety or comfort of many persons who at the time are not aware that their safety is in question, or that annoyance or obstruction is threatened. From the nature of the case it seems to me that very frequently it would be incumbent upon the Magistrate to make such order as is authorized in s. 62 without any formal inquiry. The Magistrate might, for instance, receive intelligence that the fall of a building was imminent, or that some other circumstances existed which were likely either to cause danger to the lives of persons, or to cause obstruction, annoyance, or injury, or lead to an affray. The section, however, it may be noticed, does not require that something which is done or omitted to be done by a person in possession of property should be "likely to cause obstruction, annoyance, or injury, or risk of obstruction, annoyance, or injury to any persons lawfully employed, or likely to cause danger to human life, health, or safety, or should be likely to prevent an affray;" but if the Magistrate considers that the direction which he proposes to give is "likely to prevent obstruction, annoyance, or injury," and so on, or is "likely to prevent danger to human life, &c., or is likely to prevent a riot or an affray," it is lawful for him to make such an order. The Magistrate, therefore, will often be called upon to act on the shortest notice, and without any delay; and I think there is another good reason why it should not be necessary to regard the act of a Magistrate under this section as being a judicial decision, which is simply this, that the issuing of the order under the 62nd section entails no further consequences than that

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\* 5 B. L. R. App. 82 note (see p. 235 of this book).

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the person contravening that order does so at his peril, and is liable to be dealt with for such conduct under s. 188 of the Penal Code.

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That then, it seems to me, is the proper way of trying the legality of an order issued under s. 62 by a Magistrate or by any other public servant, for the operation of these sections is by no means confined to the orders of Magistrates. I may mention that I have stated pretty nearly this view of the case on a former occasion in *The Queen v. Pitti Singh*.\*

There I pointed out that the Magistrate, "if he thought such a direction tended to prevent obstruction to persons lawfully employed, might order any person to take action with the wall in his possession in the sense of removing it; and if the order were disobeyed, and the obstruction anticipated were to arise, the person disobeying might be proceeded against under s. 188, Indian Penal Code. If convicted, he might appeal or might bring his case before this Court by motion, and the validity of the proceedings would then be enquired into." Therefore, I am now inclined to say that the act of the Magistrates under s. 62 of the Code of Criminal Procedure was not a judicial proceeding of a Criminal Court, and therefore does not come within the scope of s. 404 of the Criminal Procedure Court.

KEMP, J.—I am of opinion that the order of the Magistrate in this case is not a judicial proceeding. It appears that the petitioner before us established a new market on the bank of the river Barak in Zilla Cachar, and that parties proceeding with vegetables, &c., to the new as well as to the old market were obstructed and annoyed by the rival proprietors of the two markets. This was brought to the notice of the Magistrate, and he proceeded to the spot. The Magistrate took no evidence whatever, nor did he summon either of the proprietors of the markets, or put them on their defence. There is a memorandum on the record to the effect that certain parties, whose names were given, bore marks upon their persons of injury and violence. It is noted that one of them had his head broken, and that the other was wounded. Upon this the Magistrate, not with a view of preventing riot or affray, but with a view of removing the obstructions and annoyances to persons lawfully employed, directed the petitioner to abstain from holding the new market upon the same days on which the old market was held. No evidence having been taken, and no party having been put on his defence, this order of the Magistrate was, in my opinion, not a judicial order, but an executive order, to prevent people, who were lawfully employed in bringing their goods for sale in the markets, from being obstructed and annoyed.

I concur in the judgment delivered by Mr. Justice Jackson.

BAYLEY, J.—I am of the same opinion with Mr. Justice Kemp and Mr. Justice Jackson. I do not think that this is a case coming within the scope of a judicial proceeding contemplated by s. 404 of the Code of Criminal Procedure. Under s. 62 of that Act, the Magistrate, by a written order, "may direct any person to abstain from a certain act, whenever such Magistrate shall consider that such direction is likely to prevent, or tends to prevent, obstruction, annoyance, or injury, or risk of obstruction, annoyance, or injury to any persons lawfully employed, or a riot, or an affray." Such an order might be required to be made by the Magistrate on matters of sudden emergency, where the case would not suffer the delay of a judicial proceeding by the taking and recording of evidence, and so forth. Such a judicial proceeding was not held by the Magistrate in this case. The facts shown are that parties who frequented the rival *hauts* had their boats with saleable articles inter-

\* 8 W. R., Cr. Rul., 37.

cepted on the way by the opposite party, and frequent disputes and affrays, in consequence, arose between the two proprietors, and people were found wounded in them.

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In order to prevent such obstruction, annoyance, and injury to the parties, the Magistrate, by a written order, directed that one of the rival proprietors might change the days of his *haut* so as not to interfere with the day of the *haut* of the other proprietor, and thus remove the cause of such frequent injury, annoyance, and affrays. I think such an order is legally correct under s. 62; and that such an order by the Magistrate under s. 62 is not a judicial proceeding contemplated as capable of revision under s. 404 of the Code of Criminal Procedure.

COUCH, C.J.—It has always appeared to me that the object of the Legislature in s. 62 was to provide for cases where there might be “obstruction, annoyance, or injury, or risk of obstruction, annoyance, or injury to any person lawfully employed, or danger to human life, health, or safety, or any likelihood of a riot or an affray,” where it would be necessary to act speedily, probably at once, in order that the danger might be prevented, and where the case would not admit of the delay of a judicial proceeding caused by summoning the parties to answer, which delay might be such that the mischief intended to be averted might actually be done before any order could be made. I think this is the object of s. 62 and of s. 308, which seems intended to apply to cases of danger arising from the construction or state of a building, or other causes of that kind that ought to be at once removed. I agree with Mr. Justice Phear that if we look upon this provision in the Code of Criminal Procedure as in the nature of an injunction, where the Court would exercise its power in the same way as it would in the case of an injunction, it would be necessary to give the parties an opportunity of being heard and having the matter tried as in a judicial proceeding. But it seems to me that the object of the Legislature was to avoid doing this, and to invest the Magistrate with discretionary power, very considerable no doubt, but which might be properly exercised under the circumstances. In my opinion, that is why this cannot be regarded as a judicial proceeding: and that the Legislature, in framing the Code of Criminal Procedure, intended that it should not be, is clear from the terms of s. 318. That is a section intended to prevent a breach of the peace, and it is there provided that, if the Magistrate is satisfied that a dispute likely to induce a breach of the peace exists within his jurisdiction, he shall record a proceeding of his being so satisfied, and shall call on all parties concerned in such dispute to attend his Court within a stated period, and to give in a written statement of their respective claims, clearly showing that the Legislature, when it meant to direct the Magistrate to proceed judicially, pointed out the course that he ought to pursue. But we find no provision of the kind in s. 62; the language of it seems to point out that it was intended to give the Magistrate a power to be exercised with the utmost promptitude, and if he should make an order which he had no authority to make, and the party on whom that order is made should not obey it, and be convicted, its legality may then be tried. That is the ground upon which I have always been of opinion that this is not a judicial proceeding, and although I feel some doubt as to its correctness in that Mr. Justice Phear takes a different view, I am confirmed in it by finding that it is shared by the three other Judges who form this Bench.



## BENGAL LAW REPORTS.

## [APPELLATE CRIMINAL.]

*Before Mr. Justice L. S. Jackson and Mr. Justice Ainslie.*

## QUEEN v. RUPAN RAI.\*

1871.

Jan. 26.

*Power of a Magistrate—Criminal Procedure Code (Act XXV. of 1861), Ch. XV.—Compensation to an Accused—False Evidence—Committal on a charge of Perjury.*

6 B. L. R. 296.

[15 W. R. 9.]

When a prosecutor fails to substantiate his charge by making contradictory statements, the Magistrate who tries the case under Chap. XV. of the Criminal Procedure Code can award compensation to the accused, although he commit the prosecutor to take his trial on a charge of giving false evidence.

THE Officiating Judge of Patna submitted the following case for the opinion of the High Court:—

“One Rupan complained before the Assistant Magistrate of Patna that certain persons forcibly rescued some cattle that he was taking to the thannah. In his preliminary examination, he stated that, of these persons, ‘Murat struck me thrice with a lathi;’ but when confronted with the accused persons, he subsequently deposed, ‘Dhodhi struck me three times with a lathi. No one else struck me. Murat did not strike me.’

			Rs.	which he tried under Chap. XV. ; and, under s. 270,
Dhodhi	...	...	40	ordered the complainant to pay to the three accused
Murat	...	...	40	persons compensation amounting in the aggregate to
Meghu	...	...	20	rupees 100. Simultaneously, or, I should more cor-
			100	rectly state, on the next day, the Assistant Magistrate
				instituted proceedings against the complainant for
				having intentionally given false evidence, by reason

of his having made these two contradictory statements, and he was committed for trial to the Court of Session.

“I submit that, inasmuch as the Assistant Magistrate had determined to prosecute Rupan Rai for having intentionally given false evidence in that he falsely charged Dhodhi and two others, it was not competent in him to prejudice the result of the Sessions trial, and award compensation, that being a point which would come before the Sessions Court for trial; and on which that Court might hold a contrary opinion. Further, if it should so happen that the Sessions Court should concur with the opinion of the Assistant Magistrate, it was fully competent to the Judge to give the requisite compensation.

“I also submit that the mere fact of committing the prisoner on contradictory statements, without any evidence as to the truth or falseness of either, showed that the Assistant Magistrate could not confidently state that both the charges were false.

“I would add in conclusion that Rupan was acquitted by the Sessions Court; there being no evidence forthcoming to show that the prisoner before the Court was the same man who deposed before the committing officer.”

The opinion of the High Court was delivered by

\* Reference, under s. 434 of the Code of Criminal Procedure, from the Officiating Sessions Judge of Patna, under cover of his letter No. 491, dated the 21st December 1870.

JACKSON, J.—It appears to me that in this case the Magistrate was competent to award compensation to the persons accused by Rupan, assuming them to have been tried, and lawfully tried, under Chap. XV. of the Criminal Procedure Code, notwithstanding that he afterwards committed, and even if he had then made up his mind to commit, Rupan to take his trial on the charge of giving false evidence.

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In the first place, the acquittal of Rupan (which took place in the Court of Session) would not establish affirmatively the truth of either of the contradictory statements which he was charged with having made, nor would it negative the finding that his complaint was frivolous and vexatious.

In the second place, if that were the result of his acquittal, I should still be of opinion that a Magistrate, having jurisdiction, would be authorized by law in making his order under s. 270, notwithstanding that the complainant was to take his trial for perjury.

It would, no doubt, be a matter of regret if the Magistrate and the Court of Session came to opposite conclusions upon the same question.

But a like result not unfrequently occurs in cases where the decision of a civil suit is followed by a criminal prosecution of one of the parties, or of his witnesses; each tribunal comes to its own independent conclusion, and the two are by no means invariably identical.

It seems to have been held by this Court in 1865 that a Magistrate might award compensation under s. 270, and also give his sanction to a prosecution under s. 211, Indian Penal Code.

Whether the Magistrate, in making this order, exercised a proper discretion, is a different question, on which, I think, we need not give an opinion.

One thing, however, is clear, namely, that the compensation awarded in this case was altogether unreasonable and disproportioned to the circumstances of the parties, and it is unfortunate that the law provides no means of setting the matter right in this respect. A proper measure of amends would seem to have been about one-fifth of that actually ordered.

Upon the Judge's letter of reference, I think it right to observe that it seems very doubtful whether, as he supposes, the Court of Session, if it convicted Rupan, could make a similar order to that made by the Magistrate. The Judge probably refers to s. 44, Criminal Procedure Code; but that section apparently does not support his opinion in this case.

Again, it is stated that Rupan was acquitted, on the ground that there was no evidence forthcoming to identify him with the person who had made the false or contradictory statements. It is difficult to believe that evidence upon this point could not have been easily procured if the Judge had adjourned the trial, and I conceive it would have been his duty to do so, in the circumstances, unless, which appears very probable, the acquittal really proceeded on the footing that the case ought not to proceed.

*Before Mr. Justice E. Jackson and Mr. Justice Mookerjee.*

THE QUEEN *v.* OFATULLA AND OTHERS.\*

*Salt—Confiscation—Rowana—Pass—Act VII. of 1864, s. 16 (B.C.).*

1871.  
Feb. 18.

6 B. L. R. 381.

[15 W. R. 21.]

If salt exceeding five seers is found within the limits prescribed by s. 12 of Act VII. of 1864 (B.C.), unprotected by a rowana or pass, the salt is contraband, and liable to seizure, and the parties transporting it are punishable under s. 16. It matters not whether any attempt or intention to sell is proved or not.

THE defendants in this case were arrested by the police while conveying a large quantity of salt in two boats, without a rowana or pass, through the district of Noakhally, which is within the limits fixed by the Government within which salt cannot be carried without a pass.

Five of the defendants were in charge of one boat, which contained 12½ maunds of salt; and the remaining five men were in charge of the other boat, containing 60 maunds and 5 seers of salt.

The defendants were convicted by the Deputy Magistrate under the provisions of s. 16 of Act VII. of 1864 (B.C.), and were sentenced, the first five men to pay a fine of rupees 621-4, at rupees 5 per maund on the 12½ maunds, and the remaining five men to pay a fine of rupees 300-10, at the same rate, on the 60 maunds, and in default of payment, to six months' simple imprisonment. The salt and the boats were ordered to be confiscated.

From this order the defendants appealed to the Judge, who acquitted the prisoners, and released the salt and the boats. The grounds of his decision are stated by Mr. Justice Mookerjee in his judgment.

A petition was then presented to the High Court under s. 404 of the Code of Criminal Procedure to send for the record, and set aside the decision of the Judge as being contrary to law.

Mr. H. Bell (the Legal Remembrancer) (with him Baboo Jagadanand Mookerjee), for the Crown, contended that the salt had been improperly released by the Sessions Judge. Act VII. of 1864 (B.C.) gives the Judge no authority to enquire whether the prisoners intended to sell the salt or not: the only issues which the Judge had authority to decide were: *1stly*—Was the salt seized in a district in which it was illegal to transport salt without a pass? *andly*,—If it was seized in such a district, was the salt protected by a pass? The Judge, having found these issues against the prisoners, was bound under s. 16 of the Act to declare the salt to be contraband, and adjudge the penalty of confiscation. If the salt is contraband, the law leaves no discretion to the Judge. He must adjudge it to be confiscated. [Jackson, J.—Suppose a boat laden with salt, and unprotected by a rowana, was driven by stress of weather within the prohibited limits, would the Magistrate be necessarily compelled to confiscate it? In such a case would he be allowed no discretion?] It was but reasonable to suppose that, under such circumstances, the salt department would prosecute; but, supposing such a case to occur, s. 39 of the Act provides a remedy. That section gives the Board of Revenue power to remit any penalties which had been adjudged under the Act. If the Magistrate or the Judge had a discretionary power to remit penalties, where was the use of vesting a similar power in the Board? This was expressly held in the case of the *Queen v. Boidonath*.†

No one appeared on the other side.

\* Criminal Motion, No. 133 of 1870, for revision of proceedings under s. 404 of the Code of Criminal Procedure.

† 7 W. R., Cr., 48.

MOOKERJEE, J.—This case comes before us merely for an expression of our opinion as to the correctness or otherwise of the view of the law taken by the Sessions Judge of Tipperah in setting aside the conviction of the prisoners, and the release of the salt confiscated by the Deputy Magistrate under s. 16 of Act VII. of 1864 (B.C.). It appears from the finding of both the Courts below that the prisoners, with the two boats of salt, were found within the boundary of the Noakhally district; that in order to pass through that district, it is requisite, under the law, to have a rowana; and that the prisoners had none. The only question before us is whether such salt shall or shall not be considered contraband, and therefore confiscated to Government, and the persons in charge thereof held liable to punishment under s. 16 of the enactment in question.

Looking to the stringent provision of the law, ss. 15 and 16 of Act VII. of 1864 (B.C.), I am of opinion that, if salt exceeding five seers is found within the limits prescribed by s. 12, unprotected by a rowana required under ss. 13 and 15, that salt must be held as contraband under s. 16 of Act VII. of 1864. Under s. 29, if the Magistrate is empowered to examine into the cause of the seizure, and to adjudge the salt to be confiscated, I apprehend that, under this latter section, a Magistrate is not legally competent to say that, though salt is found in a prohibited district, unprotected by any rowana, and therefore the offence under s. 16 is committed, he cannot convict the persons found transporting the salt, or confiscate the salt, merely because there was no attempt or intention to sell the salt within that prohibited district. But the Magistrate, I think, is quite competent to decide whether the offence has been committed or not, and therefore to enquire into the cause of the seizure of the salt. If he be of opinion that the salt was not found as a fact within the prohibited district, he would be quite competent to acquit the prisoners, though the police-officer may maintain to the contrary.

In this case the Courts below found as a fact that the salt was within the limits of the district of Noakhally, where a rowana is required for the transport of salt above five seers. The prisoners also admit that they passed through the district, and the direction of their master was to sell the salt wherever they could dispose of the same to advantage. They do not deny that a rowana was required to pass through Noakhally, but they plead that they were ignorant of the law, and had taken the route through Noakhally, because it was a highway, and was a shorter cut to Tipperah, where they intended ultimately to transport the salt if the same could not be sold to advantage elsewhere.

The Judge on appeal reversed this order of the Magistrate—

*1st.*—Because it was not proved that there was any attempt to sell the salt at Noakhally.

*2nd.*—Because eight of them were boatmen, and therefore not responsible for the cargo.

*3rd.*—Because the river was a highway by water, and was a shorter route.

*4th.*—Because the boat was found within the very precincts of the prohibited district.

*5th.*—Because the proceedings of the Magistrate were injudicious and harsh.

Now, as regards the first, I have to observe that the law does not require any such attempt or intention to be proved before a conviction can be had under s. 16; the mere fact of the salt being found within the prohibited district is sufficient to constitute an offence. The law may be very severe and harsh, but that is no reason why Courts, which are required to give effect to them, should.

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refuse to carry them out. We cannot assume the functions of the Legislature, and make or amend laws merely because we think they are harsh and inequitable.

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As regards the second ground, s. 16 of the law provides that "any person possessing or transporting or attempting to transport such salt shall be liable to a fine," &c. The prisoners were, no doubt, transporting the salt, which is contraband, and I think, therefore, the Magistrate was right in convicting them under the above section.

The third ground appears to me to be no valid ground at all. If the prisoners had a desire to transport the salt by the shortest route, they ought to have applied for a rowana, and then taken the salt by this route. They cannot, of their own choice, select a route which the executive Government had thought fit, under the powers vested in it by the law, to prohibit a passage through, except under a rowana.

With reference to the fourth objection, I do not see that it makes any difference whatsoever as to where the boats of salt were found—*i.e.*, whether at a short distance from the confines of the prohibited district, or in the far interior of it. The prisoners, as I said before, admit that they have passed through the district of Noakhally. The fifth ground is a matter in which the Judge might interfere, if the law allows him to do so, on appeal; but is not, *ipso facto*, a ground to set aside the conviction at once.

Under these circumstances, and keeping in view the provision and terms of the law, I can come to no other conclusion than that the Judge has taken a wrong view of it. He must have seen that the law gives him no option to confiscate the salt or not, if the circumstances of the seizure are found to be exactly those which are contemplated in s. 16, and the prisoners are found transporting what is contraband. S. 39 of this Act, however, gives a power to the Board of Revenue to mitigate penalties which the Magistrate may inflict under the previous section, if they shall see cause to do so. They may also direct the seizure, or any part thereof, to be restored. We are not asked by the petitioners to pass any order affecting the release of the salt in this particular instance, nor are we asked to interfere with the order passed by the Judge discharging the prisoners. We therefore do not interfere with the order passed by the Judge in this case.

JACKSON, J.—The charge is not pressed against the defendants, but we are asked to state whether the Judge is right in the law which he has laid down in this case. I would point out to the Judge that the fact of the salt being found within the particular district, unprotected by a rowana, is made an offence under the law. The intention of the law is not only to punish those who are actually smuggling salt, but also those who give an opportunity to others to smuggle salt. Persons who trade in salt doubtlessly thoroughly know the salt regulations. They know, as the prisoners in all probability knew, that they were not allowed to take the salt into this prohibited district without a rowana. They admit they were selling the salt when they could, and there was, of course, great opportunity for them to purchase smuggled salt in place of what they sold.

## [ORIGINAL SIDE.]

*Before Mr. Justice Norman.*

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*Habeas Corpus ad subjiciendum—Jurisdiction of High Court—Power to issue Writ into the Mofussil—Habeas Corpus Act, 31 Car. II., c. 2—Regulation III. of 1818—Act III. of 1858—Act XXXIV. of 1850—13 Geo. III., c. 63, s. 36—37 Geo. III., c. 142, s. 8—21 Geo. III., c. 70—3 & 4 Will. IV., c. 85, s. 43.*

A Mahomedan subject of the Crown was arrested in Calcutta, taken into the mofussil, and there detained in jail, under a warrant of the Governor-General in Council in the form prescribed by Regulation III. of 1818; *held*, that such arrest and detainer were not acts of State, but matters cognizable by a Municipal Court.

On an application to the High Court to issue a writ of *habeas corpus* to the Superintendent (a European British subject) of the Jail, *held*, that the Supreme Court had power to issue writs of *habeas corpus* to persons in the mofussil, and that the same power is continued to the High Court. Regulation III. of 1818 was applicable only to natives and those subject to the jurisdiction of the Provincial Courts. It was passed under 37 George III., c. 142, s. 8, not 13 George III., c. 63, s. 36. It was passed by a legislative authority having full power in that behalf. Considering the circumstances under which it was enacted, Act III. of 1858, which extended the effect of that Regulation to Calcutta, was not *ultra vires*.

As the person against whom the writ was applied for had acted under the written order of the Governor-General in Council, the Court would not direct the writ to issue.

AMEER KHAN, who had for many years carried on business as a merchant in Calcutta, was arrested on July 18, 1869, at his house in Calcutta, and was from thence taken to Gya, where he was confined in jail. On August 25, 1869, he was removed to the jail at Alipore, where he was detained at the time of the present proceedings. On August 1, 1870, an application was made to Mr. Justice Norman for a writ of *habeas corpus* directed to Dr. Fawcus, the Superintendent of the Alipore Jail, commanding him to bring before the Court the body of Ameer Khan.

The writ was moved for upon the following petition of Ameer Khan: That he was upwards of 75 years of age, and a subject of Her Majesty, and that he was also a Suni Moslim inhabitant of the Town of Calcutta, where he had for many years resided and carried on business as a merchant; that on 18th July 1869 he was arrested at his residence in Colootollah in Calcutta by Mr. W. B. Birch, Assistant Commissioner of Police for the Town of Calcutta, but for what charge and on what authority he was not aware, as no warrant was produced or shown to him when he was so arrested, although he demanded to have the same shown to him; that immediately upon being so arrested he was removed from his house to the railway station at Howrah, out of the local limits of the jurisdiction of the High Court, and there detained till the evening of the same day, when he was removed to Gya, and lodged in the jail there; that he remained a prisoner in the jail at Gya until he was removed in custody to Alipore, where he arrived on the 25th August 1869, and was lodged in the Alipore Jail, where he ever since had been, and was at the date of his petition

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confined a prisoner; that he had never been furnished with a copy or inspection of any warrant under which he had been so arrested, or of any warrant under which he had been so removed, or any warrant under which he was detained, neither had he been furnished with any copy or any statement of the nature of the charges made against him, and upon which he was arrested or detained, nor had he been informed of what he was accused, although he had repeatedly applied to the persons having him in custody to be furnished with all such copies, statements, and informations.

Affidavits were put in to show that a draft affidavit, in support of his petition, had been prepared under the instructions of Ameer Khan, the statements in which were true, and which he was willing and anxious to affirm; but that though a Commissioner had been appointed by the Court to take his solemn affirmation, he had been refused access to Ameer Khan by the officer in charge of the Alipore Jail, who stated: "Ameer Khan is still in my custody, and I now detain him under a warrant from the Governor-General, and it is by the orders of the Government of India that I refuse to allow you to see Ameer Khan." In the draft affidavit Ameer Khan supported the statements in his petition, and further stated "that he was a true and loyal subject of Her Britannic Majesty, and that he had never conspired with her enemies, or consorted or been in league with any person or persons, or sect of persons, who had for their object the intention of disturbing tranquillity in the territories of Native Princes entitled to the protection of the British Government, or of imperilling the security of the British dominions by foreign hostility or by internal commotion;" that he had never been furnished with a copy of the warrant (if any) on which he was arrested, or on which he was detained, nor had he been informed why he had been arrested, or with what crime he was charged, although he had petitioned therefor His Excellency the Governor-General personally and in Council, and also had repeatedly petitioned therefor His Honor the Lieutenant-Governor of Bengal; and that the only information which in that behalf he could obtain from them or any other public officer or servant was, that he was a prisoner detained under the provisions of the Bengal Regulation III. of 1818; and he further complained of hardship while in prison, and that both his health and worldly affairs had suffered by his confinement.

There were further affidavits showing a failure by the prisoner's attorneys to obtain information on the subject of his arrest, what was the charge, and what was the warrant of arrest or detention, and stating the refusal of the Lieutenant-Governor of Bengal to admit the prisoner to bail.

There was also put in, on the prisoner's behalf, a certificate by the Registrar of the Court, to the effect that the Bengal Regulation III. of 1818 was not, as far as he had been able to ascertain, registered in the late Supreme Court of Judicature at Fort William in Bengal.

Mr. Anstey (Mr. Ingram and Mr. Evans with him), on applying for the writ of *habeas corpus*, contended that the Court had power to issue the writ of *habeas corpus* into the mofussil, and cited *In re Cosa Zachariah Khan*,\* *In re Sreenauth Roy*,† *Rajah Mohinder Deb Rai v. Ramcanai Cur*,‡ *Doe d. Bree-iesseree Sealanny v. Ramnarain Misser*.§ [NORMAN, J.—That was a writ *ad*

\* Morton's Rep. 263.

† *Id.* 226.

‡ Smoult's Orders, 148.

§ *Id.* 201.

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*testificandum* only, not *ad subjiciendum*.] In the case of *The King v. Goculnauth Mullick*,\* the writ was refused, but on the express ground that the person to whom it was sought to have it directed was not subject to the jurisdiction of the Court. Here that objection cannot be taken. In *The King v. Monisse*,† the Supreme Court at Madras held that it had power to issue the writ into the palace of an independent Native Prince. In *Ram Mohun Chatterjee v. Debychurn Sircar*,‡ the Court directed the Sheriff to convey a person then in his custody into the mofussil. There it must be presumed that the Court had the power to order his release from the place in which he was confined in the mofussil, if good cause were shown for doing so. The arrest here was illegal; such arrest could only be justified under a warrant charging treason or treason-felony in accordance with the Habeas Corpus Act, 31 Car. II., c. 2; there was therefore good ground for issuing the writ. [The learned counsel then read the affidavits filed in support of the application, and commented on the facts therein appearing, drawing an analogy between the proceedings in, and circumstances of, the present case and the instances of the arbitrary exercise of power by the Crown in the reign of Charles I., and referred to a passage in 3 Howell's State Trials, 184, from a discussion in the House of Commons previous to the passing of the Petition of Right, showing the difficulties thrown in the way of obtaining the release of prisoners.] The prisoner in this case has not been informed of the offence for which he is confined; the only information he can get is, that he is imprisoned under the provisions of Regulation III. of 1818. If that Regulation does authorize such proceedings as this, it is bad, as being beyond the power given to the Legislature; if it does not authorize them, they are illegal; but Regulation III. of 1818 was not intended to supersede the ordinary judicial procedure by which this case might have been investigated, or to take away power from the Courts in order to give it to the Government. The reasons for which a person can be imprisoned under the Regulation are stated in the preamble: 1—"For the due maintenance of the alliances formed by the British Government with foreign powers. 2—For the preservation of tranquillity in the territories of Native Princes entitled to the protection of the British Government. 3—For the security of the British dominions from foreign hostility or internal commotion;" and s. 1 enacts that the imprisonment must be for one of these reasons. The two first reasons cannot be given here, and if the third reason is given, it lies on the Crown to show that such reason existed when Ameer Khan was arrested. The provisions contained in the preamble of the Regulation should be adhered to, if he is confined under it. The preamble says (*reads*). But the prisoner is not told what his offence is, or what are the grounds for the determination of the Government to keep him in personal restraint. The preamble provides also that due attention shall be given to the health of prisoners confined under it, but from the affidavits it not only appears that no such attention has been shown, but that he has been treated in a way calculated to injure his health. The Regulation, by s. 2, requires a warrant of commitment in a certain form to issue, but no such warrant is shown to have been issued for the arrest of Ameer Khan. If no warrant was issued, then no warrant exists containing the particulars required by s. 2 of the Regulation; and, consequently, the arrest is illegal, the formalities of that section not having been complied with. The law of England on the point is laid down in 2 Coke's Institutes, 52. The writ has

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 \* Clarke's Rules and Orders, Add., 36.

† 1 Strange's Notes of Cases, 418.

‡ Smoult's Orders, 158.



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always been granted where bail was refused, sometimes where bail was excessive—4 Coke's Institutes, 290 (and the same principle holds good in America), Hurd's Treatise on Habeas Corpus, 522, *Jones v. Kelly*,\* *Ex parte Croome*;† see also Burn's Justice of the Peace, Title *Habeas Corpus*, 430, *The King v. Thompson*,‡ *Rex v. Allington*,§ *Rex v. Venables*,|| *Gossett v. Howard*,¶ and *Faley on Convictions*, Introduction, 33. In *Peacock v. Bell*,\*\* it is said, "nothing shall be intended to be out of the jurisdiction of a superior Court except that which especially appears to be so; on the contrary, nothing shall be intended to be within the jurisdiction of an inferior Court unless it be so expressly alleged;" and in *Grignon's Lessee v. Astor*,†† Baldwin, J., says, a superior Court is one "as to which there can be no judicial inspection behind the judgment save by appellate powers." See also the observation of Fortescue, J., in *The King v. The Chancellor of Cambridge*.‡‡ The case of *In re The Maharanee of Lahore*,§§ in which Regulation III. of 1818 was held to apply to the Maharanee, is distinguishable from the present, as she was not a British subject, but an alien prisoner of war. The case of *In re Tuckut Roy*|| is, it is contended, bad law. It was decided in February 1858, a time of panic and commotion. In that case, too, the grounds of the detention were made known, and there was a warrant of commitment in accordance with Regulation III. of 1818. This Regulation, if it gave the power alleged, is bad, because it is in excess of the powers conferred on the Legislature. It ought not to be taken literally in a Court of Law, being dangerous to justice and to the rights of the subject—*In re Margaret Podger*,¶¶ *In re Lord Cromwell*\*\*\* No colonial legislature can pass an Act repugnant to s. 29 of the Magna Charta. This Regulation is beyond the powers given to the Legislature by 13 George III., c. 63, s. 36. That Statute gives power to pass such enactments as are just and reasonable, and not repugnant to the laws of the realm. A nominee assembly has less power than an elective assembly, and an elective assembly has no power to pass laws repugnant to fundamental principles or to the laws on which allegiance depends. See the opinions of Sir Phillip Yorke and Sir C. Talbot as to the power of the Connecticut Assembly to pass laws; Chalmers' Opinions, 341; also the opinions of Sir Phillip Yorke and Sir Clement Wearg as to the power of the Governor of Jamaica to make laws, *Id.*, 397; and the opinion of Sir Edward Northey, dated 9th July 1706, *Id.*, 349, on an Act to prevent free black men from voting; that of Mr. West, *Id.*, 439; also opinion of Sir William Murray, 22nd June 1764. When a country is conquered or ceded to the British Crown, its inhabitants become British subjects, and are entitled to all the rights and privileges of British subjects—Chalmers' Opinions, 639, 640 642, 644, and 647. All these opinions tend to show that allegiance and protection cannot be separated. Immediately a law is passed, which takes away the protection of the sovereign by infringing on the liberty of the subject, the allegiance of the subject is no longer due. The question as to whether the Indian Legislature has power to pass a retrospective Act, after being discussed, was answered by Lord Dalhousie in the negative; and Sir William Perry, in *Ramlal Thakursidas v. Dulubdas Pitamber*,††† seems to have been of the same opinion. This opinion was not controverted in the

\* 17 Massachusetts Rep. 116.

† 19 Alabama Rep. 561.

‡ 2 T. R. 18.

§ 2 Strange, 678.

|| 1 *Id.*, 630.

¶ 10 Q. B. 359; S. C., on appeal, *Id.* 411; see 452.

\*\* 1 Wms. Saunders, 74.

†† 2 Howard's Rep. (U. S.) 319.

‡‡ 1 Strange, 557.

§§ Taylor, 428.

|| 1 Boul. 354.

¶¶ 9 Rep. 106.

\*\*\* 4 Rep. 13.

††† Perry's Or. Cas. 221.

appeal to the Privy Council. See case of *Kielley v. Carson*.<sup>\*</sup> The power of the Legislature here is limited, and they have, in several instances, transgressed it—Forsyth's Constitutional Law, 17, 23, and 25.

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Another objection to Regulation III. of 1818 is, that it has not been registered in the Supreme Court, which is made necessary by 13 George III., c. 63, before it can become valid, or have any force or effect. That Statute was passed to prevent the recurrence of the outrages and oppressive tyranny which had taken place just before under Warren Hastings, and it gave a right of appeal to the Privy Council from any Rules or Regulations. Since Regulation III. of 1818 was never registered, it never had the force of law—*Doe d. Pearymoney Dossee v. Bissonauth Bonnerjee*.† The objection that it is too late to say this now, when the Regulation has been recognized in practice and by decisions, may be met by a decision of the Supreme Court of Van Dieman's Land, which was afterwards approved of in England, that an Act of the local legislature passed under the powers given by 9 George IV., c. 83, was, in almost similar circumstances to the present, illegal—*Symons v. Morgan*.‡ Long usage does not give the Regulation any force if it was originally bad, per Lord Camden in *Entick v. Carrington*.§ [NORMAN, J., referred to *In re The Bombay Justices*.||] The distinction between that case and the present is, that here the Government and its officers are treated as tort-feazors. Dr. Fawcus became a tort-feazor immediately he received and detained Ameer Khan. [NORMAN, J.—If Dr. Fawcus abused his authority, he would be a trespasser *ab initio*; but the trespass was committed by some other persons, not by him.] In *Fanokee Doss v. The King*,¶ a person resident at Benares was held to be subject to the jurisdiction of the Supreme Court at Calcutta, on the ground that he was found to be co-operating in a misdemeanour committed within the jurisdiction. See also *Poorneah Kheltry v. The King*.\*\* [NORMAN, J.—In the case of *In re The Bombay Justices*,|| it does not appear that any offence had been committed within the local limits of the jurisdiction of the Court.] No, but here Dr. Fawcus is subject to the criminal jurisdiction of the High Court, and comes within the words of the decision in that case; see p. 58 of the report. [NORMAN, J., referred to Act XXXIV. of 1850.] If Regulation III. of 1818 is bad, it cannot be made valid by being referred to in that Act. The Act is inoperative, the Regulation being void. That Act, too, only gives power to confine persons detained under Regulation III. of 1818 in the presidency-towns. It has no application to the mofussil.

The *Advocate-General* (Offg.), *contra*, submitted that, as the affidavits showed that this was a matter of State, and that the prisoner was detained by the warrant of the Governor-General, under Regulation III. of 1818, the Court had no jurisdiction in the matter.

On August 3rd Mr. Justice Norman granted a rule *nisi* calling on the Superintendent of the Alipore Jail to show cause why a writ of *habeas corpus* should not issue, and directed that notice should be given to the Advocate-General.

\* 4 Moore's P. C. 63.

† 1 Bignell, 10.

‡ 23 Law Mag. & Rev. N. S. 280; Parliamentary Papers, 566 of 1848, 75.

§ 19 Howell's State Trials, 1067.

|| 1 Knapp's P. C. 1.

¶ 1 Moore's I. A. 67.

\*\* 3 Knapp's P. C. 348.

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On August 10th *The Advocate-General* (Offg.) and *The Standing Counsel* (Offg.) appeared on behalf of Dr. Fawcus to show cause against the rule.

Mr. *Anstey*, Mr. *Ingran*, Mr. *Evans*, and Mr. *Lingham*, appeared to support the rule.

In showing cause against the rule, the Crown made use of affidavits in contradiction of the statements on behalf of the prisoner that he had endured hardship while in custody, and that he had suffered in health, and showing that the removal of the prisoner from Gya to Alipore had taken place at his own request. In an affidavit by Dr. Fawcus, the Superintendent of the Jail at Alipore, it was further stated that Ameer Khan was in his custody "under a warrant in the form prescribed by Regulation III. of 1888, and signed by Edward Clive Bayley, Esq., Secretary to the Government of India, in the Home Department."

Mr. *Anstey* objected to the admission of affidavits on behalf of the Crown in the stage of the case at which they were presented. He objected on the ground that this was not a case where a rule had been applied for to show cause why a writ of *habeas corpus* should not issue, in which case affidavits might possibly be admissible—*In re Egginton*; \* but that as a writ of *habeas corpus* had been applied for in the first instance, the Crown would have had the opportunity of putting any facts that were thought necessary into the form of a return to the writ, by which the Crown would have had the advantage that the statements so made would have had to be taken as true, that the prisoner would have no opportunity of controverting any affidavits put in at this stage, and that all that could now be gone into was the matter of law—*In re Mary Heath*.†

NORMAN, J., overruled the objection, referring to *Mary Heath's case* and *In re Richard Blake*.‡

The *Advocate-General* submitted that this was a State matter, and that the Government were not, in respect of the proceedings which had been taken in the matter, subject to the jurisdiction of the High Court. The proceedings in this matter have been taken on an order of the Governor-General under a special Regulation, which is not in conformity with the ordinary rules of procedure of this Court. If the Government, acting as it has on its own responsibility, has done wrong, there is a remedy in the proper form provided for in such a case, but its actions are not to be called in question in this Court. See *per Peel, C.J.*, in the case of *In re The Maharanee of Lahore*,§ and *per Colville, C.J.*, *In re Tuckut Roy*.||

Referring to the affidavits filed on behalf of the Crown, the *Advocate-General* contended that the Government, so far from having treated the prisoner with harshness, had been solicitous for his comfort and health, and that the requirements of the Regulation III. of 1818 with regard to these matters had been complied with.

The *Advocate-General* then proceeded to argue the following points of law:—

1st.—That the Court has no power to issue a writ of *habeas corpus* into the mofussil.

\* 2 E. & B. 731.

† 18 Howells's State Trials, 10.

‡ 1 Boul. 354.

§ 2 M. & S. 428.

§ Taylor, 428; see 433.

2nd.—That Regulation III. of 1818 was not invalid as being *ultra vires* of the Legislature, and not having been registered; and that Acts XXXIV. of 1850 and III. of 1858 were not void as being in excess of the power of the Legislature, nor opposed to the prerogative of the Crown.

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On the first point he contended that the authorities cited in support of the Court having the power contended for are all early ones, decided at a time when the relations of the Supreme Court and the Indian Government were not well defined or understood; they are therefore unreliable. Though the Supreme Court had the power of issuing writs of *habeas corpus* within the limits of its local jurisdiction, that power did not proceed on 31 Car. II., c. 2, but was exercised quite independently of that Statute. Though the Court had express power given by the Charter of 1773, s. 21 (see Smoult and Ryan's Rules and Orders, 25), to grant other writs there named, among them the writ of *habeas corpus* is not mentioned. Whatever powers the Judges had under the Charter, which gave them the powers of Judges of the King's Bench at Common Law, the 31 Car. II., c. 2, was not intended to apply, and never has been applied, to this country. The terms of that Statute show that it was enacted for particular purposes, which are specified in it, and which had reference solely to the state of things then existing in England, when the Judges showed a reluctance to exercise the power they had to grant the writ at Common Law (reads 31 Car. II., c. 2, s. 10). By the Statute, power is given to certain specified persons to grant writs of *habeas corpus*—to the Lord Chancellor or Lord Keeper, and the Judges or Barons of the superior Courts in England. The Statute is therefore by its terms special, and not general; and in no case in which a writ has been granted here have the Courts proceeded on that Statute. [NORMAN, J.—The Statute assumes the power of the Judges to issue writs of *habeas corpus* at Common Law.] But before the Statute they had a discretion to grant it; the Statute took away that discretion. It is said that because this Statute was part of the English law prior to 1726, that it was therefore introduced into this country. But every Statute in force in England in 1726 was not necessarily introduced. The law of alienage has been held not to apply—*The Mayor of Lyons v. The East India Company*.\* So with the Statutes of Mortmain—*Attorney-General v. Stewart*,† there held not to apply to the Island of Grenada. In *Das Mercies v. Cones*‡ and *Andrews v. Joakim*§ the Statute of Superstitious Uses, and in *Abraham v. The Queen*|| the Lord's Day Act were held not to apply. It is contended, therefore, that the authority of this Court to grant writs of *habeas corpus* is not under the Statute 31 Car. II., c. 2, but at Common Law; see case of *Rex. v. Ramgovind Mitter*.¶ [NORMAN, J.—Has the Statute never been held to have been extended to any colony? S. 6 is very general in its terms. The Act was for securing the liberty of the subject, and for preventing imprisonment beyond the seas.] There is no decision that I am aware of extending it to any colony. The expression "beyond the seas" implies that the Act would not apply in the colonies, because a power is given to the Courts at Westminster to prevent illegal imprisonment beyond the seas; it would be unnecessary to give local tribunals the power. It could not be contended that the penalty enacted for refusing to grant the writ could be enforced in this country. The power of the Court then is limited, and none of the cases cited on the other side decide the contrary; they are by no means

\* 1 Moore's I. A. 175, see 220.

† 2 Merivale's Rep. 161.

‡ 2 Hyde, 565.

§ 2 B. L. R. O. C. 148.

|| 1 B. L. R. A. Cr. 17.

¶ Morton's Rep. 211.

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decisive. *In re Cosa Zachariah Khan*\* decides nothing. There is no argument reported; it is not said whether the writ was *ad subjiciendum* or *ad testificandum*, and the whole case is obscure. In *Rajah Mohinder Deb Rai v. Ramcanai Cur*,† the question was not raised. In *Doe d Breejesseree Seatanny v. Ramnarain Misser*‡ a writ *ad testificandum* was granted by consent, which involved no conflict of jurisdiction. Even in the case of a writ *ad testificandum* it is not certain that the Supreme Court had the power to issue it outside the local jurisdiction. [NORMAN, J.—They had power to issue *subpœnas*.] That power is given by s. 13 of the Supreme Court's Charter—Smoult and Ryan's Rules and Orders, 9; and because they could so issue *subpœnas*, it does not follow that they could issue writs of *habeas corpus ad testificandum* out of the local jurisdiction: if such power had been considered necessary, it would also have been given by the Charter. The case of *In re Sreenauth Roy*§ does not bear on the point. The writ in that case was issued on the ground that the Raja was an inhabitant of Calcutta. The return to the writ denied this, but did not specifically traverse the facts, from which it was to be inferred that he was an inhabitant of Calcutta, and this traverse, and therefore the return, was held insufficient. In that case there was a mere question of a civil right between two private individuals. The Supreme Court had criminal jurisdiction over the Raja in that case, but the prisoner in this case is confined under an order of the Governor-General, over whom the Supreme Court, and therefore this Court, has no criminal jurisdiction, except in cases of treason and felony—s. 39, Charter of 1773; and in respect of whom 21 Geo. III., c. 70, makes a further enactment, exempting him from the jurisdiction of the Court, "for or by reason of any act or order or any other matter or thing whatsoever permitted or done by him in his public capacity only as Governor-General." The case of *In re Sreenauth Roy*§ is therefore distinguished from the present. The case of *In re The Bombay Justices*|| is also distinguishable. The Charter of the Bombay Supreme Court (see 2 Morley's Digest, p. 638) is not materially different from that of this Court. In that case it was contended that, according to the second resolution there laid down, this Court had power to issue a writ of *habeas corpus* to Dr. Fawcus as being "a person out of such local limits who is personally subject to the civil and criminal jurisdiction of the Supreme Court." The third resolution lays down that the Court had "no power to issue a writ of *habeas corpus* to the jailor or officer of a Native Court." The third resolution applies to all jailors of Native Courts, and therefore to Dr. Fawcus; and by the second resolution the person must be subject to the "civil and criminal jurisdiction;" the words are conjunctive. Now, Dr. Fawcus, even if he were shown to be a British subject, would not be subject to the civil jurisdiction of this Court on that account. Under the old law he would have been so subject; but since the Charters of 1862 and 1865, he is not so, as they put liability to the jurisdiction on other grounds. The words of the second resolution in the case of *In re The Bombay Justices*|| do not therefore apply to Dr. Fawcus; see as to this *In re the Maharanee of Lahore*,¶ per Peel, C.J.

II. This Regulation, III. of 1818, is not invalid as being contrary to the provisions of Magna Charta and repugnant to the principles of the English law. It was contended, on the other side, that the power of the Governor-General in Council to make laws is founded exclusively on 13 Geo. III., c. 63, ss. 36 and

\* Morton's Rep. 263.

† Smoult's Orders, 148.

‡ *Id.*, 201.

§ Morton's Rep. 226.

|| 1 Knapp's P. C. 1.

¶ Taylor, 433.

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37; and that as Regulation III. of 1818 had not been registered in accordance with that Statute, it was invalid. But there are other Statutes giving this power under which very many of the Acts and Regulations have been passed, as 39 & 40 Geo. III., c. 79, ss. 18 and 19, which gave power to the Governor-General to impose corporal punishment in addition to the powers given by 13 Geo. III., c. 63; and 47 Geo. III., c. 68, ss. 1 and 2, which gave the same power to the Governors of Madras and Bombay. Most of the Regulations were passed under 21 Geo. III., c. 21, s. 23, and 37 Geo. III., c. 142, s. 8, and registration in the Supreme Court was not required for a Regulation passed under these two Statutes. The requirements of the Statutes must be taken, at this distance of time, to have been complied with. Even if registration were necessary to make Regulation III. of 1818 valid, the fact that it is recognized and established by Acts XXXIV. of 1850 and III. of 1858 has done away with the necessity for registration. The date when the Company ceased to be agents for the Mogul in Bengal, Behar, and Orissa, though not exactly fixed (see *per* Lloyd in *The Mayor of Lyons v. East India Company*\*), was previous to the passing of 21 Geo. III., c. 70. By Regulations IX. and XLI. of 1793, all the Regulations then passed were formed into a Code, and by 37 Geo. III., c. 142, s. 8, all the Regulations were recognized and established; see opinion of Grey, C.J., Smoult and Ryan's Rules and Orders, 52. Regulation III. of 1818 was passed with reference to natives, as to whom there was a clear power of legislating. [NORMAN, J.—Does it not apply also to British subjects?] European British subjects would not, at the time of the passing of the Regulation, have been in the contemplation of the Legislature with reference to the object of that enactment, and its terms show it was for native subjects. The expressions “zemin-dars,” “talookdars,” &c., were not intended to apply to European British subjects; at that time they could not hold land in the mofussil. 3 and 4 Will. IV., c. 85, gives further power to the Governor-General to make Laws and Regulations, and even supposing Regulation III. of 1818 had been invalid, it would be established by that Statute—see ss. 43 and 45; and, taken in connection with the later Acts, XXXIV. of 1850 and III. of 1858, that Statute confirms the Regulation, and treats it as perfectly good law, and a law then in force. This cures the want of registration, if registration were ever necessary. The Regulation is upheld by Colville, C.J., in the case of *In re Fackut Roy*,† in giving the decision of the Court. [NORMAN, J.—Was there more than one Judge in that case? Applications of this kind are usually made before a single Judge—Morley's Digest, Title Habeas Corpus, 277.—Mr. Anstey referred to *Rex v. Ramgovind Miller*.‡] The case of *In re Fackut Roy*† was not a case where a writ was granted; it was a case where a rule had been granted to show cause why a writ should not be issued; the rule was discharged by the Court. The granting or discharging a rule is always the act of the Court, not of a single Judge.

It was contended that the Government, in confining any one under Regulation III. of 1818, ought to show that there was danger of foreign hostility or internal commotion, but that is entirely a question for the executive Government to decide, and one which they have decided by the steps they have taken. The prisoner is confined under a warrant in accordance with the Regulation, and the question cannot be gone into now.

\* 1 Moore's I. A. 252.

† 1 Boul. 354.

‡ Morton's Rep. 211.

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The powers of legislation given to the Government of India by 3 and 4 Will. IV., c. 85, are very large: there were limits that they might not make Acts in contravention of those already made, or against the prerogative of the Crown. [NORMAN, J.—Is not a writ of *habeas corpus* a prerogative writ? Mr. Anley.—See *Bushell's case* \* and *Darnel's case*†.] The Regulation does not affect the prerogative of the Crown; see *per* Colville, C.J., *In re Fockut Roy*;‡ Blackstone's Commentaries by Stephen, vol. 2, p. 620. See his definition of prerogative, *Id.*, p. 482. It cannot be contended that the Regulation absolves subjects from their allegiance; see *per* Colville, C.J., *In re Fockut Roy*.§ In that case all the points arose which have arisen here, therefore the present question has been decided. The argument is fallacious, which is based on the assumption that all the laws which are in force in England are also law here. The difference between the circumstances of the two countries has been ignored. A law which would not be good in England might very well be law here, whether we consider the country as ceded or conquered. (The Advocate-General then reviewed the state of this country at the time it was conquered by the English, and the manner in which they acquired criminal jurisdiction. He referred to Morley's Digest, Introduction 31, and continued): The position in which conquered or ceded countries are is laid down in several cases. In *Blankard v. Galdy*,§ it was held that, with regard to an uninhabited country, the laws of the conquerors apply; but, if inhabited, the law of the conqueror is not established there until it is declared to be so established. The same was held in an *Anonymous case*.|| In *Campbell v. Hall*¶ it was decided that the Crown had no power to impose taxes in the Island of Grenada, which had been conquered from the French, it having been stipulated that it should be governed by its existing laws, and the Crown having given power to the Governor to summon a Council for making laws there. What took place in this country was, that the East India Company took the administration of civil and criminal law from the Mogul, and the Mahomedan law was then the law of the Criminal Courts, and it remained so, subject to any Acts or Regulations made by the Governor-General as representing the Government.

It is said that Regulation III. of 1818 is void as being contrary to Magna Charta; but has Magna Charta been introduced into this country? As to the Regulation itself, there is nothing either in its scope or object *malum in se*. It is the law of this country, and, therefore, a person can be lawfully imprisoned under it, so that it cannot be said to be contrary to Magna Charta. That the passing of this law absolved every subject from his allegiance cannot be seriously contended. It lies on the other side to show that it is so. [NORMAN, J.—Do you contend that Magna Charta was never introduced either in the mofussil or in the local jurisdiction; into Calcutta for instance?] It is contended it was not introduced into the mofussil; in the local jurisdiction it would apply to British subjects, but it is not so clear that it was introduced as regards native subjects. This, however, is a matter existing out of the local jurisdiction. The Parliament has power at any time to suspend the Habeas Corpus Act, and, if they do, it cannot be said that the allegiance of the subject is at an end. So Parliament has given power to the Legislature here to pass Regulation III. of 1818, which is practically the same as a suspension of the Habeas Corpus

\* Vaughan's Rep. 135.

† 3 Howell's State Trials, 1.

‡ Boul. 357, 358.

§ 2 Salk. 411.

|| 2 P. Wms. 75.

¶ 1 Cowp. 209.

Act; and unless the argument is valid that, on the suspension of the Habeas Corpus Act, every subject ceases to owe allegiance to the sovereign, the argument that Regulation III. of 1818 causes a cessation of allegiance in the subject is invalid.

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The Regulation, too, is supported by the Acts XXXIV. of 1850 and III. of 1858, which extend its operation, and were passed at a time when it cannot be doubted the Legislature had power to pass them. By the latter of these Acts they enact by s. 2 that "Regulation III. of 1818 shall be in force within the local limits of the jurisdiction of the Supreme Courts of Judicature at Calcutta, Madras, and Bombay." This gives the right of arresting prisoners in the Presidency towns. The removal of the prisoner in this case, which is alleged to have been illegal, is justified by s. 5 of Act III. of 1858.

It appears upon the affidavits that Amir Khan is detained by a warrant in accordance with the law—*viz.*, Regulation III. of 1818; and the detention being lawful, the rule ought to be discharged.

The *Standing Counsel* (*Offg.*) on the same side.—Is this a case in which, assuming the Court has power to issue a writ of *habeas corpus*, it ought to do so, having regard to the matter disclosed in the affidavits and the circumstances of the case? It is to these rather than to precedents that the Court must look. The circumstances in the case of *In re Sreenauth Roy*\* differed from those of the present case. There an offence had been committed in Calcutta, and the Court held they had jurisdiction; here Dr. Fawcus had committed no offence in Calcutta. In that case it was said that an action of trespass would lie, and therefore a writ of *habeas corpus* could be issued; but suppose a person had been enticed inside the limits of Calcutta, and had then come out and been seized outside, would a writ of *habeas corpus* issue? Many of the decisions of the Supreme Court as to its jurisdiction are not in accordance with law or justice; they show how jurisdiction was usurped, and are unreliable—*Punchanund Bose v. Davison*,† *Martindell v. Toman*,‡ *Bamasoondery Dossee v. Rajcoomaree Dossee*.§ Later decisions have gone on a contrary principle—*Emirt Loll v. Kidd*.|| The affidavits in this case do not connect Dr. Fawcus with the arrest at all, either as principal or accessory; no act has been done by him which, though lawful originally, has since become unlawful so as to constitute trespass; see the *Six Carpenters'* case.¶ The special object of a writ of *habeas corpus* is to bring up the person detained, and to inquire whether he is properly in custody, not to punish the person who is detaining him.

The original arrest is not to be considered in issuing a writ of *habeas corpus*, but only the legality or otherwise of the detention. It is submitted, then, that the legality or otherwise of the arrest is not a necessary element in this case; and that, if it is necessary, that cannot affect Dr. Fawcus, as he had nothing to do with it. [NORMAN, J.—Suppose, in *In re Sreenauth Roy*,\*\* the person detained had been handed over to some one else out of the jurisdiction, could not a writ have issued from the Court here?] It is submitted it could not: this is a Court of limited jurisdiction. The Court of Queen's Bench might issue a writ as in *In re Anderson*,\*\* but it is unnecessary to consider that.

\* Morton's Rep. 226.

† *Id.*, 149.

‡ *Id.*, 161.

§ Taylor, 70.

|| 2 Hyde, 117.

¶ 1 Smith's L. C. 134.

\*\* 30 L. J. Q. B. 129.



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Where a party is criminally liable, the Court will not consider the question of the arrest—3 Burn's Justice of the Peace, Title Habeas Corpus, pp. 430-431, and cases there cited. The fact that Dr. Fawcus is a British subject does not make him subject to the civil jurisdiction, for the civil jurisdiction does not now depend on the question whether a person is a British subject or not. The fact of the capture having been made in Calcutta does not make Dr. Fawcus subject to the jurisdiction, for with that he had nothing to do. The writ of *habeas corpus* is not a wholly criminal process; see 3 Burn's Justice of the Peace, Title Habeas Corpus, p. 431, 4 Blackstone's Commentaries, p. 27; and it may well be that the Court has no power to issue a writ of *habeas corpus* against a man, although it has criminal jurisdiction over him. If it be a wholly criminal matter, Dr. Fawcus is not primarily liable to the jurisdiction of the Court; he should be committed and sent up in the usual way under the provisions of the Criminal Procedure Code. The jurisdiction of this Court is limited. [NORMAN, J.—If a European British subject were seized in Calcutta, and put in jail in the mofussil, would he not be entitled to a *habeas corpus* from this Court?] He would be entitled to a writ of *habeas corpus*; the question is—What Court could grant it? In the case of a European British subject being imprisoned in the mofussil, it might well be that this Court could issue a writ of *habeas corpus* to bring him up, as this Court has criminal jurisdiction over him in respect of offences committed by him; but in *In re Sreenauth Roy*,\* the writ was issued, not because the person detained had a right to it, but because the detainer was held subject to the jurisdiction. The case of *In re The Bombay Justices*† merely decides that, where the Court has both civil and criminal jurisdiction, a writ of *habeas corpus* will issue—that is, because a writ of *habeas corpus* is partly civil and partly criminal. *The King v. Monisse*‡ is not in point; the writ there was issued to a place within the local limits of the jurisdiction. Those cases which have been cited as precedents are no guide whatever, and are no authority to the Court to issue a writ of *habeas corpus* in the present case.

It has been assumed that, on the establishment of English rule here, all the law of England was introduced; but this does not follow. How are conquered or ceded countries dealt with as to the laws governing them? In *Picton's case*,§ the principle in *Campbell v. Hall*,|| that the laws of a ceded country remain until expressly altered, was fully admitted; see also *Anonymous case*.¶ [NORMAN, J.—Do you contend that the English statute law, except that totally inapplicable, has not been prior to 1726 introduced into India?] Yes. Slavery existed here long after the Slavery Abolition Act in 1833. In 1834 power was given to the Government here by 3 & 4 Will. IV., c. 85, s. 88, to take into consideration the abolition of slavery in this country; but it was not then abolished, nor virtually until the passing of the Penal Code. It could not be said that a slave had a right to a writ of *habeas corpus* on the ground that, under Magna Charta, he had the same rights as a European British subject. If he had, how was slavery, so repugnant to the English constitution, continued until 1860? English law could not have been introduced bodily, or slavery would have ceased in 1833. If slavery could exist, why could not a law like Regulation III. of 1818, for the confinement of seditious persons, exist also? It is much less repugnant to English law than slavery. Englishmen and Native

\* Morton's Rep. 226.

† 1 Knapp, P. C. 1.

‡ 1 Strange's Notes of Cases, 418.

§ 30 Howell's State Trials, 934.

|| 1 Cowp. 209.

¶ 2 P. Wms. 47.

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subjects never were on an equal footing; if so, natives would have been entitled to the privilege of being tried by a native jury, yet until 7 Geo. IV., c. 37, they were always tried by English juries. The laws of this country were not altered by the Statutes. The Charters establishing Mayors' Courts in 1726, and 13 Geo. III., c. 63, merely give civil and criminal jurisdiction, but do not state what law was to be administered. [NORMAN, J.—They give certain powers to make laws not repugnant to the law of England. It seems to me that, under them, English criminal law was to be administered.] The Mahomedan law, which existed here prior to 1726, was not then immediately and entirely subverted. [NORMAN, J.—The Charter of Charles II., dated April 3, 1661, gives power of civil and criminal jurisdiction over all persons according to the laws of England.] That refers only to the servants of the East India Company; it would not introduce English law universally. The country was not conquered or ceded until 1765, and till it was ceded or conquered the laws would remain unaltered; how then can it be said English law was introduced in 1726, when the country was subject to the Mogul? Prior to the time when Bengal became a British province, the law of England was not introduced. The most important Statute subsequently is 13 Geo. III., c. 63. The words, "His Majesty's subjects," in s. 14, do not include native subjects, but only apply to British-born subjects; s. 16 makes a further distinction; see also s. 34. The extended privileges given by 7 Geo. IV., c. 37, as to jurors, show what was meant by British subjects; 13 Geo. III., c. 63, draws a wide distinction between "His Majesty's subjects" and "inhabitants of India." If it be said that the distinction was done away with by the proclamation of 1858, the answer is that such a result can only be effected by Parliament,—the Queen has no power alone to authorize it. No change was introduced by the Charter of 1774; see Smoult and Ryan's Rules and Orders, 9—17; the words "Our subjects" there only apply to British-born subjects. The preamble of 21 Geo. III., c. 70, shows that it was never supposed that English law had been introduced into Bengal, and by other portions of it their own laws are expressly reserved to natives in certain cases, see s. 17. The enumeration of cases there does not exhaust their whole law, and it was not intended that in all other cases English law should be introduced. *Musleah v. Musleah*\* was decided on this principle, but Peel, C.J., afterwards resiled from this opinion in *Emmer v. Crump*; † see also *Musleah v. Musleah* on review. ‡ These decisions, however, all assume that the English law applies because there is no other law; but the application of the English law has been limited in many cases. In *Bysack v. Bysack*§ the law of perpetuities was held not to apply to this country. In the case of *The Mayor of Lyons v. The East India Company*,|| the law of alienage was declared inapplicable; and in *The Advocate-General of Bengal v. Ranee Surnomoyee Dossee*,¶ the law of forfeiture for suicide was held not to be part of the law of this country. [NORMAN, J.—When by Charter the English Government assume to appoint authorities in Calcutta, and give them civil and criminal jurisdiction, and the power of making bye-laws not repugnant to English law, is it not a clear inference that they meant English law to be introduced?] If they had intended it, they could have expressly introduced it, and not have left it to be implied. If English law was introduced by 13 Geo. III., c. 63, why does 21 Geo. III., c. 70, commence by being repugnant to the idea that English law had been introduced? If any difficulty

\* Fulton, 420.

† Montriou's Morton, 242, 255.

‡ Boul. 235.

§ Bourke's Rep. 282.

|| 1 Moore's I. A. 270.

¶ 9 Moore's I. A. 387.

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was found as to what law was to be applied in cases to which no law was made expressly applicable, the difficulty ought to have been represented to the Legislature; whereas the Courts took upon themselves to introduce English law. The decision in *The Mayor of Lyons v. The East India Company*\* was on the ground that it would be gross injustice to apply the law of alienage to Calcutta, and nothing is said there of the introduction of English law; see also *The Advocate-General of Bengal v. Ranee Surnomoyee Dossee*,† *The Indian Chief*,‡ *Jebb v. Lefevre*.§ The *lex loci* of Calcutta for European British subjects was the English law, modified to the position and state of the country. Other European nations had their own laws. Mahomedan law was in force in Calcutta for natives of the country and in the mofussil. 21 Geo. III., c. 70, s. 17, does not abrogate the Mahomedan law; the exceptions in that section are not exhaustive—see the preamble to the Act. On the same principle, a clear devise in a will is not made void by a general inaccurate clause,—see Jarman on Wills, cl. 26. So the enumeration of *Bandhus* in the Mitakshara has been held by the Privy Council not to be exhaustive. The whole body of English law was never introduced with regard to native subjects. If it is said it was introduced *in toto*, in what way is it to be limited? but it has been limited, therefore the inference is it was not wholly introduced—*Advocate-General of Bengal v. Ranee Surnomoyee Dossee*,|| *per* Lord Kingsdown. *The Indian Chief*,‡ *Jebb v. Lefevre*,§ *The Queen v. Nelson and Brand*,¶ *per* Cockburn, C.J. In all the decisions in which the question arose, it seems to have been assumed that it had been introduced. If the words "*liber homo*" are used as opposed to a slave, the fact that slavery existed here would show that Magna Charta was not introduced; if they are used as showing the distinction between a freeholder and a villain, and imply a superiority of tenure, that very language shows that Magna Charta is not applicable to this country. [NORMAN, J., refers to the definition of *liber homo* given by Coke, 2nd Institute, p. 27.

The Mahomedan law gave the sovereign absolute power over the subject, and the Governor-General had much the same power when Regulation III. of 1818 was passed. The Statute 13 Geo. III., c. 63, was passed for the general improvement of the Company's administration, not on account of the atrocities alleged to have been committed by Warren Hastings; those took place subsequently. No particular state of circumstances arose in 1818 to give any explanation of the passing of Regulation III. of that year; the absence of any events showing the necessity of it makes it clear it was an act of State policy, and rather limited than extended the then power of the Governor-General. (The learned counsel here referred to the provisions of the Regulation with regard to measures for the health and comfort of the prisoner, and the power of appeal given him.)

Regulation III. of 1818 does not give any new powers for the first time, nor does it enact anything repugnant to the law of the realm, or beyond the power of its framers,—see the argument of Serjeant Spankie in *Buckingham's case* before the Privy Council,\*\* and *Ouseley v. Plowden*.†† The Statute 13 Geo. III., c. 63, had made registration of the Regulation in the Supreme Court necessary. 37 Geo. III., c. 142, makes registration no longer necessary, and Regulation III. of 1818 was passed under the powers given by the latter Statute.

\* 1 Moore's I. A. 270.

† 9 Moore's I. A. 387.

‡ 3 Rob. Adm. Rep. 29.

§ Clarke's Rules and Orders, Add. 56.

|| 9 Moore's I. A. 387; see 425.

¶ Page 10 of the Charge to the Grand Jury.

\*\* Auber's Analysis, 18.

†† 1 Boul. 145.

Nor is the Regulation III. of 1818 void as being in derogation of the prerogative of the Crown. The word "prerogative" has a double meaning; the liberty of the subject may be in derogation of the prerogative of the Crown. The first attempt of the Indian Legislature to grant patents was held an encroachment on the prerogative, because leave ought to have been first obtained under 16 & 17 Vict., c. 95, s. 26. It is difficult to see how the Regulation can absolve the subjects from their allegiance, when by its terms it implies that it is for attempting to throw off their allegiance that they are to be deprived of liberty. The point in this case has been decided in the case of *In re Tuckut Roy*.<sup>\*</sup> The circumstance that in that case the man was arrested in the mofussil and confined in Calcutta, and in the present case arrested in Calcutta and confined in the mofussil, cannot make any difference since the passing of Act III. of 1858. The fact that this is not a case of arrest by the Court, but by warrant of the Governor-General in Council, must be taken into consideration. If the enlargement of the prisoner by writ of *habeas corpus* is against public justice, 31 Car. II., c. 2, does not apply; the *habeas corpus* at Common Law is applicable—4 Stephen's Blackstone, 27, 28. See also *Burdett v. Abbott*.<sup>†</sup>

Mr. Anstey, in support of the rule, cited 8 Howell's State Trials, 38, note, and 19 *Id.*, 1152, note, to show the ill effects of arbitrary power in individuals, and instances of its abuse by persons who assumed pretensions to it. The law of England does not sanction such pretension to arbitrary power. The cases which have been cited on the other side have no application to this question; they are cases relating to things, this is a case relating to the rights of persons; they are cases of private law, this is a case of public law. The word "law" has been misused by the other side—*viz.*, as meaning a habit or custom of life; it should here be used in its primary sense—*i. e.*, a commandment. The question is not one of the *status* of persons, or under what law as to inheritance or contract they may be living; the question is one on which their allegiance may depend. The persons who first acquired this territory were, although living beyond the realm, subject to the sovereignty. Their own act put them out of the reach of the protection of the sovereign, but they took their laws with them—Chalmers' Opinions, 206, *et seq.*, 517; *The King v. The inhabitants of Brampton*,<sup>‡</sup> *per* Ellenborough, C.J.; Clarke's Colonial Law, 8, note 4. If it is by the sovereign's act that his protection is withdrawn, the subject ceases to owe allegiance. In the Charter 10 & 11 Will. III., in 1798, the settlements of the English in India are called "plantations," and are mentioned as subject to the English sovereignty. The Statute 13 Geo. III., c. 63, was passed to prevent the recurrence of the atrocities and cruelties after Clive's time; as 21 Geo. III., c. 70, was passed on account of the abuses in Warren Hastings' administration. (The learned counsel then referred to the various early Charters granted to the East India Company, showing how English law was introduced—by Elizabeth, 31st December 1600; by James I., 31st May 1609; by Charles II., April 3rd, 1661, and 27th March 1668; in connection with which he referred to the cases of *Naoroji Beramji v. Rogers*,<sup>§</sup> *Lopes v. Lopes*; ¶ and Clark's Colonial Law, p. 7, note 9.

These Charters and the Statutes since passed had for their object to strengthen the power of the Courts against the Company—see the Minute of Sir E. Ryan, dated October 2, 1829, in the 5th Appendix to the 3rd Report of the Select Committee of the House of Commons on the East India Company—

\* 1 Boul. 354.

† 14 East, 1.

‡ 10 East, 288.

§ 4 Bom. H. C. Rep. 37.

¶ 5 Bom. H. C. Rep. 172.

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in which he states that, with reference to the Regulations passed by the Governor-General in Council, parties made frequent applications in the Courts against the registration of such Regulations, as provided in the 13 Geo. III., c. 63; and it was always considered that they had a right to be heard. The time and circumstances in which decisions were given, and, in construing the Acts of Parliament, the history of those Acts must be taken into consideration. The whole of the English law was introduced as the *lex loci* by the early Charters and by 13 Geo. III., c. 63; and afterwards exceptions were made on the ground of greater convenience, and the different state of the two countries. Thus, at various times, Acts were passed by the Imperial Parliament, and decisions were given with respect to the applicability of particular portions of English law to India; and in certain cases the native laws were reserved to the natives. What would be crime by English law was not to be crime here if justified by the religion of the people, hence the difficulty of abolishing slavery. It is said that slavery existed here long after it was abolished in England; it was not until the case of *The Negro Somersett*\* that it was shown to be contrary to the law of England—*per* Lord Mansfield. Before that it could not be said to be contrary to the law of England, as could have been said of torture. A late opinion on slavery is that of Mr. Justice Best in *Forbes v. Cochrane*,† given before the Slavery Abolition Act 3 & 4 Will. IV., c. 85. Torture was never legal under the British rule in India; it was never used here in accordance with law; see on this subject *Picton's case*.‡ Torture would cease on the entry of a British force into the country—*Mostyn v. Fabrigas*.§ These cases show that laws contrary to the principles of the law of England would, on the introduction of English law, be abrogated without special Act of Parliament. (The learned counsel then referred to Mr. Law's contention at the trial of Warren Hastings that his conduct was justified by the Mahomedan law, and Mr. Burke's reply showing that, although the Mahomedan laws were severe, they were just, and did not permit an arbitrary exercise of arbitrary power—3rd volume, Burke's Speeches.) If it is said this arrest has been made in accordance with Mahomedan law, it has failed to answer the requirements of that law; if it is good at all, it must be by English law. (The learned counsel referred to the late Charters down to the establishment of the Supreme Court granted by Charles II. on 27th March 1669; by 2 Jac. II., 12th April 1686; 5 Will. & Mary, 11th November 1693; 10 & 11 Will. III., 5th September 1698; 5 Geo. I., c. 11; 7 Geo. I., c. 21; 13 Geo. I., 24th September 1726; 26 Geo. II., 8th January 1753; and 31 Geo. II., 19th September 1757, observing of them that they all contained provisions requiring that the laws made by the Company should be reasonable, not repugnant to the laws of England, and subject to confirmation by Parliament.) The next Statute was 13 Geo. III., c. 63, which establishes the Supreme Court, under the powers given by which the Regulation III. of 1818 was passed. The argument that Magna Charta and other laws relating to personal liberty are on the same footing as merely local laws, and do not apply to India, is not valid; because whilst many laws which it would be inconvenient to introduce, or which would have a penal effect, might not apply, it would not follow that a statute which would be beneficial (as one regarding personal liberty) would not be applicable. "Beneficial laws may extend to things not *in esse* at the time of making the Statute, penal ones never do"—*Dawes v. Painter*.¶ On this principle, 56 Geo. III.,

\* 20 Howell's State Trials, 1.

† 2 B. & C. 470.

‡ 30 Howell's State Trials, 870.

§ 1 Smith's L. C. 623.

¶ Freeman's Rep. 175.

c. 100, passed to amend the Habeas Corpus Act, applies to India. The right to a writ of *habeas corpus* is a natural right; the date of it is doubtful, but it is an ancient right—Croke, Car., 466. In Roman law, it is found in the *De homine libero exhibendo*—Dig., 43, Tit. 49. It existed in Spain in the form of the writ of “manifestation,” see 2 Hallam’s Middle Ages, 222. It is a prerogative writ in some sense, because it is a writ granted by the sovereign as protector of his subjects—Bacon’s Abridgment, Title Habeas Corpus, A; see *Richard Bourn’s case*\* and *Bushell’s case*†. It has been contended on the other side that the capture is immaterial; and that it is only necessary to justify the detention—but see Bacon’s Abridgment, Title Habeas Corpus, A, where it is said to be in “the nature of a writ of error to enquire into the legality of the commitment, and orders the day, the caption, and the cause of detention to be returned.” (The learned counsel then read a portion of, and commented on, the Magna Charta,‡ observing that the reading “*vel per legem terræ*” was preferred to that of “*et per legem terræ*” on the question whether the Attorney-General had power to file *ex officio* informations, which it was held he had.) The *lex terræ* is the law of England as it existed then. (He also cited the words of Lord Chatham on the words of the Charta; see Hurd’s Treatise on Habeas Corpus.) The other side contend that there was no trial by jury in the mofussil until the Criminal Procedure Code, and therefore Magna Charta does not apply; but it did exist, at least in the West of India, in the *punchayet*, which, according to an instance given by Palgrave, was similar to the ancient form of jury in England in time of Edward III. The Sheriff was bound to impanel none but those who had seen the offence or knew the offender. The original writ to summon witnesses was not a *subpœna*, but a *habeas corpus* followed by a *distringas*. Thus it was not necessary to introduce trial by jury, as it already existed in the mofussil.

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As to the right of every subject of the Crown to the writ of *habeas corpus* see 2 Hallam’s Middle Ages, 342; Coke’s 2nd Institute, 45b; 1st *Id.*, 123b: these were the later opinions of Lord Coke; Preface, 15th Edition, 39, *Darnel’s case*.§ All the Statutes that apply to personal liberty have a permanent personal application, and are not like merely local Statutes; such Statutes are extra-territorial. Besides *habeas corpus*, there are other writs which might be issued, and which are writs of right. One is the writ *de homine replegiando*, for the effect of which see *In re Martin*|| and *In re Treblecock*,¶ in which latter case the writ was maintained by Lord Hardwicke. Another writ is that of *mainprize*, which any one imprisoned is entitled to, on giving security to answer any charge—*Jenkes’ case*,\*\* which led to the passing of the Habeas Corpus Act, 31 Car. II., c. 2. In the present case there is no intention on the part of the Government to try Ameer Khan, and they have concealed the reasons for his arrest. The Statute 56 Geo. III., c. 100, was passed to amend and extend the application of the Habeas Corpus Act; this Act also applies to India, at least

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\* Cr. Jac. 543.

† Vaughan’s Rep. 136.

‡ *Nullus liber homo capiatur, imprisonetur, aut disseisietur de libero tenemento suo, vel libertatibus vel liberis consuetudinibus suis; aut ut lagetur, aut Exuletur aut aliquo modo destruat; nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum, vel per legem terræ.*

§ 3 Howell’s State Trials, 43; see also pages 8—16.

|| 2 Payne’s Cir. Rep. 348.

¶ 1 Attkyn’s, 633.

\*\* 6 Howell’s State Trials, 1200.

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since the constitution of the High Courts. There are no words in the Statute saying it shall not apply. The Letters Patent do not exclude it. It applies, together with the rest of the Statute law applicable to the state of the country before 1726. Practice should not put any restriction on its applying; practice is not unfrequently wrong—*Wilson v. Bates*.<sup>\*</sup> It is submitted, however, it is not practice. "Acts of Parliament which alter other Acts in force in the colonies are also considered by inference as themselves applying there." This was the opinion of Dwaris, following the best authorities—Clark's Colonial Law, 16; see also Chalmers' Opinions, 197-220; *Blankard v. Galdy*;† Comyn's Digest, Title Navigation, G. 3; *Anonymous Case*;‡ 1 Blackstone's Commentaries, 108; *Reg. v. The Mayor of Norwich*;§ Stokes' Law of the Colonies, 5. This precept has been acted on in the High Court of Bombay, and in this Court in *Griffin v. Deatker*,|| decided on the Statute 24 Geo. II., c. 44, see Morley's Digest, Title Arrest. The only distinction taken is that beneficial laws are held to apply, and penal ones not—*Daves v. Painter*;¶ Introduction to Blackstone's Commentaries, 107; 2nd Report of West Indian Commission, 61; *Penn v. Lord Baltimore*.\*\* The portion of Magna Charta relating to weirs on the Thames and Medway, which is eminently a local law, was, *mutatis mutandis*, held to be extended to Ireland, because it was a beneficial law—Harris' Hibernica. Those not beneficial have been held to be not applicable here, as the Statutes relating to superstitious uses, &c. English law may be kept out of a country; but, when once introduced, there is no power to limit its application—*Campbell v. Hall*.†† In judging whether Acts apply or not to this country, it must be considered whether they are beneficial or not; and Courts of Justice established by Act of Parliament are not bound to take the law from any particular date, as 1726, but all the beneficial laws are applicable; thus Magna Charta, the Statutes with respect to the liberty of the subject passed by the Plantagenets, the Petition of Right, the Bill of Rights 1688, and 56 Geo. III., c. 100, are all of them applicable to this country. The Privy Council, in *The Advocate-General of Bengal v. Surnomoyee Dossee*,‡‡ say that those who live among British settlers are partakers of their laws. [NORMAN, J.—But they expressly exclude India.] The state of things existing at the time of that decision does not exist now. "Reasons of State are not allowed to influence our judgments by the constitution of English law," *per* Lord Mansfield in *The King v. Wilkes*;§§ and as to the danger of arbitrary power in the State, and claim to summary jurisdiction, see 3rd volume of Sir W. Jones' works, 48, in his charge to the Grand Jury. The present claim to summary jurisdiction goes farther than what is denounced by Sir W. Jones. In *Queen v. Ogilvie*,||| Peel, C.J., says: "On the construction of the *habeas corpus* we are bound to follow the decisions of the English Courts in preference to decisions of this Court." Sir C. Grey, Sir E. Ryan, and the other Judges in 1829, gave their express opinion that the English law relating to *habeas corpus* was in force in India—see 5th Appendix to the 3rd Report, 1200; see also the observations of Cockburn, C.J., in *The Queen v. Nelson and Brand*.¶¶ Express power was given to the Company by 5 Geo. I., c. 21, s. 22, to arrest, seize, and deport persons who

\* 3 M. & Cr. 197.

† 4 Mod. Rep. 222; S. C. 2 Salk. 411.

‡ 2 P. Wms. 75.

§ 2 Ld. Raym. 1245.

|| Morton's Rep. 360.

¶ Freeman's Rep. 175.

\*\* 1 Ves. 385.

†† 1 Cowp. 204.

‡‡ 9 Moore's I. A. 424.

§§ 19 Howell's State Trials, 1112.

||| Taylor, 137.

¶¶ P. 65 and 66 of the Charge to the Grand Jury.

traded without authority in the East Indies. Power to deport implies power to arrest and detain, but power to arrest and detain does not necessarily imply power to deport—see *Nicol v. Verelst*,\* which was a case decided on that Act of Parliament. If the power of making laws to restrain the liberty of the subject exists here, the *onus* of showing that it does exist is on those who assert such a power, and express authority must be shown for its exercise, for without express authority they cannot make laws at all. The cases of the arbitrary exercise of power of arrest cited by the other side are cases where express authority was given by the Legislature. Here there is no express authority. In *Buckingham's case*,† there was such express power given, and the Privy Council refused to interfere only because such special power had been given, and they thought that the complainant had mistaken his remedy, which was by action in the ordinary way under the Statute. This is borne out by the fact that compensation was afterwards made to him. As to the introduction of English law, and the distinction between public law and personal law, between rights of persons and rights of things, see *The Secretary of State v. The Administrator-General of Bengal*,‡ per Markby, J. All the Charters reserved the laws of England, and, in giving the power of legislation, expressly stipulated that such legislation should be reasonable and not repugnant to the law of England. (13 Geo. III., c. 63; 21 Geo. III., c. 70; 10 Geo. III., c. 21; 33 Geo. III., c. 52, s. 45; 37 Geo. III., c. 142, which enacts that certain Regulations should be codified, without, as the other side contend, recognizing the validity of each separately; 39 & 40 Geo. III., c. 79, ss. 18 and 19, cited to show this.) 47 Geo. III., c. 155, s. 35, made all Europeans subject to any Regulations which might be made by the local legislature. Thus, Regulation III. of 1818, if good against Hindus, Mahomedans, &c., is also in force against all European British subjects. In *Bryant v. Foot*§ it is shown that, if a claim be bad or unjust in its inception, it is wholly bad, so it is with Regulation III. of 1818, which is void for rankness and excess of authority in the framers—*Biddle v. Tarrany Churn Bonnerjee*,|| per Peel, C.J.; see also *Bonham's case*,¶ *The City of London v. Wood*,\*\* *Day v. Savadge*,†† *Calvin's case*,‡‡ *The Le Louis*§§ per Lord Stowell, *The Lord Cromwell's case*,||| *Stewart v. Lawton*,¶¶ *The Baron de Bode v. The Queen*.\*\*\* The other side contend that English law was not in force in the mofussil in 1818. If so, where was the power to pass the Regulation III. of 1818? It was passed either under Mahomedan or English law. No authority exists in Mahomedan law under which it could have been passed. If passed under English law, it is void as being in excess of the power of legislation. Thus, in either case Regulation III. of 1818 is void. (The learned counsel here referred to the opinions of Lord Denman and Sir W. Horne, that slaves in the island of Tortola were entitled to the benefit of clergy and to the protection of the Common Law as subjects of the Queen—Forsyth's Opinions, 205, 457.) They were of opinion that the indictment was invalid because it gave the accused no notice of the offence with which he was charged.

As to how far the repugnancy of an Act to the law of England affects its validity, see the Minute of Sir C. Grey of October 1829, 3rd Appendix to the

\* 2 Wm. Bl. 1277; see 1283, per Grey, C.J.

† Auber's Analysis, 18.

‡ 1 B. L. R. O. C. 110.

§ 3 L. R. Q. B. 497.

¶ T. & B. 391, 406.

¶ 8 Rep. 114—118

\*\* 12 Mod. Rep. 687.

†† Hobart's Rep. 87.

‡‡ 7 Rep. 14.

§§ 2 Dodson's Adm. Rep. 254.

|| 4 Rep. 13.

¶¶ 1 Bing. 374.

\*\*\* 3 H. L. C. 449.

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5th Report, 1126, and the Minute of Lord W. Bentinck, p. 1188. Regulation III. of 1818 was made, if made under any of the Statutes, under 13 Geo. III., c. 63. That the Legislature here should have had powers to make a law enabling the Government to make arrests and detain suspicious persons would be inconsistent with the principles of the Imperial and Colonial Legislatures: for the Imperial Legislature at various times was called upon to extend the powers given by 13 Geo. III., c. 63, as they did by 39 and 40 Geo. III., c. 79, s. 18, 55 Geo. III., c. 84, s. 6, and 33 Geo. III., c. 52, s. 45. Regulation III. of 1818 is either void for dealing with a subject exhausted by these Acts of the Imperial Legislature, or it was not intended to apply to any case coming under the provisions of those Acts. In those Acts, power of arrest is given, but the arrest must be by warrant, and the causes of detention must be shown, and the prisoner be brought to trial; see the Minute of Sir C. Grey above referred to, 1128. Allegiance and protection are reciprocal, and any act which tends to reduce the protection of the sovereign absolves the subject from his allegiance—see *Calvin's case*.\* If an Act be passed contrary to international law, it would be void, and the Judges would not be bound to recognize it—*The Fox*,† *Regina v. Serva*,‡ decided in 1845; see also *Reg. v. Reay*,§ decided on the 21st May 1870; *Samaldars Bechardars v. The Collector of Ahmedabad*,|| decided on 20th July 1870, *per* Tucker, J.; and *The Thakoor of Palitana*,|| decided in August 1870 by the High Court at Bombay.

To come to later Acts of the Imperial Legislature giving power to the Legislature here, there is 3 & 4 Will. IV., c. 85, s. 43; that power is limited by enacting that the Governor-General shall not make laws "affecting any prerogative of the Crown, or the authority of Parliament, or any of the unwritten laws of Great Britain on which may depend the allegiance of the subject;" and s. 51 reserves the right to make laws for India, showing an intention to limit the power of the Governor-General in Council. As to what legislation the Parliament thought expedient, see ss. 85, 87, 88, 89, and 109. The effect of the whole Act was to give every native of India the full rights of a natural-born British subject in the same way as conquest, which makes naturalized subjects of the conquered—see *per* Lord Mansfield in *Campbell v. Hall*.¶ That this effect was not produced before was due to the peculiarity of the tenure of India by the English. Before that time the Company had held India on a kind of feudal tenure; after that it became a trustee for the Crown. The argument drawn from the fact that the laws of alienage do not apply here is not a correct one, for the laws of alienage could not apply unless specially introduced; they are penal laws, and were not introduced into England until 13 Edward II. by the statute *de prerogativa regis*. All the cases against which the other side contend were decided subsequently to 1833. Next was passed 16 and 17 Vic., c. 95, by s. 37 of which natives are capable of qualifying themselves for civil or military service. S. 26 makes the consent of the Queen necessary to the validity of any law of the Governor-General in Council affecting the prerogative of the Crown. There is nothing affecting the provision in former statutes that such laws shall be not repugnant to the law of England. Regulation III. of 1818 was re-enacted after the mutiny by Act III. of 1858. It was not renewed, for it never existed as a law, not having been registered; if it was in force as law, why was it not put in force in 1857 or 1858? The Legislature of

\* 7 Rep. 4 & 5.

† Ed. Adm. Rep. 313, 314.

‡ 1 Den. Cr. C. 104.

§ 7 Bom. H. C. Cr. 6.

¶ Unreported.

¶ 1 Cowp. 209.

1858 had no power to renew or confirm Regulation III. of 1818. Then comes the case of *In re Tuckut Roy*,\* decided by Sir J. Colville, C.J. [NORMAN, J.—That case, I find from the records of the Court, was heard by Colville, C.J., and Sir C. Jackson: the most recent practice of the Supreme Court seems to have been to grant writs of *habeas corpus* sitting in *banco*.] That case was decided under very different circumstances; all the horrors of the mutiny had taken place. Act III. of 1858 was passed on January 25; yet in his judgment in *In re Tuckut Roy*,\* which was only a month subsequent, Colville, C.J., does not mention Act III. of 1858; he did not think it an Act to be relied on. The previous opinion of Colville, C.J., was a different one from that expressed in *In re Tuckut Roy*,\* see *Ouseley v. Plowden*.† The expression “government of territories” means government of the inhabitants of the territories. Either Regulation III. of 1818 is utterly void, or it is applicable to every one—all subjects alike. The case of *In re Tuckut Roy*\* is distinguished in the following points: 1st—The party arrested there was not a British subject. 2nd—He was not arrested in time of peace. 3rd—He was arrested in the mofussil. 4th—The effect of the passing events of the mutiny on the minds of men must be taken into consideration. 5th—It is inconsistent with English cases, and the principle laid down by Peel, C.J., in *Reg. v. Ogilvie*,‡ should prevail, that when the right to a writ of *habeas corpus* is in question, the English cases should be looked to in preference to the Indian ones. The Court is not bound by *In re Tuckut Roy*.\* In *Drummond v. Drummond*,§ the Vice-Chancellor followed the other authorities, and refused to be bound by the Lord Chancellor (Westbury) in *Foley v. Maillardet*|| and *Cookney v. Anderson*,¶ and on appeal that decision was affirmed.\*\* [NORMAN, J.—The case of issue of writs of *habeas corpus* is different; the practice in Westminster Hall is that the decision of one Judge in the matter of a writ of *habeas corpus* does not conclude another Judge.] Just so. If *In re Tuckut Roy*\* was ever an authority, it is no longer so since the passing of 21 and 22 Vic., c. 106, by which the government of India was transferred to the Queen. S. 78 empowers the Queen to issue proclamations. As to the power of the Queen to bind her subjects by proclamations, see Bacon’s Abridgment, Title Prerogative, D, 8; a royal proclamation has the force of law (reads proclamation of November 1, 1858). Regulation III. of 1818 is utterly inconsistent with these words. The proclamation confers equality on all subjects of the Queen in India.

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The High Court has the same power and extent of original civil jurisdiction as the Supreme Court had. It has such jurisdiction in all parts of India; it cannot be said that when a man has been arrested within its local jurisdiction, and carried without it, this Court has no power over a person illegally detaining him. Dr. Fawcus is both civilly and criminally liable to the jurisdiction of the Court. Even if this be a matter of State, this Court has power to issue a writ of *habeas corpus* to compel a discovery of all the circumstances, and, if it think fit, to restore the prisoner to liberty.

A writ of *habeas corpus* will lie to bring up a man taken in execution—*Bushell’s case*;†† such a writ will issue at Common Law, not under the Habeas Corpus Act. Where a person is imprisoned by a Criminal Court competent to

\* 1 Boul. 354.  
† *Id.*, 162, 168, 169.  
‡ Taylor, 137.  
§ 2 L. R., Eq., 335.

|| 1 De Gex., J. & Sm., 389.  
¶ *Id.*, 365.  
\*\* 2 L. R. Ch. App. 32.  
†† 6 Howell’s State Trials, 967.

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exercise such jurisdiction, there is no Common Law remedy by *habeas corpus*; but where a person is confined on a charge, a writ of *habeas corpus* will issue, and the Court will then exercise its discretion as to releasing him or remanding him. In cases where a man is detained in custody on suspicion, a writ of *habeas corpus* will issue as of right, for the suspicion may not be strong enough to justify his detention. Before 1688, to arrests of this kind the plea of prerogative was put in as a justification, but prerogative is exercised now by a minister, who has no prerogative of his own, and it cannot therefore be pleaded. The suspension of the Habeas Corpus Act does not affect those who are not amenable to it, and it is only for those who are amenable to it that an act of indemnity passes. The suspension of the Habeas Corpus Act is always only for a limited time, not permanent or for an indefinite time, nor can it be suspended except by those having power to make it—*viz.*, the Parliament. There was a power somewhat similar to this inherent in the King—*viz.*, the power of imprisonment. Lord Mansfield, in 1757, declared that, in all such cases, the Judges had power to issue writs of *habeas corpus*; and the Judges always appear to have drawn a distinction between arrest by virtue of prerogative and by course of law; in the former cases they required strict proof of the extent of the prerogative; in others, the production of the warrant or order of a competent Court was sufficient.

They also made a distinction, as to allowing the return to be controverted, between cases which were excepted from the Habeas Corpus Act and those to which 56 Geo. III., c. 100, applied; in the former cases the practice was to take the return as conclusive; in the latter, contradictory matter was allowed—*Goldswain's case*,\* *per* Gould, J. The cause of imprisonment ought to appear on the return—*Bushell's case*† *per* Vaughan, C.J., *Sireator's case*;‡ see also 2 Coke's Institutes, 52, where he says that the cause of suspicion must be shown with certainty. How is Dr. Fawcus protected by the plea that the Government have arrested Ameer Khan? In Westminster Hall a demurrer would be allowed to such a plea—*Evans v. Hutton*.§ [NORMAN, J.—That was a special demurrer, but I think the warrant ought to have been set out in this case.]

If the Governor-General has the power to detain a person in custody under Regulation III. of 1818, does that protect Dr. Fawcus? It is stated in the affidavits that Dr. Fawcus admitted he had no legal warrant under the Regulation, but a warrant of the Lieutenant-Governor of Bengal; the caption therefore was illegal. It is for the Court to say whether anything has arisen since to justify the detention. Ameer Khan is entitled to damages for his detention and to the writ of *habeas corpus*—*Rogers v. Rajendro Dutt*.|| Dr. Fawcus can be sued here, though the Governor-General cannot.

But it is not necessary for the issue of a *habeas corpus* to show that an action for the damages will lie; a *habeas corpus* will issue in any case of false imprisonment, but it does not follow that an action for false imprisonment will lie in every case in which a writ of *habeas corpus* will issue. It was remarked that by the Habeas Corpus Act the diet-money is to be in shillings, which shows it is only a local Act; but the diet-money can be calculated according to the currency of the country.—*Wise v. Dudley*, an American case in 1698, Washbourn's Judicial History of Massachusetts.

\* 2 Wm. Bl. 1209.

† 6 Howell's State Trials, 699; S. C., Vaughan's Rep. 137.

‡ 5 Howell's State Trials, 389, 402.

§ 4 M. & Gr. 954.

|| 13 Moore's P. C., 209, 213, 216, 223, 236.

The learned Counsel summed up his arguments as follows :—

1. Ameer Khan is, by construction of law and in fact, a natural-born British subject.

2. The Court, having jurisdiction, if a proper case be made out, cannot refuse the writ of *habeas corpus* to any natural-born British subject.

3. The Court has power to issue writ of *habeas corpus* into the mofussil.

4. This power does not depend on the Charter, but on the powers given to the Judges generally—*Rex. v. Hastings*.\*

5. This power has not been affected in any way by the substitution of the Charter of the High Court for that of the Supreme Court.

6. This is a proper case on the affidavits for the exercise of such a power.

7. Great wrong has been done in refusing to show the warrant of detention, or to give any reasons for such detention.

8. No law exists in this country under which the treatment of Ameer Khan can be justified.

9. If Regulation III. of 1818 be relied on, it is not law, never was law, nor could be law. It is void as being repugnant to English law, and in excess of the power of the Legislature who passed it.

Mr. Ingram on the same side.—The questions for consideration here are : 1.—Has the Court power to issue a writ of *habeas corpus* in this case? 2.—Is this a proper case for the exercise of that power? The case of *In re The Bombay Justices*† has been cited as deciding that a *habeas corpus* will not lie to a native officer; the ground of the decision there was that the Supreme Court had no power to issue a writ to a Mofussil Court over which it had no jurisdiction. But the Supreme and Sudder Courts are now amalgamated in the High Court, so that the question still is open whether the High Courts have such jurisdiction. (The learned counsel here referred to and read several passages from the 5th Appendix to the 3rd Report of the Select Committee of the House of Commons in 1830 to show the opinions there as to the power of the Judges to issue writs of *habeas corpus*; see 5th Appendix, 3rd Report, pp. 1220, 1224.) These passages show that a writ of *habeas corpus* then (1829) lay to an English officer of Government, and to a native officer in employment of Government. With reference to the change in the constitution of the Courts in 1862, the proclamation of the Queen in 1858 must be considered; that was issued after the case of *In re The Bombay Justices*,† and before the change in the Courts. The effect of that proclamation is to make all the natives of India denizens of the country, and as such entitled to all the rights of natural-born British subjects. *In re Tuckut Roy*,‡ Colville, C.J., upholds Regulation III. of 1818, because it applied to natives in the mofussil—see also the case of *In re The Maharanee of Lahore*.§ There are three classes of persons to whom Regulation III. of 1818 on the first glance would seem to apply : first, inhabitants of Calcutta and all Englishmen; second, all other natives of India, who, as we contend, are, since the change in the constitution of the Courts, entitled to a *habeas corpus*; third, State prisoners in the proper sense—e.g., the ex-King of Oudh. This is said to be a matter of State; but independent sove-

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\* Morton's Rep. 209.

† 1 Knapp P. C. 1.

‡ 1 Boul. 357.

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reigns and their property are the only matters that can be dealt with without judicial investigation ; to such a person the term " State prisoner " might apply ; it does not apply to Ameer Khan. There should be no interference with the liberty of the subject which ought not to be subject to judicial investigation ; Regulation III. of 1818 is improperly put in force in such a case as this. Whether natives in the mofussil can be affected by this Regulation or not, it is contended that native inhabitants of Calcutta cannot ; the latter are on the same footing as Englishmen for all purposes, and entitled to all the privileges of Englishmen. The words of 13 Geo. III., c. 63, put the natives in this position, at least those resident in Calcutta. That Statute gives an entire criminal system. The writ of *habeas corpus* is not mentioned there, though all other writs are, because the power to grant writs of *habeas corpus* is inherent in each Judge by virtue of his office, as representative of the prerogative of the Crown. The same criminal law as that of England was intended to be administered in the Courts in India—9 Geo. IV., c. 74. [Norman, J., to the Advocate-General.—If the natives in the original English factories were liable to English criminal law, as they certainly were, were they not also entitled to the protection of that law? The *Advocate-General*.—They were liable to and entitled to the criminal law as part of the *lex fori*, but the substantive law was different, it not having been so introduced.] The opinion of Lord Stowell was that the territories of the East India Company were part of the kingdom of England—*The Maria Françoise* ;\* see also the reference to this case by the Judges in the 5th Appendix to the 3rd Report, p. 1144. Throughout that report the Judges seem to have adhered to two principles—the absolute necessity of registration of the Statutes and Regulations of the Indian Council ; and that natives resident in Calcutta are on the same footing as European British subjects ; see Sir C. Grey's opinion in the 5th Appendix to the 3rd Report, 1149 ; and the opinion of the other Judges, 1230. In these opinions the principle of *Campbell v. Hall*† is applied to all the Indian territories ; that case was decided in the same year as the Charter 21 Geo. III., c. 70, was passed. The same principle governs the case of *The Advocate-General of Bengal v. Ranee Surnomoye Dossee*,‡ where it is said that when Englishmen establish themselves in a barbarous or uninhabited country, they carry with them their laws and sovereignty ; that in coming here they came to a civilized Mahomedan country ; and that English law was introduced and made applicable to natives of Calcutta at a fixed period—viz., 1726, see also *Killican v. Juggernaut Dutt*.§

If these opinions and authorities are correct, Ameer Khan has all the rights of an Englishman, and of these rights it is attempted to deprive him by Regulation III. of 1818.

The power of the framers of that Regulation was a limited power—see the opinions of Sir E. East and Sir E. Ryan on the extent of the power of the Indian Legislature, 5th Appendix to the 3rd Report, 1183. The words in 13 Geo. III., c. 63, s. 44—" rules, ordinances, and regulations "—were designedly used, as Sir W. Jones avers ; and the word " laws " advisedly not made use of. With the limited power given them, the Legislature had no power to pass a law like Regulation III. of 1818. So it cannot now be revived. [NORMAN, J., to the Advocate-General.—Do you contend that the Regulation III. of 1818 was made under the powers given by 13 Geo. III., c. 63? The *Advocate-General*.—

\* 6 Rob. Adm. Rep. 288.

† 1 Cowp. 209.

‡ 9 Moore's I. A. 387.

§ Morton's Rep. 119.

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No; probably it was made under 37 Geo. III., c. 142. NORMAN, J.—13 Geo. III., c. 63, seems to me to give the power of legislating for Calcutta only.] If made under 37 Geo. III., c. 142, the Regulation never had any existence, as that Statute applied only to Provincial Courts. It is bad on another ground, that it makes no distinction between Europeans and natives. It is void *pro tanto*, and therefore void *in toto*; it is void for uncertainty; before a law can be obeyed (see *Bonham's case*),\* it must be certain, for how can a person be told to obey a law, and have to find out which part of it is bad and which good? The Regulation then never existed. A repealed Act must be treated as if it never existed—*Surtees v. Ellison*,† *per* Lord Tenterden. An Act cannot be revived in part; it is either wholly revivable or it cannot be revived—*Ward v. Stephens*.‡ The Statute 3 & 4 Will. IV., s. 85, did not enable the Indian Legislature to revive the Regulation as far as natives of India were concerned. Allegiance and protection are reciprocal, and, when protection is at an end, allegiance ceases. Regulation III. of 1818 removes the protection of the sovereign, and affects the allegiance of the subject—Blackstone's Commentaries, 10; *Calvin's case*; § Forsyth's Opinions, Title Allegiance, note 1. This Regulation is void, too, as affecting the prerogative of the Crown. Act VI. of 1856 was declared to be illegal as affecting the Crown's prerogative of granting patents, and was declared void—see preamble to the Patent Act XV. of 1859. Regulation III. is with greater reason void as affecting a higher prerogative—*viz.*, the protection of the subject by the sovereign. All prerogative must be for the advantage and good of the people—Bacon's Abridgment, Title Prerogative. This Regulation, being a highly penal one, must be restrictively construed: where a constitutional meaning can be given to legislation, such meaning should be given; thus construing the Regulation, Ameer Khan cannot be said to come within its terms as being a State prisoner—see *per* Peel, C.J., in *In re The Maharanee of Lahore*.|| [NORMAN, J.—The Advocate-General contends that Regulation III. of 1818 was passed under 37 Geo. III., c. 142, with reference only to natives in the mofussil.] 37 Geo. III., c. 142, must be taken in connection with 13 Geo. III., c. 63, and 21 Geo. III., c. 70. It enabled the Legislature to make rules, &c., for the regulation of Provincial Courts; such rules, &c., were not intended to apply to Calcutta—Harrington's Analysis, 13—16. Natives of India in the mofussil became, after 1726, subject to the English law, both civil and criminal. Native inhabitants of Calcutta have their vessels registered under 17 & 18 Vic., c. 104, the Merchant Shipping Act, as if they were European British subjects. If they are thus treated for the purposes of that Act, why not for the purpose of granting a writ of *habeas corpus*?

The opinion of Mr. Ritchie, late Advocate-General of Bengal, was that, for the purposes of the Merchant Shipping Act, a native of India is a natural-born British subject. State-prisoners are persons who commit offences against the State, or persons who have committed an offence, and are taken and confined by a State to which they owe no allegiance. Ameer Khan is not a State-prisoner within the meaning of this Regulation; he is a subject of this Government. The Regulation clearly applies to, and was passed for, a special class of persons in existence when it was passed; this is confirmed by considering the period at which it has been revived—*viz.*, in 1850 by Act XXXIV.

\* 8 Rep. 114.

† 9 B. &amp; C. 752.

‡ 1 New Sessions Cases, 592.

§ 7 Coke, 11.

|| Taylor, 428.

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of 1850, and in 1858 by Act III. of that year. The Bombay Regulation of the same nature, XXV. of 1827, is even stronger in limiting it to a special class of persons. The Government was not legislating then for their subjects, but for those enemies who in such unquiet times might fall into their hands. Under 37 Geo. III., c. 142, there was no new power to legislate given. If the Legislature had not power to make Regulation III. of 1818 under 13 Geo. III., c. 63—and it is admitted it was not made under that Act—37 Geo. III., c. 142, gave them no power; it merely gives power to form laws already passed into a Code. Regulation III. of 1818 was first revived by Act XXXIV. of 1850. That Act shows that there were doubts whether a prisoner arrested in the mofussil could be legally detained in a Presidency-town under Regulation III. of 1818—a *fortiori*, they must have had doubts as to the arrest. See *In re The Maharanee of Lahore*, per Peel, C.J.\* Both this Act and Act III. of 1858 revive Regulation III. of 1818, with regard only to the detention. Act III. of 1858 removes doubts as to the detention. Tuckut Roy was arrested as an enemy and a State-prisoner. He was captured in the house of the King of Oudh, who was exempted from the jurisdiction of the Courts; *In re Tuckut Roy*, therefore, is distinguished. Bearing in mind that a State-prisoner is one who is not bound by any allegiance to the Imperial Government, what is a State matter is shown by the cases of *The Nabob of Oude v. The East India Company*; † *The Secretary of State v. Kamachee Boye Sahaba*; ‡ and *The East India Company v. Syed Ally*.§ A matter of State must be one referring to a person not subject to the Government or the Courts, and not to a person who owes allegiance.

Then we come to the Queen's proclamation, November 1st, 1858, which gives equal rights to all the Queen's subjects, whether native or European. Since that proclamation, no Regulation which is contrary, as Regulation III. of 1818 is, to the declaration made therein, is in force; the proclamation repeals it by implication. As to the proceedings of the Government in this case, see the charge of Cockburn, C.J., to the Grand Jury in the case of *The Queen v. Nelson and Brand*.||

The *Advocate-General* proposed to put in an affidavit with a copy of the warrant under which Ameer Khan was detained, which was in the form prescribed by Regulation III. of 1818, and dated May 7th, 1870.

Mr. *Anstey* objected that, at this stage of the case, no fresh affidavits should be admitted.

NORMAN, J., admitted the affidavit; and, on the application of Mr. Anstey, also admitted an affidavit that Dr. Fawcus was a European British subject.

The affidavits were as follows:—

That of Dr. Fawcus stated that the warrant referred to in the 19th paragraph of his affidavit made in this matter on the 9th, and filed in this Court on the 10th August 1870, under which Ameer Khan was detained in custody in the gaol at Alipore, was in the words and figures following:—

"No. 3.

"TO THE OFFICER IN CHARGE OF THE GAOL AT ALIPORE.

"Whereas the Governor-General in Council, for good and sufficient reasons, has seen fit to determine that Ameer Khan, of Colootollah, shall be placed under

\* Taylor, 433.

† 4 Brown's Ch. C. 180.

‡ 7 Moore's I. A. 476.

§ *Id.*, 555.

|| Page 165 of the Appendix to the charge to the Grand Jury.

personal restraint in the Alipore Gaol, you are hereby required and commanded, in pursuance of that determination, to receive the person above-named into your custody, and to deal with him in conformity with the orders of the Governor-General in Council, and the provisions of Regulation III. of 1818.

"By order of the Governor-General in Council,

"E. C. BAYLEY."

That of Mr. Carruthers stated :—

"That Dr. Fawcus, the Officer in charge of the Alipore Gaol at Alipore, in the District of 24-Pergunnas, in the Presidency of Bengal, and now residing at Alipore aforesaid, was, he verily believed, an Assistant Surgeon in the employ of Her Majesty's Indian Government, and a natural-born European British subject, and was subject to the criminal jurisdiction of this Court alone, so long as he was commorant in the Bengal Presidency."

On a subsequent day, in answer to a question by the Court, the Advocate-General admitted that the arrest in Calcutta had taken place with the sanction of the Governor-General in Council.

NORMAN, J. (after stating the facts, continued).—The Advocate-General protested against this Court assuming any jurisdiction. He contended that the act of the Governor-General in Council in causing the arrest was an act of State; that the supposed wrong, if any, was not a matter cognizable by any Municipal Court, because the Governor-General in Council, in causing the arrest, had acted under the terms of the Act, and without reference to Municipal Law. He referred to a passage in the judgment of Sir Lawrence Peel, C.J., in the case of *In re the Maharanee of Lahore* : \* "The conduct of the Government in so dealing with State-prisoners is exempt from the jurisdiction of this Court, as well as of the Courts of the East India Company. For an oppressive use of this power, which is not to be supposed probable, the remedy would be by application to a higher, though distant, authority." But Sir Lawrence Peel is merely speaking of the detention of a State-prisoner, without charges made or evidence of guilt communicated. In the next paragraph, he says : "It appears to us that this lady, who is not a subject, who owes not even a temporary allegiance, who is brought into this country a prisoner of State during actual hostilities, and so remains, hostilities still raging, can claim no right to this high prerogative writ grantable as of right to a subject, for the vindication of that liberty which the English law gives to all resident where it prevails." The Advocate-General cited no case except that of *In re the Maharanee of Lahore* \* in support of his position. I know of no authority for extending the immunity from the control of municipal law which exists in regard to acts done by Governors in their political capacity as regards foreign States or in time of war—instances of which may be found in the case of *Elphinstone v. Heerachund Bedree Chund†* and *The Secretary of State v. Kamachee Boye Sahab‡*—to the case of a wrong alleged to have been done in time of peace to a subject of the Crown by any person or persons exercising the office of Governor. Of such a case Lord Mansfield, in *Fabrigas v. Mostyn*, § said the Governor, may be tried in England : "If he has acted rightly, according to the authority with which he is invested, he must lay it before the Court by way of plea, and the Court will exercise their judgment whether it is sufficient justification or not." He adds : "I can conceive cases in time of war, in which a Governor would be justified though he acted very arbitrarily, in which he could not be justified

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\* Taylor, 433.  
† 1 Knapp P. C. 316.

‡ 7 Moore's L. A. 476.  
§ 1 Cowp. 161; see 173.



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in time of peace. Suppose during a siege or upon an invasion of Minorca, the Governor should judge it proper to send a hundred of the inhabitants out of the island from motives of real and genuine expediency : or, suppose, upon a general suspicion, he should take people up as spies; upon proper circumstances laid before the Court, it would be very fit to see whether he had acted as the Governor of a garrison ought according to the circumstances of the case. \* \* \* To lay down in an English Court of Justice that a Governor acting by virtue of Letters Patent, under the Great Seal, is accountable only to God and his own conscience ; that he is absolutely despotic, and can spoil, plunder, and affect His Majesty's subjects, both in their liberty and property, with impunity, is a doctrine that cannot be maintained."

The Advocate-General and Mr. Paul, in showing cause against the rule, contended next that the High Court has no authority to issue a writ of *habeas corpus* into the mofussil. The question is the more important at the present day, because, although until the year 1862 the Court of Queen's Bench at Westminster had power to issue writs of *habeas corpus* to all parts of Her Majesty's dominions, even to those parts in which there were independent legislatures, as was done in the case of *In re Anderson*,\* where a *habeas corpus* was issued to Canada, that power was qualified by the 25 & 26 Vic., c. 20, which enacts that "no writ of *habeas corpus* shall issue out of England by authority of any Judge or Court of Justice therein, into any colony or foreign dominion of the Crown, where Her Majesty has a lawfully established Court or Courts of Justice having authority to grant and issue the said writ, and to ensure the due execution thereof, throughout such colony or dominion." If, therefore, the High Court has the jurisdiction which it is alleged to possess, and refuses to execute it, the party may be left without remedy. By the 9th section of the Charter Act 24 & 25 Vic., c. 104, it is enacted that, "save as by the Letters Patent may be otherwise directed, and subject, and without prejudice, to the legislative powers in relation thereto of the Governor-General of India in Council, the High Court to be established in each Presidency shall have and exercise all jurisdiction, and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under this Act at the time of the abolition of such last-mentioned Courts." If the argument that, under the new Charter, writs of *habeas corpus* will not run into the mofussil, is well founded, it seems to me that it must go the length that no process whatever can be issued into the mofussil, and that any one served with any process out of the limits of the original jurisdiction may disobey the writs issued from this Court in Her Majesty's name. Neither the adoption of Act VIII. of 1859 as a body of rules of practice by the High Court under the 37th section of the Charter, nor the service of the writ by an officer of a Mofussil Court, can give any jurisdiction to the Court, or validity or force to its process, which it does not derive from the Charter. The answer seems to be that the true construction of the Charter is, that ordinary original civil jurisdiction, within certain limits, is conferred on the Court by the 11th clause of the Charter, and all powers and authorities necessary to enable the Court to exercise that jurisdiction with effect, which had been possessed by the late Supreme Court, were preserved to the High Court by the 9th section of the Charter Act. Were this otherwise, the provision in cl. 37 of the Charter of 1862, that the proceedings of the Court should be regulated by the Code of Civil Procedure, would have to be treated as repugnant to cl. 11 of that Charter. I may observe,

\* 30 L. J., Q. B., 129.

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moreover, that the issuing of the high prerogative writ of *habeas corpus ad subjiciendum* is not a matter of ordinary original civil jurisdiction. In England, it issues on the Crown side of the Court of Queen's Bench, and in the late Supreme Court the motion for such *habeas corpus* was made in the Supreme Court, and not on any side, such as the Plea side or Equity side of the Court. See Fulton's Reports, page 372, note. The limits within which such writs can be issued are, in my opinion, not affected by the 11th clause of the Charter of 1865. The answer to the question as to the local limits within which such *habeas corpus* may be issued appears to me to depend on the jurisdiction which the late Supreme Court possessed under the Charter of 1774; and I propose to consider what was the position of the English in that which is now the Bengal Presidency, at the time when the Charter of 1774 was granted by His Majesty King Geo. III. First, then, what was the law in force in Calcutta and applicable to British subjects resident in India in 1773 at the time of the passing of the 13 Geo. III., c. 63? Writing in 1720, Mr. West, afterwards Lord Chancellor of Ireland, says: "The Common Law of England is the Common Law of the plantations, and all Statutes in affirmance of the Common Law passed in England antecedent to the settlement of a colony are in force in that colony, though no Statutes made since those settlements are there in force, unless specially mentioned. Let an Englishman go where he will, he carries as much of law and liberty with him as the nature of things will bear."\* Lord Lyndhurst says, in *Freeman v. Fairlie* :† "Those persons who established themselves in India carried with them the English law. It does not appear that the English law was established there in the first instance by any proclamation or Charter, but it was probable that the English carried with them, and acted upon, the law of England from the necessity of their situation; because the two systems of law which at that time existed there, the Mahomedan and the Hindu laws, were so blended with the particular religions of the two descriptions of persons as to render it almost impossible for that law to have been adopted by the English settlers. This, however, is rather matter of speculation than material to the question—what, so far as British subjects are concerned, is the law now existing in the settlement? Since it appears by all the Charters applicable to the state of the law, and by all the Acts of Parliament which refer to it, from the year 1601 down to the present time (and I refer particularly to the Charter of 1726), that the English law has been considered as the law of the settlement. It has been recognised as such by competent authority; and we are to consider, as far as British subjects are concerned, that the English law is not only now the law of Calcutta, but that it was so from the earliest period of that settlement." The Mayor's Court was established in Calcutta by the Charter of 1726. The same Charter empowered the East India Company to appoint a General, or Generals, of all the forces by sea and land, of or belonging to the towns, limits, or factories of Calcutta, Madras, and Bombay, and enacted that it should be lawful for the General to assemble and exercise in arms the inhabitants of the town or factory for the defence of the factories, and upon just cause to invade and destroy the enemies of the same. Surajah Dowlah attacked and took Calcutta on the 5th of August 1756. In January 1757 Calcutta was retaken by an English force under the Command of Clive and Watson. The Nabob's army was defeated by Clive. And in February of the same year, a treaty was entered into between Surajah Dowlah and the Company, by which it was agreed that the Company settlements at Calcutta, Cossim Bazar, Dacca, and other places, should be restored

\* Chalmers' Opinions, 511, 517.

† 1 Moore's J. A. 342.

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to them, and that the Company should be allowed to fortify Calcutta in such manner as they should deem proper for their defence, and that a Mint should be established at Calcutta. Sir Elijah Impey says: "The inhabitants of Calcutta inhabited a narrow district, and that district an English town and settlement, not governed by their own laws, but by those of England, long since there established, when there were no Courts of Criminal Justice but those of the King of England, which administered his laws to the intent and in the form and manner in which they were established in England. The inhabitants resorted to the English flag, and enjoyed the protection of the English law; they chose those laws in preference to their own, and were hence accustomed to them. The town was part of the dominion of the Crown by unequivocal right, originally by cession founded on compact, afterwards by capture and conquest. Their submission was voluntary, and if they disliked the laws, they had only to cross a ditch, and were no longer subject to them. The state of an inhabitant of the provinces at large was that of a man inhabiting his own country subject to its own laws. The state of a Hindu, a native of the provinces inhabiting Calcutta, which in effect was an English town to all intents and purposes, did not differ from that of any other foreigner; from whatsoever country he might have immigrated, he partook of the protection of the laws, and in return owed them obedience." By treaty with Jaffer Ally Khan, the lands to the south of Calcutta as far as Calpee in the 24-Pergunnas were granted to the East India Company, the revenue to be paid to them in the same manner with other zemindaries. In 1763, in accordance with a previous treaty between Meer Mahomed Kassim Khan and the Company, Burdwan, Midnapore, and Chittagong, were assigned to the East India Company for defraying the expenses of their troops. After the battle of Buxar in 1764, the Emperor of Delhi granted Ghazeepore and Benares to the Company. In August 1765 the East India Company entered into an alliance, offensive and defensive, with Soojahood Dowlah, Nabob Vizier of Oude, and by the treaty the parties stipulated that the Emperor should remain in full possession of Corah and Allahabad, which were ceded to His Majesty as a royal demesne for the support of his dignity and expenses. The sovereignty and possession of Benares, Jounpore, and Ghazeepore, &c., were given up by the Nabob to the East India Company in September 1765. The Dewanny of the provinces of Bengal, Behar, and Orissa, was granted by the Emperor to the East India Company, to be held by them in perpetuity, the Company guaranteeing the payment of 26 lakhs of rupees yearly, the revenue of the province, which had formerly been paid by Nabob Nuzumood Dowlah Bahadoor. Mr. Morley says: \* "The firman which conferred in perpetuity the Dewanny authority over the provinces of Bengal, Behar, and Orissa on the East India Company, constituted them the masters and virtual sovereigns of those provinces; the office of Dewan implying not merely the collection of the revenue, but also the administration of civil justice." By treaties with the Nabobs Nuzumood Dowlah in 1765, Sijefood Dowlah in 1766, and Mookburickood Dowlah in 1772, the entire military defence of Bengal was placed under the management of the Company. By general regulations made by the President and Council in Bengal in 1772, in each district two Courts of Judicature, the Mofussil Dewanny Adawlut (Provincial Court of Dewanny for the trial of civil cases) and the Fouzdary Adawlut for the trial of all crimes and misdemeanours, were established, and the Dewanny Sudder Adawlut and Nizamut Sudder Adawlut were established at the chief seat of Government. In a letter, dated the 3rd of August 1772,

\* Morley's Digest, Introduction, 31.

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Mr. Warren Hastings, the President of the Council, writes: "Although we profess to leave the King as the final Judge in all criminal cases, and the officers of this Court to proceed according to their own laws, forms, and opinions independent of the control of the Government, yet many cases may occur in which an invariable observance of this rule may prove of dangerous consequence to the power by which the Governor of this country is held, and to the peace and security of its inhabitants. Wherever such cases occur, the remedy can only be obtained from those in whom the sovereign power exists. It is on them that the inhabitants depend for protection and for the redress of all their grievances, and they have a right to the accomplishment of this expectation, of which no treaties or casuistical distinctions can deprive them." He goes on to point out that the Company, as Dewan, have an interest in the welfare of the country, and, "as the governing power, have equally a right and obligation to maintain it." These words show that, in 1773, the rights, powers, and duties of the East India Company, as the true rulers of the country, were fully understood and acknowledged by the head of that Government in India. Then came the Statute 13 Geo. III., c. 63. By the 7th section it was enacted that, for the government of the Presidency of Fort William in Bengal, "there should be appointed a Governor-General and four Councillors, and that the whole civil and military government of the said Presidency, and also the ordinary management and government of all the territorial acquisitions and revenues of the kingdoms of Bengal, Behar, and Orissa, should, so long as the same should remain in the possession of the Company, be vested in the Governor-General and Council of the said Presidency of Fort William, as the same now are or at any time heretofore might have been exercised by the President and Council or Select Committee," as the case may be. The 13th section recites the Letters Patent of the 26th Geo. II., establishing Courts of civil, criminal, and ecclesiastical jurisdiction at the Company's settlements at Madras, Bombay, and Fort William in Bengal, and that the Charter "does not sufficiently provide for the administration of justice in such manner as the state and condition of the Company's Presidency of Fort William in Bengal, so long as the said Company shall continue in possession of the territorial acquisitions before-mentioned, do and must require." It proceeds to enact that it shall be lawful for His Majesty to establish a Supreme Court, "which said Supreme Court of Judicature shall have, and the same is declared to have, all civil, criminal, admiralty, and ecclesiastical jurisdiction, and to form and establish such rules of practice, and such rules for the process of the Court, and to do all such other things as shall be necessary for the administration of justice, and the due execution of all, or any, of the powers which by the Charter shall be granted and committed to the Court, and also shall be at all times a Court of Record, and shall be a Court of Oyer and Terminer and Jail Delivery, in and for the said Town of Calcutta and Factory of Fort William in Bengal aforesaid, and the limits thereof and the factories subordinate thereto." It is clear, on reading this provision, that the Court was to be a great Court of Judicature for the Presidency of Bengal, as well as a Court of Record and Oyer and Terminer for the Town of Calcutta. By the 14th section of the Act, and the 13th clause of the Charter, the jurisdiction in civil cases is defined. It extends to all British subjects residing in the provinces of Bengal, Behar, and Orissa, and persons employed in the service of the Company, or of any of His Majesty's subjects. By the 19th clause of the Charter, the jurisdiction in criminal cases is defined. It extends to the same classes of persons as those to which cl. 13 relates, and

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empowers the Sheriff to arrest the bodies of such offenders, and bring them to Fort William. S. 17 empowers the Supreme Court, in cases where there has been an agreement that a matter should be determined in that Court, "to issue, either before or after sentence, a writ or precept commanding either party suing in violation of that agreement in the Country Courts, to surcease proceeding further in such suit." The 6th section of the Charter ordains that "all writs, summonses, precepts, rules, orders, and other mandatory process," shall run in the name of the Crown, and be sealed with the seal of the Court. The 39th section commands all "Governors, Commanders, Magistrates, Officers, and Ministers, civil and military, &c., in the execution of the powers by the Charter created, to be aiding, assisting in, and obedient in all things to the Supreme Court." There are several sections of the Charter which show that it was intended that the process of the Court should go into the mofussil, and might be addressed to natives. The 21 Geo. III., c. 70, s. 19, empowers the Supreme Court "to frame such process, and make rules for the service thereof, in suits against the natives of Bengal, Behar, and Orissa." From the date of the Charter in 1774, if not from an earlier period, the native inhabitants of the town of Calcutta were punishable by the English criminal law for any crimes committed by them within the limits of the settlement. I may answer Mr. Paul's argument on that point in the words of Lord Brougham in *Warrender v. Worrender*.\* "The *lex loci* must needs govern all criminal jurisdiction from the nature of the thing and the purpose of that jurisdiction." In *Somerset v. Stewart*,† where the question was, whether a Negro slave, who had been brought to England by his master, could be detained in slavery in England, Mr. Hargreave argued successfully that, from the submission of the Negro to the laws of England, he was liable to all their penalties, and consequently had a right to their protection. In *Campbell v. Hall*,‡ Lord Mansfield, delivering the unanimous opinion of the Court of King's Bench, said: "The law and legislative government of every dominion equally affects all persons and all property within the limits thereof, and is the rule of decision for all questions which arise there. Whoever purchases, or lives, or sues there, puts himself under the law of the place. An Englishman in Ireland, Minorca, the Isle of Man, or the Plantations" (meaning thereby where English law has been introduced), "has no privilege distinct from the natives." There were, therefore, at the time of the passing of the 13 Geo. III., c. 63, not only a great number of Europeans in India, but there were, at the passing of that Act, a great number of native inhabitants of Calcutta who could claim the benefits of English law, and the rights and privileges of Englishmen. The most precious of all rights which a British subject possesses is the right of personal liberty, and if the Charter had contained no words providing any machinery by which that right could be vindicated, it could hardly have been said to provide for the due administration of justice in such manner as the condition of the Company's Presidency at Fort William in Bengal required. The Advocate-General argued that the Habeas Corpus Act, 31 Car. II., c. 2, was not part of the Statute law introduced into India. His argument may be well founded as to certain parts of that Statute, which apply specially, or by name, to the Superior Courts of Common Law at Westminster. But other parts, which are general in their terms, apparently do apply to India, and if that is the case, it was an additional reason for putting such a construction on the Charter of

\* 9 Bligh's N. S. 119.

[† Lofft's Rep. 1.

‡ 1 Cowp. 208.

1774 as would enable the Supreme Court to issue a writ which the law gives to the subject as a matter of right. I may observe that, generally speaking, in cases where a person is illegally deprived of his liberty, he has three remedies: first, by civil action; secondly, by indictment; and, thirdly, by the writ of *habeas corpus*. But as no action or criminal charge can be maintained in the Courts of this country against the Governor-General for an illegal imprisonment, the only remedy for the wrong in such case is that afforded by the writ of *habeas corpus*. The right appears to be preserved as regards European British subjects committed by the Governor-General in Council by the 3rd section of the 21 Geo. III., c. 70, which contains a provision that, "with respect to such order or orders of the said Governor-General in Council as do or shall extend to any British" (meaning European British) "subject or subjects, the said Court shall have and retain as full and competent jurisdiction as if the Act had never been made." Therefore, as regards European British subjects, the right to demand a writ of *habeas corpus* from this Court would not be taken away by the section. The legality of an order by the Governor-General in Council for the arrest and deportation of a European British subject brought up by *habeas corpus* came under the consideration of the Supreme Court (Sir R. Chambers, C.J., and Sir William Jones) in *The King v. Gordon*.\* I will now turn to the Charter. By the 4th clause it was declared that the Chief Justice and Puisne Justices were "appointed to be Justices and Conservators of the Peace and Coroners within and throughout the said provinces, districts, and countries of Bengal, Behar, and Orissa, and every part thereof; and to have such jurisdiction and authority as the Justices of our Court of King's Bench have, and may lawfully exercise within that part of Great Britain called England by the Common Law thereof." Blackstone, speaking of the writ of *habeas corpus ad subjiciendum*, says:† "This is a high prerogative writ, and therefore, by the Common Law, issues out of the King's Bench by a fiat from the Chief Justice, or any other of the Judges, running into all parts of the King's dominions, for the King is at all times entitled to have an account why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted." The words of the 4th section of the Charter have been treated as giving power to the Court to issue writs of *habeas corpus* from the time when the Supreme Court was first established. This appears from the language of Sir Elijah Impey, C.J., in the case of *Rex v. Warren Hastings* in 1775,‡ and *In re Coza Zachariah Khan* in 1779.§ That power was not questioned in the 21 Geo. III., c. 70. Indeed, the 3rd section of that Act, which declares that the Supreme Court shall retain full jurisdiction with respect to orders made by the Governor-General in Council, extending to British subjects, has apparently direct reference to writs of *habeas corpus*. Writs of *habeas corpus* have been issued in the mofussil in 1794, when a witness on his way from the Supreme Court to his home was arrested—*Rajah Mohinder Deb Rai v. Ramcanai Cur*;|| in 1800, in *Breejesseree Seatanny v. Ramnarain Misser*,¶ to a jailor of the 24-Pergunnas, to bring up a prisoner as a witness; in 1815, to bring up a woman, plaintiff in a suit, who had been carried off by force out of Calcutta, with a view to compel her to withdraw her suit; *In the Matter of Muddoosooden Sandell*.\*\* In 1829-30, the jurisdiction to issue such writs into the mofussil is treated as clear by Sir Charles Grey and Sir Edward Ryan. (See the 5th Appendix to

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\* East's Notes, 2 Morley's Digest, 223.

† Vol. III., 131.

‡ Morton's Rep. 206.

§ Morton's Rep. 263.

|| Smoult's Orders, 148.

¶ *Ibid.*

\*\* East's Notes, 2 Morley, 29.

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the 3rd Report of the Select Committee of the House of Commons, pp. 1225 and 1281). Writs of *habeas corpus* to bring up witnesses from the mofussil were issued by Sir Edward Ryan in 1839—*Doe d. Buddinauth Ghosaul v. Deverall*; \* by Sir Edward Ryan in 1840, to bring up a person who had been carried off from his house in Calcutta into the mofussil, from the custody of a person not otherwise subject to the jurisdiction than in respect of the wrong committed by him in the abduction—*In re Sreenauth Roy*; † in the time of Peel, C.J., to bring up a witness from a mofussil jail—*The Queen v. Shawe*. ‡ In the case of *In re the Maharanee of Lahore*, § Peel, C.J., says: "Enough is not shown to lead to the inference that her imprisonment was illegal; she is not resident where the English law is the general law as regards personal liberty. The English law as to personal liberty does prevail in Calcutta as to all its inhabitants. Beyond the local limits of Calcutta the English law on this subject is the personal law of a class, viz., British subjects, which they carry with them. The Common Law of England, which gives the right to this writ, has been introduced into Calcutta with the general body of the English law. Nothing but an Act of the Legislature could here in Calcutta suspend its operation." The power of the late Supreme Court to issue writs of *habeas corpus* to persons in the mofussil has been asserted from the time of the promulgation of the Charter to the present day, and is admitted in the case of *In re the Bombay Justices*. || I confess that it was not without surprise that I heard the Advocate-General challenge the jurisdiction. If the construction which has always hitherto been put on the 4th clause of the Charter of 1774 is erroneous, it is at least no longer open to any Judge of this Court to say so. No Judge in this country could be justified in pronouncing a decision contrary to the long course of decisions and the interpretation which has hitherto been universally received. If the propriety of these decisions is to be questioned, it must be in a higher Court. For myself, I have no hesitation in accepting those decisions as settling the law.

Regulation III. of 1818, entitled a Regulation for the confinement of State-prisoners, recites, amongst other things, that "reasons of State, embracing the due maintenance of the alliances formed by the British Government with foreign powers, the preservation of tranquillity in the territories of Native Princes entitled to its protection, and the security of the British dominions from foreign hostility and from internal commotion, occasionally render it necessary to place under personal restraint individuals against whom there may not be sufficient ground to institute any judicial proceedings, or when such proceeding may not be adapted to the nature of the case, or may for other reasons be inadvisable or improper; and whereas it is fit that in any case of the nature herein referred to, the determination to be taken should proceed immediately from the authority of the Governor-General in Council;" and enacts that "when the reasons stated in the preamble of this Regulation may seem to the Governor-General in Council to require that an individual should be placed under personal restraint, without any immediate view to ulterior proceedings of a judicial nature, a warrant of commitment, under the authority of the Governor-General in Council, and under the hand of the Chief Secretary, or of one of the Secretaries to Government, shall be issued to the officer in whose custody such person is to be placed." Regulation III. of 1818 having been passed by a legislative authority which had

\* Morton's Rep. 184.  
† *Id.*, 226.

‡ Fulton, 328.  
§ Taylor, 433.

|| 1 Knapp's P. C. I.

no power to bind "European" British subjects, it seems to me that it must be taken as applicable, and enacted with reference only to natives and others subject to the jurisdiction of the Provincial Courts. The Regulation appears to have been passed by the Vice-President in Council under the provisions of the 37 Geo. III., c. 142, s. 8. It has been objected that it was not registered as required by 13 Geo. III., c. 63, s. 36. But it appears to me that the legislative powers conferred by the 13 Geo. III., c. 63, s. 36, are intended to apply only to what is there described as the Company's settlement at Fort William, in other words, Calcutta and its dependent factories, where English law had been introduced, and not to what are in that Act described as the territorial acquisition of Bengal, Behar, and Orissa. Legislative powers for the Government of Bengal, Behar, and Orissa, were first conferred by the 21 Geo. III., c. 70, s. 23. Those powers were extended by the 37 Geo. III., c. 142, s. 8, which enacted that "all Regulations which should be issued and passed by the Governor-General in Council at Fort William in Bengal, affecting the rights, persons, or property of the natives, or any other individuals who may be amenable to the Provincial Courts of Justice, shall be registered in the judicial department, and formed into a regular code, and that the grounds of each Regulation shall be prefixed to it, and all the Provincial Courts shall be and they are hereby directed to regulate their decisions by such rules and ordinances as shall be contained in the said Regulations."

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The effect of Regulation III. of 1818 and Act XXXIV. of 1850, which enacts in substance that State prisoners under Regulation III. of 1818 may be detained within the local jurisdiction of the Supreme Courts, &c., were considered by the late Supreme Court in *In re Tuckut Roy*.\* In that case it was decided that a native of Oude, a mohurrir in the employment of the Queen of Oude, who had been arrested at Garden Reach, outside the local limits of the town of Calcutta, under a warrant issued by the Governor-General in Council under Regulation III. of 1818, was lawfully detained, and could not be discharged upon *habeas corpus*. Mr. Newmarch argued, as Mr. Anstey has done in the case now before me, that the Act of 1850 was contrary to Magna Charta; that it affected the unwritten law, whereon might depend the allegiance of the subject. The Common Law, the unwritten law and constitution of England, has never been introduced into the mofussil. The provinces of Bengal, Behar, and Orissa, were countries which, at the time when they came into the possession of the English Government, had laws of their own, for the administration of which provision was made. When the East India Company took upon itself the office of Dewan, the 21 Geo. III., c. 70, s. 23, and 37 Geo. III., c. 142, s. 8, made provision for the introduction of such changes in the ancient laws of the country as the Governor-General in Council might from time to time think fit to make. Express provisions against the introduction of English law were made by Regulation III. of 1793 (see the preamble and s. 31); Regulation IV. of 1793, s. 15; and Regulation VII. of 1832, s. 9. Down to the time of the introduction of the Penal Code, the Mahomedan criminal law, modified by different Regulations, made by the Governor-General in Council under the powers of the 21 Geo. III., c. 70, s. 23, and 37 Geo. III., c. 142, s. 8, continued to be the law by which all offences triable before the Mofussil Courts were punishable. By the 37 Geo. III., c. 142, s. 8, Parliament conferred on the Governor-General in Council a power of legislation concerning the rights, persons, and properties of the natives amen-

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\* 1 Boul. 355.



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able to the Provincial Courts, without restriction or limitation of any kind. The Regulation III. of 1818 is one which falls within that class of laws which authorizes the infliction of penalties, the privation of liberty, even the destruction of life, with a view to the future prevention of crime, and insuring the safety and well being of the public. It falls within the principle *salus populi suprema lex*. It is useless to urge that the Regulation makes no provision against the possibility that the party may be confined on charges which may be false and malicious, and which he has no opportunity of answering. With all its defects, if defects they be, it was passed by a legislative authority having full power to enact it as it stands. It does no more than give to the Governor-General in Council a power analogous to that which the Parliament of the United Kingdom exercises, when by a legislative enactment it suspends the Habeas Corpus Act. There is nothing in the 3 & 4 Will. IV., c. 85, s. 43, which could make it questionable whether the Governor-General in Council had power to enact that a prisoner confined under a law already in force might be detained within the presidency-town.

But a very different question arises under Act III. of 1858, a question not decided, or even touched by the decision in *In re Tuckut Roy*.<sup>\*</sup> The Act recites that it is expedient that the powers of Regulation III. of 1818 of the Bengal Code be extended, and enacts that "the provisions of Regulation III. of 1818 of the Bengal Code, relating to the arrest and confinement of persons as State-prisoners, shall be in force within the local limits of the jurisdiction of the Supreme Court of Judicature at Calcutta." There is apparently no exception or restriction whatever. It applies to all persons within the local limits, whether European British subjects, or persons living within the local limits under the protection of, and subject to, English law. Act III. of 1858 was passed by a Legislature which derived its power from the 3 & 4 Will. IV., c. 85, s. 43, which contains a proviso "that the Governor-General in Council shall not have the power of making any laws or regulations which shall in any way affect any prerogative of the Crown, or the authority of the Parliament, or the institutions or rights of the said Company, or any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland, whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom or the sovereignty or dominion of the said Crown over any part of the said territories." In order to see what is meant by the words, "unwritten laws or constitution whereon may depend in any degree the allegiance of any person," it is necessary to consider, first, what allegiance is. It is the true and faithful obedience of the subject to the sovereign. Every one born within the dominions of the King of England, whether in England or in the colonies or dependencies, being under the protection, therefore, according to our Common Law, owes allegiance to the King. Every British subject is born a debtor by the fealty and allegiance which he owes his sovereign and the State, a creditor by the benefit and protection of the King, the laws, and the constitution. "Allegiance," says Sir William Blackstone,<sup>†</sup> "is the tie which binds the subject to the King in return for that protection which the King affords to the subject." Foremost amongst the privileges assured to the subject by the protection of the sovereign is liberty and security of the person. The Crown cannot derogate from these rights. Bracton tells us that "the King is under the law, for the law makes the King." The King cannot interfere with the liberty of the subject, nor deprive him of any of his

<sup>\*</sup> 1 Boul. 355.

<sup>†</sup> 2 Stephen's Blackstone, 413.

rights. How absolute soever the sovereigns of other nations may be, the King of England cannot take up or detain the meanest subject at his mere will and pleasure. I will proceed to consider what are the "unwritten laws and constitution" of the United Kingdom, which are alluded to in the section before me. It is well known that the provisions of the Great Charter and the Petition of Right are for the most part declarations of what the existing law was, not enactments of any new law. They set forth and assert the right of the subject, according to what was assumed to be the ancient unwritten law and constitution of the realm. The Great Charter itself was confirmed by upwards of thirty different Statutes prior to the time of King Henry VI. One of these Acts, the 28 Edward III., c. 3, declared that "no man, of what state or condition he be, can be taken or imprisoned without being brought to answer by due process of law." The Petition of Right was addressed to King Charles I. by the Lords Spiritual and Temporal, telling him that, "against the tenor of the said Statutes, divers of your subjects have of late been imprisoned without cause shown, and when for their deliverance they were brought before your Justices by your Majesty's writ of *habeas corpus*, there to undergo and receive as the Court should order, and their keepers commanded to certify the causes of their detainer, no cause was certified, but that they were detained by your Majesty's special command, signified by the Lords of your Privy Council, and yet were returned back to their several prisons, without being charged with anything of which they might answer in due course of law;" and praying, "as their rights and liberties according to the law and Statutes of the realm," that His Majesty would "vouchsafe to declare that the proceedings to the prejudice of the people should not be drawn into consequence or example, and that His Majesty would declare his royal will and pleasure, that in the things aforesaid, his officers should serve him according to the law and Statutes of the realm." There are also the Act for the abolition of the Star Chamber, 16 Car. I., c. 10, and the Habeas Corpus Act, 31 Car. II., c. 2. Now, if it be true, as laid down in *Calvin's case*,\* that *protectio trahit subjectionem et subjectio protectionem*, that allegiance and protection are reciprocally due from the subject and the sovereign, it is evident that the strict observance of the laws which provide for such liberty and security ensures the faithful and loving allegiance of subjects. The infraction of such laws may be carried to such an extent as to give rise to the right of self-defence on the part of the subject, a right which, says Sir Michael Foster, "the law of nature giveth, and no law of society hath taken away." No man can study the history of England, or can read the great judgment passed by the High Court of Parliament by the Bill of Rights on King James II., without seeing that on the faithful observance by the sovereign of the unwritten laws and constitution of the United Kingdom, as contained in the Great Charter and other Acts which I have mentioned, depend, in no small degree, the allegiance of the subjects. It would be a startling thing to find that rights of so sacred a character could be taken away by an act of the subordinate legislature. It would be strange, indeed, if a great popular assembly like the Parliament of England had put into the power of a legislature which has not, and in the nature of things could not have, any representative character, the power of abrogating or tampering with such fundamental laws. I think that the 43rd section of the 3 & 4 Will. IV., c. 85, shows clearly that the Imperial Legislature has not forgotten the rights of the people. It is convenient that I should turn

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for a moment to the history of this piece of legislation. The 13 Geo. III., c. 63, s. 36, empowered the Governor and Council to make rules, ordinances, and regulations for the civil government of the settlement of Fort William, "not being repugnant to the laws of the realm." It was found difficult to give any precise interpretation to these words. These laws were to be registered and published in the Supreme Court with the consent and approbation of that Court. The Judges claimed a right to hear the inhabitants of Calcutta by their counsel against the registry of Regulations made by the Governor-General in Council. This led to great inconveniences. A minute by Sir Charles Grey, in the 5th Appendix to the 3rd Report of the Select Committee of the House of Commons, 1833, p. 1129, shows that it was felt that the due consistency of Indian law with the law of the United Kingdom ought to be secured by specific limitations of the subordinate legislative power. It was suggested (p. 1127) that in view of possible incongruities between the ordinances of a subordinate legislature and the primary laws of the United Kingdom, the Judges, or English lawyers appointed by the Crown, might have a power of veto (p. 1131), or of suspending a Regulation, until the authorities in England could be consulted, in cases in which any primary law of the United Kingdom should appear to be violated. The Governor-General in Council, Lord William Bentinck, in a letter to the Judges of the Supreme Court, dated the 28th of October 1829, writes: "We fully concur with you that, besides reserving a veto to the Governor-General, the restriction contained in the 33 Geo. III., c. 52, s. 51, should also, of course, be maintained. It will be entirely proper that the Judges of the Supreme Court, or a majority of them, should have the power of suspending the enforcement of any act of the Legislative Council which they may consider to be illegal." The minutes of the Judges and correspondence of the Governor-General resulted in the preparation of heads of a bill to be entitled "An Act for establishing a Legislative Council in the East Indies." The suspending power, as proposed, appears in the 6th section of this draft, and in the 8th, the phrase we have now to construe; which is repealed in the 24 & 25 Vic., c. 67, s. 22, for the first time makes its appearance. If I am right in my construction, the several provisions will be found in what I conceive to be their due order. There are provisions for the protection of the rights, firstly, of the Crown; secondly, of the Parliament; thirdly, of the East India Company; fourthly, of the people. It should be observed that the proviso is not that no law shall be made contrary to the Magna Charta or any other similar Statute. Had that been the case, probably it would not have been competent to the Indian Legislature to pass any enactment in the nature of a suspension of the Habeas Corpus Act. But the "unwritten law or constitution" of England is of more flexible character. It would admit of a relaxation of the rules securing private rights in times of public distress or danger, *ne quid detrimenti capiat respublica*. An act for the suspension of the Habeas Corpus Act in such times is no violation of the constitution. The question then comes—does Regulation III. of 1818 fall within the principle above stated? The Advocate-General showed that, before answering that question, it is necessary to consider the peculiar circumstances of the country. Mr. Ingram pointed out that, at the time of the making of Regulation III. of 1818, there were in the country numerous and powerful feudatories of the sovereigns of recently conquered and ceded provinces, nominally subjects of His Majesty, but from whom danger might at any time be apprehended. I may observe that, at the time of the passing of Act III. of 1858, the recent mutiny showed that there were in the ranks of the population fanatics, whose conspiracies or preachings might, if they were allowed to continue them without interference, cause great danger to the peace of the community at large. It is clear-

that if such persons were allowed in the presidency-town a license and immunity which they did not enjoy in other parts of Her Majesty's Indian empire, they would resort to Calcutta, and thus the capital of the empire would become a hot-bed of conspiracies, the refuge and chosen home of traitors, fanatics, and conspirators. The Regulation differs from Acts passed for the suspension of the Habeas Corpus Act in this—that it is not a temporary Act; but if the danger to be apprehended from the conspiracies of people of such a character as those I have mentioned is not temporary, but from the condition of the country must be permanent, it seems to me that the principles which justify the temporary suspension of the Habeas Corpus Act in England justify the Indian Legislature in entrusting to the Governor-General in Council an exceptional power of placing individuals under personal restraint when, for the security of the British dominions from foreign hostility, and from internal commotion, such a course might appear necessary to the Governor-General in Council. I am, therefore, of opinion that, in enacting Act III. of 1858, the Indian Legislature did not exceed its powers.

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The questions raised are of so much importance, and I have felt so much difficulty in arriving at a conclusion satisfactory to myself, that I might have been inclined to issue the writ of *habeas corpus* in order that the points to which I have adverted in this judgment should be more fully discussed upon the return. But then comes the question, assuming that I have a general power to issue writs of *habeas corpus ad subjiciendum* to the officers of mofussil jails, should I be justified in issuing such a writ in the present case? If the only obstacle was a difficulty in enforcing the writ, I should feel bound to follow the example of the Court of Queen's Bench in *In re Anderson*,\* and to issue the writ without reference to the question whether the Court would be in a position to enforce obedience to it. But it is necessary to remember that by the 21 Geo. III., c. 70, s. 1, it is enacted "that the Governor-General and Council of Bengal shall not be subject jointly or severally to the jurisdiction of the Supreme Court, for, or by reason of, any act or order, or any other matter or thing whatsoever counselled, ordered, or done by them in their public capacity only." And s. 2 goes on to enact that "for any acts done by the order of the Governor-General in writing \*\*\* the said order, with proof that the act or acts done has or have been done according to the purport of the same, shall amount to a sufficient justification of the said acts," and "the defendant shall be fully justified, acquitted, and discharged from all and every suit, action, and process whatsoever, civil or criminal, in the said Court. Therefore, as the Superintendent of the Jail at Alipore holds the prisoner under the warrant in writing of the Governor-General in Council, it is clear that such order must prevail as against the command of any writ which this Court has the power to issue. It appears to me, therefore, that I ought not to issue a writ which it would be the duty of the Superintendent of the Jail to disobey. The distinction between *In re Anderson*\* and that now before me is that, in the present case, the order of the Governor-General in Council, which this Court has no power to set aside or disregard, warrants the detainer. In *In re Anderson*,\* the difficulty was only in enforcing obedience to the writ. If the prisoner, in obedience to that writ, was brought before the Court, it had an undoubted authority to discharge him.

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\* 30 L. J. Q. B. 129.

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For the reasons given above, I am of opinion that no writ of *habeas corpus* to bring up the body of Ameer Khan ought to issue, and the rule will, therefore, be discharged.

*Rule discharged.*

Attorneys for Ameer Khan : Messrs. *Carruthers* and *Dignam*.

Attorney for the Government : Mr. *Chauntrell*, Govt. Solicitor.

*Before Mr. Justice Norman.*

# IN THE MATTER OF AMEER KHAN.

*Mainprise, Writ of—Power of High Court to issue it.*

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A writ of *mainprise* could only be issued where the party applying for it was bailable, and had offered securities, but bail had been refused ; it could not be issued to a prisoner confined under Regulation III. of 1818, which authorizes his detention absolutely and unconditionally, and gives him no right to demand to be released on bail.

The writ is one which could be issued only on the Common Law Side of the Court of Chancery in England. The Power of the Common Law Side of the Court of Chancery to issue such writ was not conferred on the Supreme Court ; nor is there anything in the Charter of the High Court to give that Court power to issue it.

AFTER MR. Justice Norman had given judgment in this case, discharging the rule which had been issued to show cause why a writ of *habeas corpus* should not issue, Mr. *Anstey*, on behalf of the petitioner, applied, on the affidavits used in obtaining the rule, for a writ of *mainprise*, in order that Ameer Khan might be admitted to bail.

Mr. *Anstey* in support of the application.—When a writ of *habeas corpus* is refused, two remedies exist for the prisoner, either to sue out the writ *de odio et atia* or the writ of *mainprise*. The writ *de odio et atia* is disallowed in India by 9 Geo. IV., c. 74. But a writ of *mainprise* can be granted. The writ requires the prisoner, unless good cause be shown against it, to be released from custody on his giving security, two main-pernors undertaking, in such sum as the Court may require, to produce the prisoner to answer any charges which may be made against him. Thus it differs from release on bail, which is for a specific offence. The writ is mentioned in the Indian Insolvent Act, 11 & 12 Vic., c. 21, s. 58. The first question of *mainprise* arose in a case where, as in the present case, the Court was unable or unwilling to grant a writ of *habeas corpus*, and yet was not willing to keep the prisoner in perpetual confinement—*Jenkes's case*.\* See also *Crowley's case*,† where *Jenkes's case*\* is referred to by Lord Nottingham. In that case the writ of *mainprise* was refused, the Court holding it could not grant it since the passing of 28 Edwd. III., c. 9, but the prisoner was discharged. There Fitzherbert's *Natura Brevium*, 250, was referred to in support of the application. There was another case after the rebellion of 1745, where the writ was applied for ; there the writ was refused, but not until the Attorney-General had named a day for trial.

The warrant in this case is not a warrant of arrest ; it is a warrant of detention, and was issued on May 7, 1870, long after Ameer Khan had been arrested. There is no intention of bringing him to trial, and no specific charge is

\* 6 Howell's State Trials, 1200. † 2 Swanston, 12.

made against him. This is his only remedy, for this Court having held that it has jurisdiction to issue *habeas corpus*, the right to sue out the writ in the Queen's Bench is gone. Under the Queen's proclamation of 1858, this writ of *mainprize* cannot be refused. The balance of inconvenience is against the refusal of the writ, for the conditions of granting it are in the discretion of the Court, and may be such that the security cannot be broken.

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NORMAN, J. (after stating the application, continued)—The proceeding is one which in England has become wholly obsolete. Mr. Anstey was not able to refer to any case in which such a writ has been granted in modern times. In *Jenkes's case*,\* Lord Nottingham, after careful consideration of the old precedents which had been referred to, came to the conclusion that though in old times the writ of *mainprize* had issued, the right to such writ had been abolished by the Statute 28 Edward III., c. 9. Lord Eldon, in *Crowley's case*,† cites that opinion without appearing to dissent from it. Lord Coke says, the writ is taken away by 28 Edward III., c. 9.‡ Sir Mathew Hale, in his *Pleas of the Crown*, Vol. II., p. 143, seems to think that there are cases in which the writ of *mainprize* may still issue. But without going into the question whether there is any case in which a writ of *mainprize* could be issued in England at the present day, there are two conclusive answers to this application.

In the first place, the writ only issues where the party is bailable, and has offered sufficient sureties to the sheriff or others who have authority to bail him, and he or they have refused to admit the applicant to bail—see Fitzherbert's *Natura Brevium*, 563.§ But the Regulation, under the provisions of which Ameer Khan is confined, authorizes his detention absolutely and unconditionally, and gives him no right to demand to be liberated on bail.

Secondly, the writ is one which issues only on the ordinary or Common Law Side of the High Court of Chancery in England.

By the 17th clause of the Charter of 1774, it was ordained that the Supreme Court should be a Court of Equity having power to administer justice according to the rules and practice of the Court of Chancery in England. The powers of the Court of Chancery as a Court of Common Law to issue writs such as that now in question does not appear to have been conferred on the Supreme Court; nor is there anything in the Charter of the High Court on which any pretension to issue such writ could be founded.

*Application refused.*

*Before Mr. Justice Phear and Mr. Justice Markby.*

IN THE MATTER OF AMEER KHAN.

*Habeas Corpus—Regulation III. of 1818—Act XXXIV. of 1850—Act III. of 1858—3 & 4 Will. IV., c. 85, s. 43—Allegiance—Prerogative—Appeal—Detention—Warrant—Arrest.*

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Assuming the power of a Judge of the High Court to issue a writ of *habeas corpus*, and assuming the right of appeal against an order refusing such writ, held, that, it appearing that the prisoner was in custody under a warrant in the form prescribed by Regulation III. of 1818, the detention was legal. The detention, to be

\* 6 Howell's State Trials, 1200.

† 2 Swanston, 12.

‡ 2 Inst. 190.

§ 9th Edition, 149.

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legal, need only be covered by an actually existing warrant of the Governor-General in Council in the form prescribed without regard to the lawfulness of the arrest. The Regulation is not confined to prisoners of war or foreigners held in confinement for political reasons.

The substance of Regulation III. of 1818 was expressly re-enacted by Act XXXIV. of 1850 and Act III. of 1858, and therefore, as the result of these later Acts alone, the detention would be legal. These Acts are not contrary to the powers conferred on the Indian Legislature by 3 & 4 Will. IV., c. 85, s. 43.

THIS was an appeal from the order of Mr. Justice Norman, discharging the rule *nisi* which had been granted to show cause why a writ of *habeas corpus* should not issue, commanding Dr. Fawcus, the Superintendent of the jail at Alipore, in which Ameer Khan was confined, to bring before the Court the body of Ameer Khan. For the facts of the case see the report, *ante*, p. 393.\*

The grounds of appeal were as follow :—

1. That, even assuming the detention in the jail at Alipore on and from May 7, 1870, or any subsequent date, could be justified by the warrant of that date, such warrant was not any justification or authority for the previous arrest and detention without warrant in Calcutta on July 12, 1869, and of the several other detentions and removals in custody without lawful warrant on and from that day, not only at Alipore, but also at Howrah and Gya, down to the date when the warrant of detention of May 7, 1870, reached the hands of the officer in charge of the jail at Alipore; and therefore the learned Judge ought to have awarded the writ, so that the causes (if any) of such preceding detentions, removals, and of the original arrest, should be returned, and it should be determined, whether to remand or discharge Ameer Khan, and, if so, whether on security or not, and to what amount.

2. That the learned Judge in the Court below committed an error in fact and law by pronouncing in favour of the sufficiency of the cause shown against the rule for awarding and issuing the writ, whereas he ought to have held the same to be wholly insufficient, inasmuch as it was not denied or questioned in showing such cause that the arrest, removals, and detentions, had been accompanied with and effected by the circumstances of oppression and cruelty set forth by Ameer Khan in his original petition, and shown by the affidavits in support of the petition; and therefore the learned Judge ought to have held that even if the arrest, removals, and detentions, were otherwise unexceptionable, yet the same were avoided *ab initio* as having been done in fraud of the alleged powers under which they were surmised or awarded to have been done and against the apparent intent and meaning thereof, and in violation of the common law and constitution of England, and in disobedience of the tenor of the Queen's proclamation of November 1, 1858, and that Ameer Khan was, on that ground alone (if on no other), entitled to be discharged and released from custody.

\* After the order discharging the rule had been made, Mr. Anstey asked that the order might be made the subject of an appeal. Mr. Justice Norman said he was willing to give every facility for an appeal, but wished to be understood as abstaining from expressing any opinion as to whether an order in such a matter was appealable. On September 9th, Mr. Anstey, on behalf of Ameer Khan, applied to the Court of Appeal consisting of COUCH, C.J., and MARKBY, J., asking that the petition of appeal might be admitted, and an early day fixed for the hearing. The Court refused to receive the petition, and said it should be filed in the Registrar's office in the ordinary way; the Court also refused to fix any day for the hearing of the appeal. On September 14th the Appeal Court, consisting of the same Judges, refused an application made by Mr. Anstey for leave to appeal to the Privy Council from the order refusing to receive the petition of appeal, and from the order of Mr. Justice Norman. The petition was accordingly filed in the ordinary way, and came on for hearing, after the vacation, on November 19th.

3. That the writ of *habeas corpus* is a writ of right, and not of grace, and ought not to be denied, withholden, or delayed to the subject when duly applied for, every such denial, withholding, or refusal being an obstruction of justice and a breach of the Great Charter of Englishmen, and therefore the learned Judge ought to have awarded the writ when it was applied for, and not have withheld or delayed the same until cause should be shown against the rule *nisi*.

4. That the learned Judge found that sufficient cause had been shown against the rule, whereas he ought to have held that no sufficient cause was shown; and that the writ ought to issue as prayed, and any cause which the persons showing cause against it might be advised to offer ought to be offered and shown upon the return to the writ.

5. That the learned Judge held in effect that the application for the writ was barred or precluded by the Act 21 Geo. III., c. 70, ss. 1 and 2, whereas he ought to have held that the application, the said sections or anything else in the said Act notwithstanding, was one of right, and ought to have been granted, inasmuch as none of the enactments of the Act purported to affect in any way the said writ of *habeas corpus* or the title thereto which every imprisoned Englishman (as Ameer Khan submits he is) in every part of Her Majesty's dominions, and by whatever authority he is imprisoned (other than the sentence of a competent Court), has to apply for the said writ and obtain his deliverance by due course of law.

6. That the learned Judge held and determined in effect that, although he had full power and jurisdiction to issue the writ into Alipore, and to direct the same to the Superintendent of the Jail at Alipore, yet that it would be the duty of the Superintendent in the present case to disobey it, whereas he ought to have held that, inasmuch as it is for this Court alone to judge of the fitness and lawfulness of its procedure, it doth necessarily follow that it is the duty of the subject to obey any order or writ made or issued by the Court according to the exigency thereof.

7. That the learned Judge found that, notwithstanding the Imperial Acts passed from time to time for restraining and preventing the Indian Legislatures for the time being from passing any Regulations contrary or repugnant to the Magna Charta, or to the Statutes constituting the Supreme Court or High Court, or to the prerogative, or to any other portions of the Statute or Common Law of England, and especially to any of the unwritten law or constitution of England whereon allegiance to any extent might depend, it was competent to the Legislature to pass Regulation III. of 1818, Act XXXIV. of 1850, and Act III. of 1858, and that the said Regulation and Acts were valid and legal enactments, and binding on every subject of Her Majesty within the limits of the jurisdiction of the Legislature, whereas he ought to have held that the said Regulation and Acts were *ultra vires* of the Legislature, and illegal and invalid at least as far as respects all persons within the said jurisdiction not being alien enemies of the Queen.

8. That the learned Judge held that the unwritten laws and constitution of England are of so flexible a character as to justify the total and permanent suspension of the said laws and constitution by the said Regulation and Acts or by any Act of the Governor-General in Council, which is directed or extended to or for the prevention of any apprehended public mischief of a permanent nature, whereas he ought to have held that no such purpose can justify such suspension or abolition, and that the proposition that it can justify such suspension is necessarily insensible, repugnant, and inconsistent, and a term of no force, or value, or meaning in law.

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9. That the learned Judge ought to have held that, at all events, the arrest, imprisonment, and removals of Ameer Khan within Calcutta, were illegal, or at all events apparently illegal, and therefore he ought to have ordered that the causes or alleged causes thereof should be returned to the High Court.

Mr. Ingram and Mr. Evans for the appellant.

The *Advocate-General* (Offg.) and The *Standing Counsel* (Offg.), *contra*.

The *Advocate-General* raised a preliminary objection that no appeal lay from the order of Mr. Justice Norman. The power of appeal from Courts of original jurisdiction is given by s. 15 of the Letters Patent of 1865; but that section does not include such a case as this. The refusal of a writ of *habeas corpus* is not a judgment within the meaning of that section. It is not a binding judgment: it is open to the party to apply to another Judge, and, if refused, to all the Judges in succession. [PHEAR, J.—You assume that.] In England no doubt it is so. [PHEAR, J.—Is not that by Statute?] Before the Habeas Corpus Act it could be done, as all the Judges had equal powers, and one was not bound by the decision of another. Even if this were not so, Norman, J., holds that the Habeas Corpus Act applies here, under which the course of applying to another Judge could be taken. It is not the judgment which is appealed from, but the order made upon such judgment, which was the order discharging the rule. As to what is a judgment see *De Sousa v. Coles*\* *per* Bittleston, J. The distinction between that case and the present is, that if there the appeal had been disallowed, there would have been no other remedy; here the refusal of the writ by one Judge is not final: there the judgment appealed from was binding, here it is not. [PHEAR, J.—Is not the issuing or refusing to issue a writ of *habeas corpus* the act of the Court?] That would be inconsistent with the being able to apply to another Judge, a course which it is contended is open to the party. See Morton's Reports, 212 note and 263 note. The procedure in that respect is the same as in England; no alteration has been made in it by the Legislature. This is a criminal or quasi-criminal matter. The Judge has to exercise his discretion as to whether he will grant or refuse the writ. If it is a matter of discretion, the exercise of it by a Judge is final as far as that Judge is concerned. At Common Law it is submitted it is a matter of discretion. So that if this writ has been refused at Common Law, the Judge has exercised his discretion, and his decision is final; if under the Habeas Corpus Act, the remedy is to apply to another Judge. In either case the order is not appealable. See Chitty's General Practice, Part II., 686; *Hobhouse's case*.†

Mr. Ingram *contra*.—A writ of *habeas corpus* is issued by the Court, and a refusal to grant it is an act of the Court. See Habeas Corpus Act, s. 3. [PHEAR, J.—See s. 7.] It must have been returned into Court—Smoult's Rules and Orders, Vol. II., p. 22. If it was an act of Court, the Judges could not be applied to successively, and the refusal to grant the writ is appealable. The case of *Ashby v. White*‡ decided that an order of a Judge refusing a writ of *habeas corpus* was appealable. See *The Aylesbury case*;§ a writ of error was granted there. [PHEAR, J.—You have filed your appeal, and are now in the same position as if a writ of error had been granted; the Judges expressly state in that case that they abstain from saying that error could be maintained when the writ should be granted, as that was matter to be determined by the tribunal to which the writ would be returned.] This appeal can be entertained under

\* 3 Mad. H. C. Rep. 384.

† 3 B. & Ald. 422, *per* Abbott, C.J.

‡ 14 Howell's State Trials, 605; S. C., 1 Smith's L. C. 227.

§ 14 East, 92, note.

the general words of s. 15 of the Letters Patent, 1865. See *De Souza v. Coles*.\* The affidavits in the case are not entitled as in any particular Court or jurisdiction. It is not necessary to entitle them at all. See the practice in the Supreme Court in *The Queen v. Rajah Rajnarain Roy*,† and in the note it is said they should be entitled "In the Supreme Court" simply. So in England they would be entitled "In the Queen's Bench" only, unless on the Crown side.

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This is not a criminal matter; it cannot be a criminal matter, as there is no charge made against Ameer Khan. An appeal lies in all cases except criminal matters. The Court issues writs of *habeas corpus* in term: see the practice of the Supreme Court, Morton's Rep., 212, note. [*The Advocate-General*.—In the case of a rule it is different.] The refusal of an application before a single Judge is not final, and it is submitted an appeal lies. In the somewhat analogous case of the refusal to admit a plaint, an appeal lies; but there is nothing in law which prevents the same application being made before another Judge; out of courtesy only it is never done.

The *Advocate-General* in reply.—Can error be assigned in a matter of discretion? A writ of *habeas corpus* is not obtained for detention at some past time. The question is whether a present imprisonment is lawful or not. There is not the reason here that generally exists for granting an appeal,—*vis.*, that the party would otherwise be finally concluded by the order made. By the heading of s. 15 of the Letters Patent, the section relates wholly to appeals from original jurisdiction, yet there is in the section an exception of criminal matters. This is a criminal matter. As to the rejection of a plaint there is special provision in s. 36, Act VIII. of 1859, for an appeal from such an order; but the present order is not in its nature appealable.

After taking time to consider, the Court, on November 17th, allowed the appeal to go on.

The appeal, accordingly, came on on November 18th, and was argued by Mr. *Ingram* and Mr. *Evans* for the appellant. The arguments of Mr. *Ingram* were substantially the same as those used in support of the rule before Mr. Justice Norman. Mr. *Evans*, in addition, pointed out that, if Act III. of 1858 is presumed to be applicable to Englishmen as well as natives, the first section repeals the provision in the Bombay Regulation XXV. of 1827, s. 1, cl. 1, "that with reference to the individual the measure (taken to place him under restraint) shall not be in breach of British law" with respect to natives, but makes an exception in favour of European British subjects. In Calcutta there is no such distinction. So that it appears that in Calcutta a European British subject could be summarily arrested under Regulation III. of 1818, while in Bombay, under the corresponding Regulation XXV. of 1827, he could not.

The *Advocate-General* (Offg.) and the *Standing Counsel* (Offg.) were not called upon.

The following judgments were delivered:—

PEAR, J. (after shortly stating the facts, continued)—Ameer Khan; under the peculiar provisions of cl. 15 of the High Court Charter, which give in certain cases an appeal within the Court itself, so to speak, against the judgments of the Judges, now prefers an appeal to us against the decision of Mr. Justice Norman.

\* 3 Mad. H. C. Rep. 384.

† Fulton's Rep. 372.

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Several most important questions of law have been raised before us, which I do not think it necessary that we should determine, because I am of opinion that, quite independently of these questions, Mr. Justice Norman's decision is in its result right, and ought not to be disturbed.

The conclusion at which I have arrived is shortly this—namely, that if Mr. Justice Norman, by virtue of any authority which he possesses as Judge of this Court, had power to issue the writ of *habeas corpus* in this case (as to which I express no opinion by way of doubt or otherwise), Dr. Fawcus has shown good reason why it should not be issued; and therefore, supposing the appeal to be rightly before us, we ought to dismiss it.

Dr. Fawcus states, in the first of the two affidavits which he has given in this matter, that the petitioner Ameer Khan is under personal restraint in the jail at Alipore in his (Dr. Fawcus's) custody under a warrant in the form prescribed by Regulation III. of 1818, and signed by Edward Clive Bayley, Esquire, Secretary to the Government of India in the Home Department; and in the second affidavit he sets out the warrant (*reads* the warrant and the preamble and 2nd section of Regulation III. of 1818).

It thus appears that Ameer Khan is detained in custody by Dr. Fawcus under a warrant of the Governor-General in Council, which is precisely in the form prescribed by the second clause of the second section of this Regulation. Therefore it would seem to follow immediately from the third clause of the same section that the detention is legal, and, consequently, if Ameer Khan were brought before the Court in obedience to a writ of *habeas corpus*, it would be the duty of the Court to remand him to Dr. Fawcus's custody. If this be so, it is clear that the writ ought not to issue. Whatever may be the state of the law with regard to cases which are covered by the 3rd and 10th sections of 31 Car. II., c. 2, it is sufficient to say that the present application is not one of them. In all other cases, as is stated in Wilmot's Opinions, p. 81, &c., the writ ought not to issue of course, but only upon probable cause verified by affidavit, although, no doubt, as the same very learned Judge also states, "upon probable cause so shown, the writ is as much a writ of right as a writ which issues of course." Indeed, it appears to me that we must treat this appeal as being in substance a complaint to the effect that the learned Judge below has deprived the petitioner of his right by refusing to issue the writ of *habeas corpus*, notwithstanding that the affidavits before the Court disclose probable cause for an examination into the legality of the custody in which he is detained; and then the complaint is answered by the copy of the warrant and the words of the Regulation which I have read. Besides, the reason of the thing is all one way. To use the words of Chief Justice Abbott in *Hobhouse's case*\*—"It would be a very strange inconsistency in the law of England if we were bound to do an act nugatory in itself, and that would be the case if, upon a view of the copy of the warrant, a writ was of course to issue, the only effect of which would be that upon the return to it the prisoner must be remanded."

But the learned Counsel for the petitioner argued that the warrant set out in Dr. Fawcus's affidavit, although it pursues the words of the Regulation, nevertheless does not operate to validate the detention; and he places this proposition on three grounds, which I will take in the following order:—

1. The warrant referred to in s. 2, cl. 3 of the Regulation III. is a warrant to be issued to the officer in whose custody the person named in it is to be

\* 3 B. & Ald. 421.

placed; before that custody actually commences; whereas in fact this warrant, as the date upon it shows, was not issued to Dr. Fawcus until Ameer Khan had been in his custody many months.

2. Regulation III. of 1818 is aimed at the cases of political prisoners who are aliens, and does not extend to natural-born subjects of the Queen in this country, even though reasons of state for their confinement be supposed to exist.

3. Regulation III. of 1818 is itself void and inoperative in this matter as being *ultra vires* of the Legislature of this country, at least so far as it may affect a person having the status which Ameer Khan has.

With regard to the first of these three grounds, it is perhaps in terms unimpeachable. Unquestionably, it appears clearly enough from the language of the section and the form of the warrant itself that the Legislature contemplated that the warrant would in practice be actually issued by the Governor-General in Council before the officer who was to have charge of the prisoner was called upon to receive him into custody. But it is equally clear that the warrant is not a warrant of arrest. It is a warrant of commitment, reciting that which is, by virtue of the Regulation, equivalent to a conviction. From its nature I may say that the person committed by it must almost necessarily be under detention at the time when the warrant is formally drawn up. The argument then appears to take this form, that inasmuch as the prisoner, at the date when, according to the warrant, the commitment was made, was and had long been in Dr. Fawcus's custody without any warrant at all, either of arrest or commitment, he was then in unlawful custody, and that consequently the subsequent detention, based as it necessarily was, in one sense, upon this illegal custody, cannot be justified even under a commitment which would otherwise be valid. I do not think that this contention in its general form can be supported. It would not be sound in all cases even of that which I may term arrest upon arrest, irrespective of the fact of commitment. The House of Lords in *Hooper v. Lane*\* no doubt held that, "if a sheriff by the illegal act of himself or his officer has taken a person unlawfully into custody, so that the custody amounts to a false imprisonment, he cannot avail himself of that illegal detention to execute against his body writs which he holds at the suit of other plaintiffs." But this doctrine of law hangs upon peculiarities in the office and duties of the sheriff under English procedure: and it is to be observed that in the same case of *Hooper v. Lane*\* the House of Lords also laid down that "there is no doubt of the right and duty of the sheriff to arrest any one against whom he has a writ, and who can be found in his bailiwick, whether he is at large there, or is illegally detained there by a stranger." Now, on the materials before us, the utmost that can be contended on behalf of the prisoner is that, when the Governor-General in Council took action, and issued his writ of commitment, Ameer Khan was already in the custody of Dr. Fawcus, illegally detained under the order of the Lieutenant-Governor of Bengal. If this were so, though it might well be that Ameer Khan has some remedy for his false imprisonment against the Lieutenant-Governor and his officers, so far as they are not protected by privilege of office, yet, according to the decision in *Hooper v. Lane*,\* on the supposition that the Governor-General in Council possesses the power to arrest, and unless under Regulation III. of 1818, or otherwise, he is in a worse posi-

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tion than an English sheriff, Ameer Khan, while unlawfully under arrest, and detained by Dr. Fawcus, could be lawfully arrested and detained by the direction of the Governor-General in Council. But, even if it be assumed that the arrest of Ameer Khan was originally made at the instance of the Governor-General in Council, and was unlawful, it is not now a question before us whether or not, irrespective of express enactment, the Governor-General in Council could take advantage of his own wrongs, for cl. 3 of s. 2, Regulation III. of 1818, which I have already read, run thus: "The warrant of commitment shall be sufficient authority for the detention of the State prisoner in any fortress, jail, &c." There is here no mention of the original reception of the prisoner, and I think it was the plain meaning of the Legislature that a detention covered by an actually existing warrant of the Governor-General in Council, couched in the terms prescribed by the section, should be legal without regard to the facts which had antecedently occurred. This seems to me the plain meaning of the words as they stand, and I do not think there is anything in other parts of the Regulation which would justify us in interpolating words of qualification. Any construction which rendered it necessary to look behind the warrant for its validity would have the effect of making this clause of the Regulation practically useless. Had it not been for this clause, the absence from the Regulation of any reference to the arrest might have had the effect of limiting the operation of the Regulation to those cases in which the Governor-General in Council had otherwise by law power to arrest. But this clause, if it means anything of practical effect, must, as it seems to me, mean that the prescribed warrant of commitment and detention is to render the detention legal irrespective of all questions as to the lawfulness of the arrest. The whole power of the Governor-General in this matter is the creation of the Regulation, and I think the local Legislature intended that it should be placed beyond all question; and for that purpose declared that the legality of the imprisonment should depend upon the legality and sufficiency of this instrument alone. I am, therefore, of opinion that the warrant which is now in question before us is such a warrant as by the Regulation is made sufficient authority for the detention of the prisoner, and that therefore the first of the three grounds fails to help the petitioner.

In support of the second ground, the learned counsel pressed us with an elaborate and ingenious argument which I do not think it necessary now to follow in detail. I understood him principally to contend that the words of the Regulation were plainly capable of an interpretation which would exclude from its scope all natural-born or undoubted subjects of the Queen or Company; and that any other than this limited interpretation was so fraught with consequences antagonistic to all the traditions of English lawyers, and all our accepted principles of right and justice, to the benefit of which the prisoner is entitled, that this Court could not in reason take it to have been intended by the Legislature. He also argued that, unless the interpretation for which he contended were adopted, the Regulation would cover ground which was already the subject of an act of the Imperial Legislature, namely, 33 Geo. III., c. 52, s. 45, and that it could never be supposed that the local Legislature, in the language which it has used, meant that which manifestly would be superfluous and without effect, if not absurd. I have given my best consideration to the learned counsel's argument on this topic and the numerous illustrations with which he fortified it, but I feel myself unable to put upon the words of the Regulation the limited meaning which he attributes to them. The title of the Regulation, "a Regulation for the confinement of State prisoners," is almost the only line in the enactment which, as it seems to me, really favours the view which the learned counsel de-

sires us to take. "State-prisoners" unexplained might, no doubt, easily enough be read in a sense which would include only prisoners of war or foreigners held in confinement for political reasons. But it appears clear to me that the words of the preamble and of the first enacting section carry us much beyond this. The preamble commences thus:—

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"Whereas reasons of State, embracing the due maintenance of the alliances formed by the British Government with foreign powers, the preservation of tranquillity in the territories of native princes entitled to its protection, and the security of the British dominions from foreign hostility and from internal commotion, occasionally render it necessary to place under personal restraint individuals against whom there may not be sufficient ground to institute any judicial proceeding, or when such proceeding may not be adapted to the nature of the case, or may, for other reasons, be unadvisable or improper." Obviously these several classes of reasons are spoken of disjunctively. They cannot be made inter-dependent: each arises out of its own circumstances, and corresponds with a separate distinct emergency. One of them, then, may be taken apart from the rest. We may read by itself a portion of the recital thus: "Whereas reasons of State, embracing the security of the British dominions from internal commotion, occasionally render it necessary to place under personal restraint individuals against whom there may not be sufficient ground to institute any judicial proceeding, or when such proceeding may not be adapted to the nature of the case, or may, for other reasons, be unadvisable or improper." Can it be said for a moment that a citizen of Calcutta is not "an individual" who can be supposed to fulfil the conditions here expressed? If Ameer Khan, though born and resident in Calcutta, has been so plotting and behaving that Bengal or India can only be secured from internal commotion by placing him under personal restraint, while at the same time there are not sufficient grounds, or for some reason or another it may be unadvisable or improper to institute any judicial proceedings against him in the Courts of the country, then certainly his case, little disposed as one might be to expect it *à priori*, affords to the letter an instance of one sort of mischief which is mentioned in the preamble as a reason for the passing of the Regulation. And it therefore seems impossible to escape the conclusion that the powers bestowed by the Regulation on the Governor-General in Council for abating this mischief must extend to him; for the following section, without any limitation, enacts that, "when the reasons (which must here mean any of the reasons) stated in the preamble of this Regulation may seem to the Governor-General in Council to require that an individual should be placed under personal restraint without any immediate view to ulterior proceedings of a judicial nature, a warrant of commitment under the authority of the Governor-General in Council, and under the hand of the Chief Secretary or of one of the Secretaries to Government shall be issued to the officer in whose custody such person is to be placed." In my opinion, then, the second also of the three grounds above stated is unsound, and cannot be maintained.

It remains for us to consider the last of the three grounds. The learned counsel reminded us that the Legislature of the country possesses only such limited powers of legislation as are from time to time bestowed upon it by the Imperial Legislature; and he said that the Imperial Legislature never had in fact given this Legislature a power which would enable it to interfere with or affect the rights and liberties of persons subject to the English Crown in the manner attempted by Regulation III. of 1818. He dwelt upon the unlimited power of imprisoning which this Regulation pretended to give to the Governor-General in

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Council, a power far more extensive than any which the English Parliament itself had ever, even in the greatest exigencies of State, conferred upon the constitutional Ministers of the Crown; and he argued very earnestly, with some copiousness of illustration, that the Imperial Legislature could not be considered as having delegated a legislative authority which would support this enactment, unless express words of delegation to that end could be found, and that certainly nothing of the kind existed in the Statute-book. When we trace back the history of the local Legislature of India, it is undoubtedly matter of some surprise to find how narrow was the ground upon which the great structure of legislation, built up in 1793, and some following years, at first rested. But, in truth, we are not now concerned with any consideration which might arise out of an historical inquiry of this nature. What the Governor-General in Council had done was afterwards ratified and confirmed, and the powers of the local Legislature enlarged by Parliament by 37 Geo. III., c. 142, s. 8; and in regard to the particular matter before us, whatever might have been the authority of the local Legislature in 1818 when Regulation III. of that year was passed, and whether or not the necessary conditions precedent to its becoming the law in Calcutta have ever been fulfilled, the present force of the Regulation depends upon the effect of two subsequent Acts, namely, Act XXXIV. of 1850 and Act III. of 1858. (The learned Judge read the preamble and 1st section of Act XXXIV. of 1850, and proceeded.) The meaning of this is plainly that, whether Regulation III. of 1818 is or is not now of any legal force within certain specified local limits, it is expedient that it should have legal force, and that its powers should be extended to all the territories under the Government of the East India Company, and therefore it is enacted anew that "the warrant of commitment of any State-prisoner under Regulation III. of 1818 may be delivered to the sheriff of any gaol of the Supreme Courts of Judicature established by Royal Charter in the said territories, or to the commandant of any fortress, or to the officer in charge of any gaol or other place, in which it is deemed expedient that such State-prisoner be confined in any part of the said territories, and such warrant shall be sufficient authority for the detention of such State-prisoner in the fortress, gaol, or other place mentioned in the warrant." Here again then, the warrant of commitment, issued in the prescribed form by the Governor-General in Council, is, by express words, made to legalize the detention of the State-prisoner without reference to any of the circumstances of his arrest; and the State-prisoner is the State-prisoner of Regulation III. of 1818. It appears that, after the passing of this last Act, there still remained some opening for doubt whether or not the Legislature intended thereby to make the provisions of Regulation III. of 1818 operative to all intents and purposes in the presidency-towns, where the Supreme Courts had local jurisdiction; and therefore, to remove this doubt, it was enacted by s. 2 of Act III. of 1858 that—

"The provisions of Regulation III. of 1818 of the Bengal Code, Regulation II. of 1819 of the Madras Code, and Regulation XXV. of 1827 of the Bombay Code as altered by s. 1 of this Act, relating to the arrest and confinement of State-prisoners, shall be in force within the local limits of the jurisdiction of the Supreme Courts of Judicature at Calcutta, Madras, and Bombay respectively." I think that the local Legislature of India did, by these two Acts, *viz.*, Act XXXIV. of 1850 and Act III. of 1858, expressly (not simply by implication or reference) re-enact the substance of Regulation III. of 1818, and declare that its provisions should have force throughout all the territories under the Government of the East India Company, including the local limits of the jurisdiction of the Supreme Court at Calcutta. If, then, the power

possessed by the local Legislature in 1850 and 1858 was such as would enable it legally to pass these Acts, it follows from the opinion which I have already expressed relative to the meaning and intended effect of Regulation III. of 1818 that, without any regard to the original validity of that Regulation itself, and merely as the result of these later Acts, the detention of Ameer Khan would be rendered lawful by the warrant of the Governor-General in Council which has been set out. Now, the power of legislation, which was passed by the Governor-General in Council both in 1850 and in 1858, was that which is the subject of s. 43 of 3 & 4 Will IV., c. 85; for although the arrangement effected with the East India Company by this Act was for the limited period of twenty years only, the power of legislating thereby given was continued beyond the twenty years by 16 & 17 Vic., c. 95.

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The words of s. 43 of 3 & 4 Will. IV., c. 85, are: "And be it enacted that the said Governor-General in Council shall have power to make laws and regulations for repealing, amending, or altering any laws and regulations whatever now in force or hereafter to be in force in the said territories or any part thereof, and to make laws and regulations for all persons, whether British or native, foreigners or others, and for all Courts of Justice, whether established by His Majesty's Charters or otherwise, and the jurisdiction thereof, and for all places and things whatsoever, within and throughout the whole or any part of the said territories, and for all servants of the said Company within the dominions of princes and states in alliance with the said Company; save and except that the said Governor-General in Council shall not have the power of making laws or regulations which shall in any way repeal, vary, suspend, or affect any of the provisions of this Act, or any of the provisions of the Acts for punishing mutiny and desertion of officers and soldiers, whether in the service of His Majesty or the said Company, or any provisions of any Act hereafter to be passed in anywise affecting the said Company or the said territories or the inhabitants thereof, or any laws or regulations which shall in any way affect any prerogative of the Crown, or the authority of Parliament, or the constitution or rights of the said Company, or any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland, whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom, or the sovereignty or dominion of the said Crown over any part of the said territories." It is at once apparent that the power thus bestowed is the fullest possible in all directions, and for all purposes, except so far as the saving clause imposes particular limitations. Therefore Acts XXXIV. of 1850 and III. of 1858 will be valid unless they are such as to fall within one or another of these limitations. The prisoner's counsel says that they transgress the latter portion of the saving clause. The argument of the learned counsel on this head was somewhat voluminous, and it is not easy to state with precision and conciseness the positions of law which he successively took up. I understood him in substance to urge that the Queen's prerogative was infringed by these Acts, because in making the warrant of the Governor-General in Council a sufficient authority for the indefinite detention of a prisoner, they pretended to exclude the Queen from the exercise through Her Courts of Her prerogative right to inquire, on a complaint duly made, into the cause of an alleged imprisonment, to release those found on such inquiry to be unlawfully confined, and so to protect the liberty of all Her subjects. And further that, inasmuch as the subject's allegiance is by the unwritten law and constitution of the United Kingdom correlative with the protection afforded him by the sovereign, these Acts, by withdrawing from him and depriving him of that protection, do affect the unwritten



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laws and constitution upon which the allegiance of persons in this country to the Crown of the United Kingdom depends. It is enough for me to say that I think this argument involves an entire misconstruction as well of the words used by the Imperial Legislature as of the effect of the local Statutes. These latter do not in any way lessen or interfere with the right, call it prerogative in its nature, or otherwise, which the Crown by its Charters and Letters Patent, sanctioned by Act of Parliament, may have entrusted to or bestowed upon the High Court to inquire into the legality of any imprisonment, and to set at liberty prisoners unlawfully confined. The real effect of these Acts is that they create and make lawful a new cause of imprisonment, and constitute the Governor-General in Council a Court, endowed with the fullest discretion to adjudicate such a cause, and with power to imprison therefore during pleasure. It may, indeed, be taken in effect, that on the present occasion the High Court has inquired into the legality of Ameer Khan's imprisonment, and has ascertained that he is imprisoned under a conviction and commitment of a competent tribunal, the warrant of which conviction and commitment is good on the face of it. Had the power of imprisoning, conferred on the Governor-General in Council by the local Acts, been a power to imprison for a limited period, however long, it could hardly, I suppose, have been suggested that the Queen's prerogative was thereby invaded. The local Legislature has constantly given officers or Courts of this country summary powers of arrest and detention; I never heard it said that it by such Acts in any degree restrained or interfered with the Queen's prerogative, and it seems to me that the element of indefiniteness in the imprisonment does not alter the matter in this respect.

These considerations appear to me to dispose of the whole of the objection which the prisoner's counsel based upon the exceptions in s. 43 of 3 & 4 Will. IV., c. 85, and I need not therefore in strictness examine that objection further. But I think it right to say that, in my judgment, the words "whereon may depend," &c., do not refer to any assumed conditions precedent to be performed by or on behalf of the Crown as necessary to found the allegiance of the subject, but to laws or principles which prescribe the nature of the allegiance, *viz.*, of the relations between the Crown on the one hand and the inhabitants of particular provinces, or particular classes of the community, on the other; and obviously such laws and principles as these are not touched by the local Acts which are impeached before us. The learned counsel for the prisoner says that Regulation III. of 1818, as it violates the English laws of liberty, violates a part of the "laws or constitution, &c., whereon the allegiance of the subject depends," and he quotes a note of Mr. Forsyth at p. 334 of his recent work on Constitutional Law in support of this contention. Mr. Forsyth there says: "Allegiance by the English law is correlative with protection—*Calvin's case*;\* and where the sovereign can no longer *de jure* protect his subjects, their allegiance ceases; before this principle allegiance is changed by conquest, or by cession of territory under a treaty." Mr. Forsyth's purpose in this passage was merely to point out by reference to authority a criterion by which to test the sovereignty to which allegiance is due, on the occurrence of conflicting claims made by opposing powers upon the subject. He is not speaking of a domestic law which is to have force even in the absence of any opposing sovereign power. Indeed, the learned counsel appeared to me, at this stage of his argument, to be endeavouring to convert a political sentiment into a principle of law. There can be no doubt he will without

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\* 7 Rep. 5.

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difficulty find Englishmen who will agree with him that interference with personal liberty may be conceived as being carried so far, even under the sanction of law, as to amount to an oppression of the people, which would constitute justification of a successful rebellion. Invoking some such feeling as this, the learned counsel seemed to me to deal with it as part of the fundamental laws of the realm, and, upon the foundation so laid, proceeded to ask us, who sit here as Judges of the actual law, to say that the Regulation and the Acts which are under our present consideration are void and of no legal force, because, if they are valid, all the inhabitants of Bengal have a right by law to disclaim allegiance to the Crown of the United Kingdom. Surely a more startling proposition than this was never made to this Court, and ought not for a moment to receive its sanction.

On the foregoing reasons, it appears to me that the decision of Mr. Justice Norman, as I have before said, ought not to be disturbed, and, therefore, assuming that this appeal is rightly before us, I think it should be dismissed.

MARKBY, J.—I have come to the same conclusion as Mr. Justice Phear, and for reasons which are I believe similar.

In this case, I shall assume, without expressing any opinion whatever upon the point, that the writ of *habeas corpus* might have been issued on the present application, and in the same manner I shall assume that the learned Judge having declined to issue the writ, an appeal will lie to this Court against his decision.

It is, however, as I understand, not contested by the learned counsel for the appellant that we ought not to issue the writ if we see clearly that the prisoner, on being brought up, must be remanded.

I think it is clear upon the facts stated in these affidavits that the prisoner, if brought up, would, upon the production of the writ, have to be remanded. The prisoner is in, Alipore jail in the custody of Dr. Fawcus under a writ in the form given in s. 2 of Regulation III. of 1818, which section, after giving the form of the writ, concludes thus:

“The warrant of commitment shall be sufficient authority for the detention of any State-prisoner in any fortress, jail, or other place, within the territories subject to the presidency of Fort William.”

Assuming this to be a valid Regulation, and to be applicable to the present case, I think the warrant itself is a conclusive authority for the detention of the prisoner, and that we have no power to inquire further into the matter. It was contended for the appellant against this view of the Regulation that it did not confer any power at all to arrest a prisoner, but only empowered the Governor-General in Council to regulate the place and manner of confinement of prisoners in custody; that the Regulation assumes the person to have been already made a prisoner; and that it was necessary, therefore, to show that, when the warrant issued, the prisoner was lawfully under arrest. I think that this argument is answered by the plain words of the Statute. By s. 1, the warrant may issue in any case in which “the reasons stated in the preamble may seem to require that an individual should be placed under personal restraint.” And the preamble recites that “reasons of State occasionally render it necessary to place under personal restraint,” &c. It seems to me clear that these words contemplate the arrest of a person who is still at large.

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It was next argued that, at any rate, the Regulation contemplated that the warrant should precede the arrest, and that it could not legalize an arrest which was unlawful. No doubt, in one sense this is so, and it may be an irregularity in this case that the warrant was not issued prior to the arrest. But, whatever effect this irregularity may have upon the legality of the original arrest or the detention prior to the issuing of the warrant, I do not think it affects the legality of the detention subsequent to the warrant. I base my decision on this point, not on any distinction between a warrant of arrest and a warrant of commitment, but upon the concluding words of s. 2 above referred to, which appear to me expressly to make the warrant a sufficient authority for the detention of the prisoner, whether the prisoner was previously in custody or not, and if previously in custody, whether that custody was lawful or not. If it is necessary to confer such extraordinary powers at all, it is essential that the exercise of them should be unquestioned by any person whatsoever. If it were otherwise, there would be great peril to those who exercised these powers, and, greater peril still to those who are called upon to obey them; and I think these words were put in expressly to exclude all such objections as that now under consideration.

We then come to the question whether the Regulation is applicable. The first argument was that Ameer Khan is not a person, or at any rate is not necessarily a person, to whom the Regulation would apply, because it speaks throughout only of State-prisoners; by which, it was argued, is meant not the ordinary subjects of the realm, but political prisoners who had been vanquished in war or captured in some general disturbance. It appears to me, however, that the terms of the Regulation preclude this distinction. It was certainly intended to apply to subjects of the Indian Government, because it is expressly recited that it was intended to protect the British dominions, not only from foreign hostility, but also from internal commotion; and though, no doubt, the Regulation does not contemplate that the power here conferred would be exercised in times of tranquillity, it recites expressly that it is desirable to give power to the Governor-General in Council to supersede the ordinary course of judicial proceedings, and in the enacting part (s. 1) the power of so doing is given in the amplest possible manner without any restriction as to person or circumstance. Nor in this is there any inconsistency. If it is proper to confer any such power at all, it is obvious that it may be as usefully, perhaps more usefully, exercised to prevent commotion, as to quell it. I think the power of arrest and confinement is given quite generally, and the Governor-General in Council is made the sole Judge of the necessity of using it. But it was contended that this Regulation would still not justify the detention of the prisoner in this case, because it appeared upon the affidavits that the prisoner was a resident within the local limits of the original jurisdiction of this Court, to whom this Regulation could not apply. If, however, any doubt can have existed on this point, it is set at rest entirely by s. 2 of Act III. of 1858, which expressly provides that the provisions of Regulation III. of 1818, relating to the arrest and confinement of prisoners, shall be enforced within the local limits of the jurisdiction of the Supreme Court of Judicature in Calcutta.

It remains to consider the last point, which was that, if this extended construction was given to the Regulation of 1818 and the Act of 1858, they were *ultra vires* and void. I must say that one of the arguments addressed to us on this point appears to me to go to an extreme length. We were asked to ignore the practice of legislation which has prevailed in this country for the

last eighty years, to ignore also the recognition of that practice by Parliament and the Crown and this Court constantly during that period, to hold that the function of legislation as exercised in this country down to the time of the passing of the 3 & 4 Will. IV., c. 85, was a usurpation, and that the Acts of the Indian Legislature done in exercise of that function during that time were to a very considerable extent void; and this because, upon the true construction of Statutes passed nearly one hundred years ago, no such powers were conferred as the Indian Legislature has proposed to exercise, and no usage could confer them. It seems to me that, if we were to hold this, it would not fail to be a grievous public calamity, because such decision would be treated as absurd. Of course, it is a wholly different thing to question the validity of a particular Act of a subordinate Legislature, such as that which exists in India; and I pass on to the consideration of those objections which have been addressed to these particular enactments. It seems to me sufficient to consider those which have been addressed to the competency of the Indian Legislature to pass the Act of 1858. If that Act was valid, there can then be no doubt that the provisions of Regulation III. of 1818 are valid and binding also. Now, by the 3 & 4 Will. IV., c. 85, the Governor-General in Council is empowered to make laws and regulations for all persons, whether British or native, foreigners or others, and for all Courts of Justice in the fullest manner possible, "save and except," &c. (*reads the saving clause*).<sup>\*</sup> By s. 45 all such laws and regulations are to be of the same force as any Act of Parliament.

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It is said that the Act of 1858 was an excess of the power hereby conferred upon the Indian Legislature—1, because it affects the prerogative of the Crown; 2, because it affects that part of the unwritten law or constitution whereon allegiance depends. It has not been pointed out, as far as I have seen, in what way this Act of the Indian Legislature affects the prerogative of the Crown. It is not in any way necessary in this case to consider whether an Act which affected the right of a party to a writ of *habeas corpus* would or would not be valid. I express no opinion that it would not be so, but that is not the point we have to consider. If this Act is void, it must be void because it affects the liberty of the subject. But I see no ground for supposing that an Act affects the prerogative of the Crown merely because it affects the liberty of the subject. If that were so, then the Indian Legislature would have no power at all to legislate in criminal matters—a position which could not be entertained for a moment. I see no connection whatever between the prerogative of the Crown and the liberty of the subject. Indeed, it has been generally supposed that these two things were rather opposed to each other, and that this very writ of *habeas corpus* was one of those protections which were won by the people against that executive authority which, under the name of prerogative, resides in the Crown. The restriction which is the foundation of the second objection to the validity of the Act is certainly couched in language to the last degree vague and obscure. Possibly a search into the discussions which preceded the Act might suggest a meaning; but I think that it is a dangerous method of interpretation, and I would rather not resort to it. I think this objection is sufficiently answered by what appears to me to be a very clear principle; namely, that the allegiance of a British subject in no way whatever depends on the existence or non-existence of such a power as is conferred on the Governor-General by the Regulation of 1818. I wholly repu-

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<sup>\*</sup> See *ante*, p. 301.

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diate the doctrine contended for, that the allegiance of a subject to his sovereign can by any possibility be legally affected by the mere withdrawal from the subject of any right, privilege, or immunity whatsoever. I think the notion of reciprocity expressed in the maxim *protectio trahit subjectionem, et subjectio protectionem*, upon which this argument depends, is one which is wholly inadmissible in any legal consideration. It appears to me that, if we are to admit such a doctrine as this at all, we must admit it, not only with regard to Acts of the Indian Legislature, but to Acts of the English Parliament. But whatever phrases may be picked up here and there in the text-books, I never heard of an Act of Parliament being seriously questioned in a Court of Law on this ground. The somewhat analogous position in the first volume of Blackstone's Commentaries has been relied on, namely, where he says that human laws are subordinate to laws natural and divine, and that, if human laws transgress these laws, a man is bound to disobey them. But I think this is just one of those mystifications to which that celebrated author has most unfortunately more than once committed himself. If it is intended as a moral precept, it is ill-expressed and wholly barren in results. But if it is intended as a legal maxim, it has, in my opinion, been over and over again shown to be a most mischievous error.

If, therefore, we have any jurisdiction at all, I think it ought undoubtedly to be exercised in affirming Mr. Justice Norman's decision and dismissing this appeal.

*Appeal dismissed.*

Attorneys for appellants : Messrs. *Carruthers and Dignam*.

Attorney for the Government : Mr. *Chauntrell, Govt. Solicitor*.

#### [APPELLATE CRIMINAL.]

*Before Mr. Justice Norman, Offg. Chief Justice, and Mr. Justice Loch.*

IN THE MATTER OF THE PETITION OF DHANOBAR GHOSE.\*

1871.  
Feb. 25.

*Act VIII. of 1869, s. 422—Appeal.*

6 B. L. R. 483.  
[15 W. R. 33.]

Upon an appeal from a sentence passed by a Magistrate, the Sessions Judge remanded the case for the purpose of additional evidence being taken by the lower Court. Such evidence having been taken by the Magistrate, the case was returned to the Appellate Court. The Sessions Judge then disposed of the case in the manner prescribed by s. 419 of the Criminal Procedure Code. On an application by the prisoner to the High Court to be allowed to appeal on the merits of the case under s. 408, Act XXV. of 1861 : *Held*, no appeal lay to the High Court on the merits.

Mr. *M. Ghose* (with him Baboos *Debendra Chandra Ghose* and *Grish Chandra Mookerjee*), for the petitioner.

The facts and arguments are sufficiently stated in the judgment of the Court, which was delivered by

\* Criminal Motion, Case No. 3 of 1871, against the order of the Officiating Sessions Judge of Nuddea, dated the 26th November 1870, confirming that of the Assistant Magistrate of that district, dated the 8th June 1870.

NORMAN, J.—We do not think it necessary to go through all the points taken by Mr. Ghose in this case; they have been disposed of in the course of the argument. The case appears to have been, in many respects, very well conducted by the Assistant Magistrate, Mr. Cotton, who has shown great tact and firmness in dealing with the objections taken before him, and we see no reason whatever for questioning the propriety of the sentence, which has been confirmed by the Sessions Judge.

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The prisoner, Dhanobar Ghose, was convicted by Mr. Cotton, the Assistant Magistrate of Choadanga, of criminal misappropriation, and sentenced to rigorous imprisonment for two years, and a fine of Rs. 300, and, in default of payment of the fine, to a further imprisonment for six months. An appeal was presented by the prisoner to the Judge of Nuddea. In consequence of certain defects in the evidence, the Judge directed that additional evidence should be taken upon particular points. Certain witnesses were examined before the Assistant Magistrate, the additional evidence was certified by him to the Appellate Court, and thereupon the Sessions Judge proceeded to dispose of the appeal in pursuance of s. 422, Act VIII. of 1869.

Mr. Ghose claimed a right on the part of the prisoner to appeal to this Court upon the facts as if the prisoner had been convicted on a trial held by a Court of Session, and contended that such right was given to him by the provisions of s. 408. Under s. 422, Act XXV. of 1861,\* if the Appellate Court ordered additional evidence to be taken, and on the result of the further enquiry, additional evidence being certified to the Appellate Court, it was competent to the Appellate Court to proceed to pass such judgment, sentence, or order as to such Court might seem right. A Full Bench of this Court† held that, under the law as it stood before the passing of Act VIII. of 1869, the sentence of the Appellate Court, hearing a case on fresh evidence under s. 422, was a new sentence, and not a mere modification of the sentence of the lower Court; and that the Appellate Court, hearing a case on additional evidence under s. 422, had power to enhance the punishment awarded by the lower Court. In the case of *The Queen v. Mohesh Chunder Chuttopadhyay* and in some other cases, it was held that from that conviction and sentence, so treated by the Full Bench as a new conviction and sentence, an appeal lay under s. 408.

It appears to us that, whatever may have been the law under s. 422, Act XXV. of 1861, from a judgment upon an appeal under s. 422, Act VIII. of 1869, no such appeal lies. Under Act VIII. of 1869, the Appellate Courts are limited to pronouncing judgment in the manner prescribed by s.

\* Act XXV. of 1861, s. 422.—“In any case in which an appeal has been allowed, it shall be competent to the Appellate Court, if it think further enquiry or additional evidence upon any point bearing upon the guilt or innocence of the accused to be necessary, to direct such enquiry to be made, and such additional evidence to be taken. The result of the further enquiry, and the additional evidence, shall be certified to the Appellate Court, and the Appellate Court shall thereupon proceed to pass such judgment, sentence, or order as to such Court shall seem right.”

† In Act VIII. of 1869, s. 422, for the words in italics, the following are substituted, “to dispose of the appeal in the manner prescribed by s. 419.”

S. 419 is as follows:—“The Appellate Court, after perusing the proceedings of the lower Court, and after hearing the plaintiff, or his counsel or agent, if they appear, may alter or reverse the finding and sentence or order of such Court, but not so as to enhance any punishment that shall have been awarded.”

† Unreported; decided by Peacock, C.J., Seton-Karr, L. S. Jackson, and E. Jackson, JJ. (Kemp, J., dissenting). See Prinsep's Cr. Pro. Code, 2nd ed., under s. 422.

‡ 2 W. R. Cr. 13.

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419. They may alter or reverse the finding and sentence or order of the inferior Courts, but not so as to enhance any punishment that has been awarded. The prisoner, whose appeal is dismissed, or on whose appeal the finding and sentence of the lower Court is modified, is not a person convicted on a trial by a Court of Session. He is merely a person who has been convicted by the first Court, and whose appeal has been disposed of by the Appellate Court.

For these reasons it appears to us that s. 408 does not apply to the case of a person whose appeal has been dismissed after additional evidence was taken under the provisions of the 422nd section.

The application to hear the case on appeal is refused.

*Application refused.*

### FULL BENCH.

*Before Mr. Justice Norman, Offg. Chief Justice, Mr. Justice Macpherson, Mr. Justice Glover, Mr. Justice Paul, and Mr. Justice Mookerjee.*

1871.  
April 29.

THE QUEEN v. SHEOGOLAM DAS AND ANOTHER (APPELLANTS).\*

6 B. L. R. 692.

*Jurisdiction of Magistrate and Sessions Judge—Registration Act (XX. of 1866), s. 95.*

The Sessions Judge has jurisdiction to try a case of abetting false personation of a witness before a Registrar of Assurances, under s. 95 of the Registration Act (XX. of 1866).†

The word "instituted" in that section should be construed to mean commenced.

THIS case was referred to a Full Bench by Macpherson and Mookerjee, JJ., under the following circumstances:—

The prisoners were found guilty by the Sessions Judge of Shahabad of having committed an offence under s. 94 of Act XX. of 1866 (the Registration Act), in that they abetted false personation, and were sentenced to rigorous imprisonment and fine. They were committed by the Joint-Magistrate for trial at the Sessions upon the charge, on which they were tried and convicted.

The prisoners appealed to the High Court, and the appeal was heard before Macpherson and Mookerjee, JJ., and was disallowed upon all points save one, which was referred for the decision of a Full Bench.

The question referred was—Whether the conviction ought to be quashed on the ground that the Sessions Judge had no jurisdiction to try the case.

It was contended that, under s. 95 of Act XX. of 1866,‡ the case ought to have been instituted and tried before a person exercising the powers of a Magistrate or Subordinate Magistrate of the first class, and that the Sessions Judge had no jurisdiction to try it. In support of this view a decision of a

\* Criminal Appeal, No. 201 of 1871, from an order of the Sessions Judge of Shahabad, dated the 18th March 1871.

† See Act VIII. of 1871, s. 81.

‡ Act XX. of 1866, s. 95.—\*\*\*\* "All prosecutions under this Act shall be instituted before a person exercising the powers of a Magistrate or Subordinate Magistrate of the first class; and all fines imposed under this Act may be recovered in manner prescribed in s. 61 of the Code of Criminal Procedure."

Division Court, in the case of *The Queen v. Asanulla*,\* was relied on. But it appeared that a different construction had been put upon the law by five Judges of the High Court in a "criminal letter" of the 18th July 1867, No. 836,† issued by Peacock, C.J., and Loch, L. S. Jackson, and Macpherson, J.J.

1871.

QUEEN  
v.  
SHEOGOLAM  
DAS,  
6 B. L. R.  
692.

\* Before Mr. Justice Phear and Mr. Justice Hobhouse.

The 21st July 1868.

QUEEN v. ASANULLA AND OTHERS (PETITIONERS).

[Reported in  
10 W. R. 21.]

The judgment of the Court was delivered by

Phear, J.—It appears to me in this case that, if we accept the account of it which has been given by the Deputy Magistrate of Rungpore, a great deal of irregularity and impropriety is manifest in the course of the proceedings. Mr. Perry reports as follows: "It appears the plaintiff, Myajan, had complained before Mr. James Anderson, on the 15th of February last, praying for a criminal prosecution in the matter, and Mr. Anderson, as Registrar, drew up a robakari consigning the case to the Magistrate's Court. Then afterwards on the same day, whilst sitting in Mr. Glazier's Bench as Joint-Magistrate in charge, during Mr. Glazier's absence on duty in the interior of the district, he passed orders for the police investigation into the matter. The case was subsequently, on Mr. Glazier's return, made over before trial to me by him on the 23rd of March. Thus it was Mr. Anderson embodied in his officiating capacity the powers of a District Magistrate and Registrar to direct the criminal trial of the case.

Now, I think it is clear from the Criminal Procedure Code that a Magistrate has only jurisdiction to entertain a criminal charge upon one of two contingencies—namely, either that the complaint is made before him by a person properly qualified to complain and prosecute, or that he himself, of his own knowledge and discretion, starts the proceedings, supposing the case to be one of those in which the Code gives him authority to do so. Now, here the Registrar of the District might very well have acted the part of prosecutor and made the complaint, but the Sub-Registrar of himself could not. Consequently Mr. Anderson's robakari was of no effect, either as a complaint under the Procedure Code, or in any other way. It was, I think I may almost venture to say, something approaching to a farce that Mr. Anderson, as Sub-Registrar in the Registrar's kutchery, should draw up a robakari for the information of Mr. Anderson, officiating as Joint-Magistrate in the Magistrate's kutchery; but whether it is right to designate this inefficacious proceeding by this term or not, it is, I think, certain, even on the meagre facts of the case which the record exhibits, that nothing whatever did really come of it. Mr. Anderson, upon perusing his own robakari, referred the matter to the police. I need not say that this does not amount to the institution of a prosecution, in any sense, under the Criminal Procedure Code. We are not concerned with the report of the police; but it appears that, upon its being given in to the Magistrate, Mr. Glazier, after his return to the kutchery, he issued a warrant for the arrest of prisoners or a summons for them to appear and answer some charge, and then handed the matter over to the Deputy Magistrate. In truth, we cannot make out from the record very precisely what happened, but undoubtedly the Magistrate seems at that time to have acted as if there was actually a matter of complaint before him. If we take literally the account given by the Deputy Magistrate in his report, it would seem as if there was in fact no matter of complaint at all before him. However, upon looking closely into the record, although we cannot discover that there was any complaint filed as by a private prosecutor, we have learnt that there is a mooktearnama signed by Myajan, in which he authorizes a mooktear to appear for him, and recites that he has made a complaint before the Magistrate, and it is in the matter of that complaint that he desires to be represented by the mooktear. Had it not been for this indication of something like a legal commencement of the criminal proceedings which were continued before the Deputy Magistrate, I should have felt myself obliged to conclude that the charge against the prisoner originated in the action of Mr. Glazier himself in the exercise of the powers vested in him by the provisions of s. 68 of the Criminal Procedure Code; and had this been the case, I should have considered that the legality of the subsequent proceedings before Mr. Perry was, under the circumstances of the case, open to much question. As, however, the mooktearnama to which I have referred is actually on the record, and has been sent up to us as part of the record by the Joint-Magistrate, I cannot resist the inference that there was a complaint properly made by Myajan, either before the Deputy Magistrate or the Magistrate himself, which could form a proper foundation for their proceeding. If there were not, there would be no meaning in the mooktearnama itself. And further, as the Deputy Magistrate in his report speaks of Myajan as plaintiff, by which word I suppose he means prosecutor, I feel obliged to assume that there really was something in the shape of a legitimate initiation of a prosecution before the one Magistrate or the other. This being so, I come indirectly, by a process of reasoning only unaided by any express statement on the record, to the conclusion that the criminal proceedings in this case were properly instituted, and there can be, I think, no doubt that, after the point of time where the prisoner under a warrant or summons appeared before the Deputy Magistrate to answer the charge, every thing was regular and unimpeachable. I regret very

† 8 W. R. Cr. Letters, 14.



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Baboo *Taruknath Dutt* for the prisoner.—The offence here is a new offence created by the Registration Act. But for that law it was no offence at all, and the section of the Criminal Procedure Code which regulates the jurisdiction of the several Criminal Courts applies only to the trial of offences contemplated in the Penal Code; therefore, the argument that the punishment provided by the 95th section is beyond the competency of the Magistrate has no force.

The true meaning of the word “instituted” is that the case should be commenced, tried, and brought to a conclusion, resulting either in conviction or in acquittal by and before a Magistrate. See *The Queen v. Asanulla*.\*

The judgment of the Full Bench was delivered by

NORMAN, J.—In this case the prisoners Sheogolam Das and Ramsunder Das were charged with abetting the false personation of a witness in registering a kabuliati before the Sub-Registrar of Assurances at Buxar. The offence is punishable under the 94th section of the Indian Registration Act of 1866 with a term of imprisonment which may extend to seven years. In pursuance of the provisions of s. 95 the prosecution was instituted before the Joint-Magistrate, and by him the prisoners were committed for trial before the Sessions Judge.

The question before us is, whether the Sessions Judge had authority to try the prisoners; whether, in fact, the conviction by the Sessions Judge ought to be quashed on the ground that he had no jurisdiction. The reference has

much that a want of attention to the provisions of the Criminal Procedure Code should have left in this case so much opening for the prisoner to contend that the earlier conduct of the prosecution was irregular and informal to the extent of rendering the whole proceedings void for want of jurisdiction. I have given my reasons for thinking that that contention cannot, even in the imperfect state of the record, be supported.

The prisoner's pleader has further argued that, even supposing the prosecution was rightly instituted before the Magistrate or the Deputy Magistrate, still that this was a case in which the Magistrate had no power to proceed to a conviction, and that he ought, instead of so doing, to have committed the accused for trial to the Sessions. In support of this position he has pointed to the universal practice of Magistrates in this respect, to the provisions of the Criminal Procedure Code in analogous cases of personation, and to the inadequacy of the Magistrate's powers relative to inflicting the full amount of punishment given by s. 94 of Act XX. of 1866. And on these grounds he has asked us to infer that the words, “as to the institution of prosecutions,” in s. 95 of Act XX. of 1866, do not authorize the Magistrate to finally hear and determine the matter of the charge. I think this argument is not substantial. It seems to me that the word “prosecution,” as used by the Legislature in this place, means the entire proceedings in trial of a person who is accused of a criminal offence. It is, in short, employed to designate a criminal trial, as the word “suit” designates a civil trial with all its proceedings from beginning to end, and this contradiction appears in many places both of the Penal Code and the Criminal Procedure Code. I will refer to s. 205 of the Penal Code as an instance. Now, when the Legislature enacts that a suit of a specified character shall be instituted in a particular Court, say in the Principal Sudder Ameen's Court, it is undoubtedly taken to mean that the suit shall be tried out in that Court. So it seems to me, here, that the natural meaning of the words in s. 95 of Act XX. of 1866—namely, “all prosecutions under this Act shall be instituted before a person exercising the powers of a Magistrate,” &c.—is that the whole of the criminal trial, from complaint to adjudication on the charge, shall be carried out before and by that person. There is not in this or any subsequent Act any limitation put upon the operation of these words; and the limitation of the Magistrate's jurisdiction as to trial, which is given by the Criminal Procedure Code, applies only to the particular offences therein mentioned, and, consequently, does not include within its scope the offence in question, which was first created by Act XX. of 1866. I think, therefore, that the Deputy Magistrate had full power, under the provisions of s. 95 of Act XX. of 1866, to entertain and to finally adjudicate on the charge made against the prisoners in the present case. The sentence passed by him did not exceed in amount of punishment that which the ordinary powers of a Subordinate Magistrate of the first class authorize him to pass, and therefore it is not necessary to decide whether Act XX. of 1866 would enable him to go beyond that limit in cases to which s. 94 of that Act applies.

On the whole, I am of opinion that this application should be rejected.

\* See *ante*, p. 309.

been made to us in consequence of a decision of Mr. Justice Phear and Mr. Justice Hobhouse in *The Queen v. Asanulla*,\* in which those learned Judges appear to have held that the whole of the criminal trial under s. 95, from complaint to adjudication on the charge, must be carried on before and by a Magistrate or Subordinate Magistrate of the first class. If that be so, of course the Joint-Magistrate had no power to commit the prisoners to the Sessions. We, however, cannot agree in the interpretation which has been put by those two learned Judges upon the word "instituted" in the 95th section of the Indian Registration Act of 1866. We think that if the full and true meaning of that word is given by construing it as "commenced," that the section in question would preclude Deputy Magistrates and others not having the powers of a Magistrate or of a Subordinate Magistrate of the first class from entertaining any charge of an offence under the 94th or other sections of the Act. Construing the word in that way, we construe it according to its literal and grammatical meaning, and it is evident that such must be the true construction; for, on reference to the 21st section of the Code of Criminal Procedure, it is clear that a Magistrate has no power to sentence a prisoner to the full period of imprisonment to which he would be liable under s. 90, and subsequent sections down to s. 94, of the Registration Act. The 21st section of the Code of Criminal Procedure provides that "the Criminal Courts of the several grades, according to the powers vested in them respectively by this Act, shall have jurisdiction in respect of offences punishable under the Indian Penal Code or under any special or local law (except offences which are by any such law made punishable by some other authority therein specially mentioned), and in the investigation and trial of the offence hereby declared to be within their jurisdiction shall be guided by the provisions of this Act." Therefore, the jurisdiction of the Magistrate in respect of an offence under any special law is the same as in respect of an offence punishable under the Penal Code. Now, the Magistrate of a district, or other officer authorized to exercise the powers of a Magistrate, is only empowered to punish with imprisonment for a term not exceeding two years. Therefore, if we were to construe the word "instituted" as if it was intended to include the whole adjudication upon the charge, we should be construing the Act in a way which would make the 95th section repugnant to ss. 90, 91, 92, 93, and 94 of the same Act; because the Legislature would first impose a penalty of seven years' imprisonment in certain cases, and then declare that the offence should be triable only by an officer who would not have power under the law to inflict a punishment with imprisonment for a term exceeding two years.

For these reasons I think it perfectly clear that the rule, as laid down in a letter No. 836 of 18th July 1867,† is correct; and that, if the Magistrate thinks that a more severe punishment is necessary than he is competent to inflict under the power conferred on him by Act XXV. of 1861, he should proceed in accordance with s. 226 of that Act to commit the prisoners to the Sessions. We think it clear that on such committal the Sessions Judge has jurisdiction and authority to deal with the charge, and sentence the prisoners as provided for in the several sections of Act XX. of 1866.

\* See *ante*, p. 309.

† 8 W. R. Cr. Letters, 14.

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1871.  
May 2.

*Before Mr. Justice Norman, Offg. Chief Justice, Mr. Justice Loch, Mr. Justice Macpherson, Mr. Justice Paul, and Mr. Justice Mookerjee.*

6 B. L. R.  
698.

THE QUEEN *v.* BAKTEAR MAIFARAZ.\*

[15 W. R. 64.] *Functions of Criminal Courts—Jurisdiction of Assistant Magistrate—Penal Code, s. 169—Code of Criminal Procedure, ss. 11, 169, 171, 422.*

When an Appellate Court directs further evidence to be taken by a Subordinate Court under s. 422 of the Code of Criminal Procedure, it is competent to the Subordinate Court before which such evidence is given, if any offence against public justice, as described in s. 169, is committed before such Court by a witness whose evidence is being recorded therein, to send the case for investigation to a Magistrate under the provisions of s. 171.

The words, "whether for the decision of such cases in the first instance or on appeal, or for commitment to any other Court or officer," in s. 11 of the Code of Criminal Procedure, are not an exhaustive enumeration of the functions of Criminal Courts.

THE facts of this case, as stated by the Sessions Judge of Nuddea, were as follows:—

It appears that the offence with which the prisoner stood charged in this case arose out of a deposition before the Assistant Magistrate of Mehirpore, taken under orders of the District Magistrate in his appellate jurisdiction. The Assistant Magistrate, considering there were grounds for suspecting that the prisoner was committing perjury when giving evidence before him as a witness, held a preliminary enquiry under s. 171 of the Criminal Procedure Code,† and made over the prisoner to the District Magistrate for investigation of the charge preliminary to commitment. The Magistrate, on receipt of the record, sent it back to Mehirpore for investigation by Baboo Pyari Mohan Banerjee, Deputy Magistrate of that station. The Deputy Magistrate left the station before the order could be carried out, and the sub-divisional officer referred the matter for further orders, when the District Magistrate passed the order that "there is no reason why the case should not be investigated by the sub-divisional officer;" and so it returned to the latter, who then held a judicial investigation, and committed the prisoner to the Sessions on a charge of perjury.

It was contended that, though the Assistant Magistrate, acting under orders of the Appellate Court, in taking the prisoner's deposition on oath, was holding a judicial proceeding (explanation 3 to s. 193), he had no power to record any judgment upon it, and that he was, consequently, not sitting as "a Court" within the meaning of s. 171.

\* Reference to the High Court, under s. 434 of the Code of Criminal Procedure, by the Sessions Judge of Nuddea.

† *Criminal Procedure Code, s. 171.*—"When any Court, civil or criminal, is of opinion that there is sufficient ground for investigating any charge mentioned in the last three preceding sections, the Court, after making such preliminary enquiry as may be necessary, may send the case for investigation to any Magistrate having power to try, or commit for trial, the accused person for the offence charged, and such Magistrate shall thereupon proceed according to law, and the Court shall have power to send the accused person in custody, or to take sufficient bail for his appearance before such Magistrate, and may bind over any person to appear and give evidence on such investigation."

S. 11.—"The words 'Criminal Court' shall denote every Judge or Magistrate lawfully exercising jurisdiction in criminal cases, whether for the decision of such cases in the first instance, or on appeal, or for commitment to any other Court or officer."

The Judge considered that this objection was perfectly sound, and that it clearly rested with the Court, which on a view of the whole case was to form an opinion upon the deposition of each witness, to say whether any one of them should be put upon his trial for giving false evidence under s. 171. He therefore made this reference with a view to having the commitment order cancelled.

The case was referred to a Full Bench by LOCH and MITTER, JJ.

The judgment of the Court was delivered by

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[15 W. R. 64.]

NORMAN, J.—The Magistrate of Nuddea, on hearing an appeal against the decision of an Assistant Magistrate, directed a further enquiry, and that additional evidence should be taken by the Assistant Magistrate under s. 422 of the Code of Criminal Procedure. While taking evidence in pursuance of that direction, the Assistant Magistrate, being of opinion that a witness who was examined before him had given false evidence, sent the case for investigation to the Magistrate, assuming to act under the provisions of s. 171. The accused person was ultimately committed to the Court of Session. But the Sessions Judge doubts the legality of the commitment, and has referred the case to this Court under s. 434, in order that the commitment may be quashed.

We think that, when an Appellate Court directs further evidence to be taken by a Subordinate Court under s. 422 of the Code of Criminal Procedure, it is competent to the Subordinate Court before which such evidence is given, if any offence against public justice, as described in s. 169, is committed before such Court by a witness whose evidence is being recorded therein, to send the case for investigation to a Magistrate under the provisions of s. 171.

We think that the Assistant Magistrate, to whom the case was sent back, and before whom the evidence in the present case was taken, was lawfully exercising jurisdiction in a criminal case. The words “whether for the decision of such cases in the first instance or on appeal, or for commitment to any other Court or officer,” in s. 11 of the Code of Criminal Procedure, are not, in our opinion, intended as an exhaustive enumeration of the functions of Criminal Courts.

The jurisdiction of the Assistant Magistrate was that of a judicial officer exercising a particular function, not merely an authority delegated to him by the Magistrate.

The trial must therefore proceed.

[ORIGINAL CRIMINAL.]

*Before Mr. Justice Paul.*

THE QUEEN v. NAKUR SIRKAR.

*Evidence, admissibility of—Record of Proceedings in Calcutta Small Cause Court.*

1871.  
Feb. 25.

The summons book of the Small Cause Court, Calcutta, is admissible in evidence, though not signed by the presiding Judge.

6 B. L. R.  
729.

The prisoner in this case was charged with “intentionally giving false evidence in a judicial proceeding.” The offence had been committed during the hearing of a case before the Second Judge of the Small Cause Court. The Second Judge of the Small Cause Court was called as a witness for the prose-

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QUEEN  
v.  
NAKUR SIR-  
KAR,  
6 B. L. R.  
729.

cution, and the summons-book of the Small Cause Court was produced to show the proceedings at the trial in that Court. The book did not bear the signature of the Judge before whom the perjury was alleged to have been committed; but it was shown that it was kept in accordance with the practice of the Small Cause Court, and was the only record of that Court.

The *Standing Counsel* for the prosecution.

Mr. *Phillips* for the prisoner.

On the examination of one of the witnesses for the prosecution, the summons book of the Small Cause Court was tendered as evidence of what took place before the Judge.

Mr. *Phillips* objected that, under s. 81 of Act IX. of 1850,\* it was inadmissible in evidence, on the ground that it was not authenticated by the signature of the Judge. He referred to *The Queen v. Shib Chandra Das*,† in which Norman, J., had refused to receive a similar document.

The said Second Judge was thereupon recalled by the Court, and he stated that the document tendered was, to the best of his belief, an accurate statement of the proceedings at the trial before him.

Mr. *Phillips* submitted that the record was the only evidence, and could not be supplemented by oral evidence.

PAUL, J.—It is in evidence that there is no other record kept in the Small Cause Court, and it is, therefore, open to the Court to take evidence *aliunde*. If it is not a record within the meaning of s. 81, Act IX. of 1850, we have it that there is no record; and in that case the proceedings must be proved in the

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\* Act IX. of 1850, s. 81.—“The clerk of every Court holden under this Act shall cause a record of all summonses, and of all orders, and of all judgments and executions, and returns thereto, and of all fines, and of all other proceedings of the Court, to be fairly entered from time to time in a book or books belonging to the Court which shall be kept at the office of the Court, and shall be duly authenticated by one or more of the Judges; and such entries in the said book or books, or a copy thereof, bearing the seal of the Court, and purporting to be signed and certified as a true copy by the clerk of the Court, shall be admitted in all Courts and places as evidence of such entries, and of the proceeding referred to by such entry or entries, and of the regularity of such proceeding without any further proof.”

† Before Mr. Justice Norman.

#### THE QUEEN v. SHIB CHANDRA DAS.

*The 7th May 1870.*

##### *Evidence, Admissibility of—Record of Proceeding in Small Cause Court.*

The record of proceedings in the Small Cause Court is not admissible in evidence, unless authenticated by the signature of the presiding Judge.

The prisoner was charged with the offence of intentionally giving false evidence in a judicial proceeding, and using as genuine a document knowing it to be false. The offence had been committed during the hearing of a case before one of the Judges of the Small Cause Court. One of the witnesses for the prosecution had been summoned to produce the record of the proceedings in the Small Cause Court. On his examination, he produced the summons book, which was the only record of the proceedings, and was kept according to the usual practice in that Court; such record was not signed by the Judge.

The *Standing Counsel* (Offg.) and Mr. *Hyde* appeared for the prosecution.

Mr. *Woodroffe*, Mr. *Branson*, and Mr. *Bonnerjee* for the prisoner.

The *Standing Counsel* submitted that the record as produced was admissible in evidence. It was the usual and only record kept by the Small Cause Court.

NORMAN, J., refused to receive it in evidence on the ground that it was not authenticated by the signature of the Judge.

On the *Standing Counsel* intimating that he could not support the case without such evidence, the jury were directed to return a verdict of “not guilty.”

best way possible. They may be proved by the Judge, and the defendant's statement taken down by him and corroborated by the summons book kept in the regular course of practice of the Small Cause Court.

But I am of opinion that this is a record authenticated by the Judge in person, sufficient to satisfy s. 81. The form follows that drawn by the Judges of the Small Cause Court with the approval of the Judges of the Supreme Court under s. 41 of Act IX. of 1850.

It was held by the Supreme Court, on a writ of error, that the Small Cause Court was a Court of Record; and the summons book of the Court, identical with the one now objected to, was then produced and admitted as a record.\*

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QUEEN  
v.  
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KAR,  
6 B. L. R.  
729.

## APPENDIX.

*Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice L. S. Jackson.*  
MAJOR FORBES AND ANOTHER v. GIRISH CHANDRA BHUTTA-  
CHARJEE AND ANOTHER.†

1870.  
Aug. 12.

6 B. L. R.  
App. 3.  
[14 W. R. 31.]

*Penal Code (Act XLV. of 1860), s. 425—Cattle-trespass.*

Mere neglect on the part of an owner of cattle to keep them from straying into fields, is not causing cattle to enter a compound within the meaning of s. 425 of the Penal Code. The section requires that, before the owner is convicted of the offence, it must be proved that he actually caused the cattle to enter knowing that by so doing he was likely to cause damage.

THE facts were thus stated in the reference :—"The cattle of the accused are said to have been in the habit of trespassing into the compound of Major Forbes, the prosecutor's master, and to have caused mischief by damaging the fence, and by eating the crops, and injuring the flowers and shrubs.

"The Joint-Magistrate, considering that the accused were guilty of mischief, an offence punishable under s. 426 of the Penal Code, has sentenced Girish Chandra to suffer one month's rigorous imprisonment, and Shiraz Sheikh one week's rigorous imprisonment.

"This Court is of opinion that [the offence under s. 425 has not been shown to have been committed by Girish Chandra. Even admitting that his cattle were in the habit of trespassing into Major Forbes' compound—though, with the exception of the rather vague assertion that his two cows have often been driven from the compound, the only direct evidence against him is that, twice within the last year, they have been taken to the pound—still, admitting that there has been frequent trespass and a want of care on the part of the owner of the cattle, this Court holds that the charge will not hold good, in that s. 425 does not apply to cases of mere carelessness; and that before the accused can be punished criminally, it is for the prosecution to show that the intention was to cause wrongful loss or damage.

\* The prisoner was found guilty, and sentenced to seven years' rigorous imprisonment.

† Reference, under s. 434 of the Code of Criminal Procedure, from the Sessions Judge of Nuddea, by his letter No. 100, dated the 1st July 1870.

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[14 W. R. 31.]

"In the present case it is not alleged that Girish Chandra had any intention to injure or damage, but it is said that he must have known that his cattle by trespassing were likely to injure property."

Mr. *Ghose* (Baboo *Girishchandra Mookerjee* and *Bipradas Mookerjee* with him) in support of the reference.

COUCH, C.J.—In this case the Magistrate says :—"It is quite clear, on the prosecutor's statement, that a prosecution for mischief against the owners of the trespassing cattle will properly lie ; for, though it is quite possible, and, in fact, most probable, that they did not intend to do actual damage, it is proved that they must have known that it was likely to occur, and, in fact, were warned of what damage had been done by the prosecutor ; again, it is no excuse to plead that they did not actually take the animals to the compound, and drive them in. In the case of *Shiraz*, he was seen watching them while they grazed ; while it is plain that *Girish Chandra*, by the mere act of letting loose his animal to stray at large, turned them into Major Forbes' compound, for there it is they daily repaired, and were daily seen."

I understand the Magistrate then to find, at the utmost, that there was no intention on the part of *Girish Chandra* to do damage, but that he let loose the cow, and that the cow had on previous occasions strayed into the compound of Major Forbes. I think that is not a causing cattle to enter upon the compound within the meaning of s. 425 of the Penal Code. This section requires something more than neglect on the part of the owner of the cattle to keep them from straying. He must, in some way, cause the cattle to enter the field, knowing that by so doing he is likely to cause damage. It does not appear to me that, taking the finding of the Magistrate to be supported by the evidence, there was here an offence for which *Girish Chandra* was liable to be punished.

It was not even shown that the cow was let loose. So that, supposing the letting the cow loose, with a knowledge that it had such a propensity to go into Major Forbes' compound, that it would inevitably go there on being let loose, would be "a causing" within the meaning of s. 425, there was no evidence here that the accused person did so. All that seems to have been shown was, that there was a neglect to keep the cow fastened up, so as to prevent it from straying into any place. That is not a case within s. 425. If Major Forbes has got a compound which is open to the incursions of the cows of the neighbouring people, he ought to protect it in some way, and not seek the aid of the criminal law. Where the owner of the cattle does nothing which may fairly be considered as "a causing" the animals to go into the compound, he is not liable to be punished. I think, upon the finding of the Magistrate, that this is clearly not a case within the criminal law, and the conviction must be annulled.

JACKSON, J.—I am of the same opinion. That which is set up against the accused person amounts merely to negligence in suffering his cow to go abroad, with the knowledge, no doubt, that the cow was likely to enter the compound of Major Forbes, or some other person, and there do some damage. Now, this negligence is not the same thing as by an illegal omission causing a thing to be done. I entirely concur in thinking that the section requires an active causing ; and that it is that active causing, coupled with the intention or the guilty knowledge, so to say, that constitutes the offence under the section.

Before Mr. Justice L. S. Jackson and Mr. Justice Miller.

NIAMATULLA v. GOPAL SAHA.\*

*Jurisdiction of Magistrate—Criminal Procedure Code (Acts XXV. of 1861 and VIII. of 1869), ss. 244 and 180 and 308.*1870.  
Sept. 12.6 B. L. R.  
App. 6.  
[14 W. R. 63.]

The accused was charged before a Deputy Magistrate with an offence under s. 431, Penal Code. The Deputy Magistrate examined the complainant, took bail from the accused, but refused to examine the complainant's witnesses, although present, and delayed the investigation unnecessarily for a long time. The Magistrate of the District then called for the proceedings, and, having looked at them, considered that there was no case for the interference of the Criminal Courts, and discharged the prisoner, although he was present and under bail.

*Held* that the Magistrate was not only competent but bound to discharge the prisoner, if his conclusion that no offence was made out was correct.

But *held* also, that the Magistrate's conclusion was wrong, and that the act complained of, if true, did amount to an offence under s. 431 of the Penal Code, therefore the Magistrate's order was set aside, and further enquiry ordered.

Baboo Bama Charan Banerjee for Niamatulla.

THE facts of this case appear in the judgment of the Court, which was delivered by.

JACKSON, J.—In this case a complaint was laid before the Deputy Magistrate of Shabazpore, in which it was alleged that the persons accused had committed an offence under s. 431 of the Indian Penal Code, by doing an act which had rendered a certain navigable channel impassible for travelling or conveying property. It was also alleged that by this act the accused persons had deprived the complainant himself of cultivating the land lying in the neighbourhood, which would otherwise have received water from the said channel; and the Magistrate was asked to take cognizance of the offence under the section mentioned above, and also to deal with the case under the provisions of the 308th section of the Code of Criminal Procedure.

The Deputy Magistrate summoned some of the accused persons. He directed an enquiry also by the police, and one of the accused persons attended. The Magistrate had also examined, at considerable length, the complainant, who was a person named Niamatulla, describing himself as a *mirdha* (shepherd) under certain zemindars.

After taking these several proceedings, and placing one of the accused persons upon bail, the Deputy Magistrate, although witnesses cited by the complainant were in attendance, refused to examine them, and declared that he could not come to any conclusion without having first made a local enquiry, and for that, or for some other reason, the case remained pending before this officer for the space of three or four months, the accused person being all the time in attendance upon bail.

The Magistrate of the District having come to know of this, and observing that the case had been a long time before his Deputy, called for the proceedings, and, having looked at the statement of the complainant, considered that there seemed to be no cause for the interference of the Criminal Courts, and ordered the accused to be discharged.

\* Reference, under s. 434 of the Code of Criminal Procedure, by the Sessions Judge of Backergunge, under his letter No. 41, dated the 13th August 1870.



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The complainant, dissatisfied with this order, came before the Sessions Judge, who referred the case to the High Court under the 434th section of the Code of Criminal Procedure, with a recommendation that the Magistrate's order be set aside.

This recommendation is based upon several grounds, one of them being that, two of the accused being present under a criminal charge, and bail having been taken from them, the Magistrate was not competent to discharge the accused without hearing the evidence against them. The Magistrate, it seems, added words implying an acquittal of the accused persons, which he could not properly do unless he had tried the case.

Another ground is that, the Magistrate was wrong in coming to the conclusion that there was no *prima facie* criminal case made out.

Upon the first of these points, it appears to me that if we assume the Magistrate to have come to a correct conclusion that there was no case of a criminal character made out against the accused, he was not only competent, but was bound to order the discharge of the accused. By s. 244 of the Code of Criminal Procedure, amended by Act VIII. of 1869, the provisions of s. 180 are made applicable to cases tried under the 14th chapter of the Code; and this offence, being one in respect of which a warrant may issue, is triable under that chapter, and, consequently, I think the words in the concluding part of s. 180, "nothing contained in this section shall prevent the Magistrate from at once dismissing the complaint if in his judgment there be no sufficient ground for proceeding with it," will amply warrant the Magistrate in dismissing the case, although the accused persons were really in attendance; and it seems to me that the circumstance of the accused persons having been detained for so long a period as they were, from what I must consider the unjustifiable dilatoriness on the part of the Deputy Magistrate, furnished only an additional ground for the Magistrate acting upon the view which he had taken.

But the question remains whether the Magistrate was right in considering whether there was no case at all for the interference of the Criminal Court under s. 308.

On this point, I feel bound to say that, so far as the case has gone, I differ from the Magistrate of the District, and concur with the Sessions Judge.

Whether the evidence, when taken, would make out the charge, or make out any of the matters alleged by the complainant, is another question; but it seems to me that the complainant in his examination did clearly allege the commission of an act which amounts to an offence under the 431st section of the Penal Code. The case referred to by the Magistrate of the cutting of a *bund* in the Hooghly district, which was the subject of a civil suit, and was appealed to this Court, differs very much from this case. The *khal* in this case was alleged to be a navigable channel, used by the public for purposes of conveyance and traffic; and if any person erected a *bund* across that *khal*, so as to render it impassable, that would appear to be an act punishable under s. 431.

Then the Magistrate observes that the complainant, in the same breath spoke of the case as one cognizable under s. 308 of the Code of Criminal Procedure. It seems to me there is nothing inconsistent in that. It might very well be that the act done by the accused, if brought home to them, might be an act which would affect the public in the way of stopping up a public and navigable channel, and it might also constitute an unlawful obstruction,

or it might be a case to be dealt with under the 22nd chapter of the Criminal Procedure Code. S. 320 declares that, "if a dispute arise concerning the right of use of any land or water, the Magistrate or other officer as aforesaid, within whose jurisdiction the subject of the dispute lies, may enquire into the matter; and if it shall appear to him that the subject of dispute is open to the use of the public or of any person or any class of persons, the Magistrate or other officer may order that possession thereof shall not be taken or retained by any party to the exclusion of the public, or of such person, or of such class of persons, as the case may be, until the party claiming such possession shall obtain the decision of a competent Court adjudging him to be entitled to such exclusive possession."

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It might be that the accused persons by putting up this *bund* were asserting a right to the exclusive use of this water, and preventing the public or the complainant from having lawful enjoyment thereof; but whether the case come under the 308th section or the 22nd chapter of the Code of Criminal Procedure, that would not justify the Magistrate from refusing to enquire into the charge under s. 431 of the Penal Code.

I think, therefore, that we must set aside the order of the Magistrate of the District, and direct that the case be enquired into, the evidence of the complainant's witnesses taken, and an order passed according to law.

— ♦ —  
*Before Mr. Justice Kemp and Mr. Justice Glover.*

QUEEN v. GURU CHARAN CHANG AND OTHERS, PRISONERS  
(APPELLANTS).\*

1870.  
Nov. 19.  
6 B. L. R.  
App. 9.  
[14 W. R. 69.]

*Rioting—Culpable Homicide—Penal Code (Act XLV. of 1860), ss. 148 and 304*

The prisoners, who, in resisting a sudden attack made upon them by certain persons for the purpose of cutting their crop, and when they had no time to complain to the police, inflicted a wound on one of them with a bamboo, from the effects of which the man died, were convicted by the Sessions Judge, under ss. 148 and 304 of the Indian Penal Code.

The High Court acquitted the prisoners, holding that the force used, or the injuries inflicted, were not such as to exceed their right of private defence of property.

Baboo *Girija Sankar Muzumdar* and *Debender Chandra Ghose* for the prisoners.

Baboo *Jagadanand Mookerjee* for the Crown.

KEMP, J.—This is an appeal on behalf of Guru Charan and others, who have been convicted under ss. 148 and 304 of the Indian Penal Code, and been sentenced to three years' rigorous imprisonment under each of these sections, or in all to six years' rigorous imprisonment. It is very clear, from the evidence of the prosecution, that the land in dispute belonged to Guru Charan; that he had sown a crop upon it in Falgun; that the opposite party came in force, and proceeded to cut the crop; and on Guru Charan and the other prisoners, who were residents of the same village, remonstrating and protesting against the cutting of the crop, the head man of the opposite party di-

\* Criminal Appeal, No. 698 of 1870, from an order of the Sessions Judge of Dacca, dated the 13th August 1870.

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rected the lattials on his side to beat Guru Charan. Guru Charan and his party, exercising the right of private defence of property, appeared to have hastily armed themselves with sticks and bamboos taken from *machans*, and to have opposed the cutting of the crops; and in the riot which took place, two men, Massin and Haranulla, on the side of the aggressing party, were wounded. It appears that Massim had a wound in the leg which mortified; and an amputation being found to be necessary, the limb was amputated, and the patient was going on well for some time, when lock-jaw set in, and he died. We think that, looking to the fact which is supported by the evidence of all the witnesses for the prosecution, that the crop was raised by Guru Charan; that the attack on the part of the opposite party was a sudden one; that Guru Charan had no time to have recourse to the police or to the authorities for protection of his property; that he, Guru Charan, acting under the right of private defence of property, was justified in resisting a forcible attempt to cut and carry away his crop; and that, in carrying out that right of private defence, and in the riot which ensued, a man on the side of the opposite party was wounded, and subsequently died, as stated above, from the effects of lock-jaw. Taking all these circumstances into consideration, and with reference to the ruling in *The Queen v. Sachee*,\* we think that the prisoners were, at the time of the riot, in actual peaceable possession of the land in dispute; that the acts of the opposite party, in attempting to cut the crops by force, were clearly illegal; that these acts were such acts as the prisoners had a right to resist; and that, although force was used in carrying out that resistance, we do not think that that force or the injuries inflicted upon Massim were such as to exceed the right which the prisoners had, the right to exercise in defending their property.

We therefore acquit the prisoners, and direct that a warrant be issued for their immediate release.

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*Before Mr. Justice L. S. Jackson and Mr. Justice Mitter.*

1870.  
Nov. 14.

IN THE MATTER OF THE PETITION OF THE MUNICIPAL COMMISSIONERS  
FOR THE SUBURBS OF CALCUTTA.†

*Slaughter-house License—Act VII. of 1865 (B.C.), s. 7.*

6 B. L. R.  
App. 28.  
[14 W. R. 69.]

R was fined by the Deputy Magistrate for using an unlicensed slaughter-house. He subsequently gave an *ijara* or lease to A to carry on the business. R was prosecuted again for evading the law by "slaughtering cattle or allowing cattle to be slaughtered" without a license. He was fined Rs. 200 by the Deputy Magistrate. On appeal to the Sessions Judge, he was acquitted. On the motion of the Municipal Commissioners for a rule to set aside the order of the Sessions Judge, it was *held*,—

*Per JACKSON, J.*—That R, by giving a lease to B, had parted with his interest, and had ceased to have any power to allow or disallow the slaughtering of cattle. That s. 7 provides penalties only, and does not describe an offence, or relate to a conviction. It is quite another question whether the act itself is an offence irrespective of s. 7, and whether R could be dealt with as an abettor.

*Per MITTER, J. (dissenting).*—The Judge has found that the lease was given by R with the avowed object of continuing the slaughter-house, and admittedly for the express purpose of evading the law; the case therefore falls within the express words of the section, "or allows cattle to be slaughtered."

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\* 7 W. R. Cr. Rul. 112.

† Criminal Motion, Case No. 138 of 1870.

THIS was a petition presented to the High Court on behalf of the Municipal Commissioners for the Suburbs of Calcutta. The petition stated that one Sheikh Rahamatulla, having been convicted by the Deputy Magistrate of Sealdah for using a place at Narkuldanga as a slaughter-house, without a license from the Suburban Municipality, was sentenced to pay a fine of Rs. 5, which sentence was finally upheld by the High Court on the 28th May 1870.

That the said Sheikh Rahamatulla, after the order of the High Court upholding the sentence of the Deputy Magistrate was passed, apparently closed the slaughter-house, but soon after gave an ijara of the same to one Sheikh Abbas Ali, under a kabuliat expressly authorizing him to continue the slaughter.

That Abbas Ali, notwithstanding that he was warned by the Commissioners from using the house without a license, re-opened his business on the 23rd July 1870.

That upon this the petitioners complained to the Deputy Magistrate against both Sheikh Rahamatulla and Sheikh Abbas Ali, and the Deputy Magistrate, finding that Rahamatulla was the prime mover and the real owner, and Abbas only a creature of his, fined the said Rahamatulla Rs. 200.

That the said Sheikh Rahamatulla appealed against the decision to the Sessions Judge of the 24-Pergunnas, who, upon such appeal, remitted the fine under the following judgment:—

"This case is nearly identical with that of Amanat Ali, appeal No. 251, which I decided on the 29th ultimo. In both cases the proprietors of old-established slaughter-houses, having leased them to other parties, who have slaughtered cattle in them, have been convicted of using the houses as slaughter-houses. It is sufficiently clear on the evidence that Rahamatulla, being afraid to incur further liability to penalties under the Slaughter-house Act, has evaded the law by making it over to another person, who undertook to continue the use of the slaughter-house. The fact of the lease and the conditions of the lease show that he divested himself of the power of using the house. I am of opinion, as I have already said, that the law making the use of a house punishable will not apply to the case of one who lets out a house on hire to another person in order that it may be used. I reverse the finding and the sentence of the Deputy Magistrate, and direct the refund of the fine.

"I observe that the record contains no specific charge, and that there is no specific finding of the offence committed."

Baboo Anukul Chandra Mookerjee appeared in support of the petition, and submitted that, upon the Judge's own finding, *viz.*, that Rahamatulla tried to evade the law by making over the management of the house to a creature of his, and that he was the prime mover in the transaction, the Judge ought to have confirmed the sentence of the Deputy Magistrate. He asked for a rule *nisi* requiring the other side to show cause why the order of the Sessions Judge should not be set aside, and that of the Deputy Magistrate restored.

MITTER, J.—I am of opinion that the record of this case ought to be sent for, and that the defendant Rahamatulla should be called upon to show cause why the Judge should not be directed to re-try this case.

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TION OF  
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It is not disputed that the defendant Rahamatulla is the owner of the slaughter-house in question ; nor is it disputed that at the time when Rahamatulla gave a lease of that house to Abbas Ali, the license to use it as a slaughter-house had been revoked by the Municipal Commissioners under the provisions of Act VII. of 1865 of the Bengal Council.

If, then, the Judge has found, as I think he has, that the lease was given by Rahamatulla for a consideration reserved with the avowed object of enabling the lessee to use the house as a slaughter-house, he, Rahamatulla, was clearly guilty of the offence described in the 7th section of the Act.

It is quite clear that the defendant Rahamatulla had the control of the house at the time when he gave the lease to Abbas Ali ; and it is admitted that that lease was given for the express purpose of evading the provisions of the law. This being so, I think the case falls within the express words of the section "or allows cattle to be slaughtered in the slaughter-house to which such license relates," and the defendant Rahamatulla ought to have been therefore convicted under the provisions of that section.

JACKSON, J.—I am very sorry to be unable to concur with my learned colleague in this matter, because I understand the Judge to have quite clearly come to the conclusion that the defendant Rahamatulla, by giving the premises in lease to Abbas Ali, has parted with his interest in the slaughter-house, and has ceased to have any power to allow or disallow the slaughtering of cattle on those premises. That being so, I think it cannot be said that, under the terms of s. 7 of the Act cited, Rahamatulla has slaughtered cattle or allowed cattle to be slaughtered in that slaughter-house. I understand the Judge to mean that if Rahamatulla, by giving a lease of the premises with the intention that cattle should be slaughtered therein, and also reserving to himself a profit upon the premises to be so used, could be made liable under the section, then he had brought himself within its terms. I concur with the Judge in both these views.

S. 7 is a section for the levying of penalties ; it does not describe an offence, nor does it relate to the conviction for an offence ; and so far as that section merely is concerned, a person who was willing to pay the penalties provided by the section, and whose business was sufficiently profitable to enable him to do so, might probably continue the business of slaughtering cattle upon his premises, subject only to the payment of the penalties. It is quite another question, whether, if the act of slaughtering cattle or allowing cattle to be slaughtered in an unlicensed slaughter-house, or a slaughter-house of which the license has been revoked or suspended, is in itself an offence irrespective of the penalties provided in s. 7, and whether the person who lets those premises for the purpose of being employed as a slaughter-house is liable to be dealt with as an abettor.

The only question in this case is, whether Rahamatulla was liable to the penalties under that section. The Deputy Magistrate, it is true, has found that Rahamatulla, in fact, had an interest in the slaughter-house, that the lease was a merely colourable and ostensible transaction, and that, although the name of Abbas Ali had been used, Rahamatulla was the proprietor ; but it is quite manifest from the words used by the Judge that he was not of the same opinion, but that, so far as this section is concerned, he thought that Rahamatulla had protected himself from liability to penalty, and had, in that way, evaded the law. Whether or not it may be possible to take other proceedings against Rahamatulla, is a question which we need not enter into now.

I am of opinion that the Judge meant to find that Rahamatulla was not, within the terms of that Act, a person who slaughtered cattle or allowed cattle to be slaughtered on his premises, and consequently was not liable to the penalty, and therefore I think there is no ground for interfering in this case.

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App. 28.  
[14 W. R. 67.]

Before Mr. Justice L. S. Jackson and Mr. Justice Glover.

QUEEN v. NOURJAN AND JAGGAT TARA.\*

Penal Code (Act XLV. of 1860), ss. 372, 373—Disposing of Minor for Prostitution—Obtaining Possession of Minor for Prostitution.

S, a married Mahomedan girl under 16, while living with N, her grandmother, and, in the absence of her husband, formed an adulterous intrigue with two Hindus, with the knowledge of N; S and N were then induced by the Hindus to remove to another village that S might take up the trade of prostitute: they there met J, a public woman, with whom they went to reside, and who introduced visitors to S, and received the money paid by them, in exchange for the board and food supplied to S and N. N was convicted, under s. 372, Indian Penal Code, of disposing of a minor for the purpose of prostitution, and J was convicted, under s. 373, Indian Penal Code, of obtaining possession of a minor for the purpose of prostitution.

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July 30.

6 B. L. R.  
App. 34.  
[14 W. R. 39.]

Held per JACKSON, J.—That, on the facts proved, no offence was committed under the Penal Code.

Per GLOVER, J.—N and J were both guilty under ss. 372 and 373 respectively, and their appeals should be dismissed.

GLOVER, J.—These prisoners have been convicted under ss. 372 and 373 of the Penal Code—Nourjan, of having disposed of a minor for the purpose of prostitution, and Jaggat Tara, of obtaining possession of the girl for the purpose of prostitution and of letting her for hire for the same purpose.

The girl, Shonaban, is a daughter of the adopted son of the prisoner, Nourjan, and is married. She does not appear to have lived much with her husband, the witness Rahim Khan, but to have remained in her grandmother's house. Whilst there, and whilst her husband was employed in another part of the district, she formed an intrigue with two Hindus, and she did this with the knowledge of her grandmother. These two Hindus, not liking to be talked about as the lovers of a Mahomedan girl, induced the grandmother to remove Shonaban to another village, and to set her going as a prostitute there, which being done, the two Hindus proposed to continue their intimacy with the girl. Nourjan, accordingly, took the girl to Bhanderea, where they met the prisoner, Jaggat Tara, a prostitute of the place, and put up with her. During the time Shonaban lived in Jaggat Tara's house, she was made to receive visitors, and the proceeds were taken by Jaggat Tara. After a week of this life, both prisoners took the girl to the police-station for the purpose of having her registered as a public prostitute.

I consider these facts clearly proved by the evidence, and that they are sufficient for conviction under ss. 372 and 373, Penal Code.

Nourjan, the grandmother, has been convicted under s. 372, and it appears to me that the words of the section, "otherwise disposes of," cover her case. It is proved that she left her house at Amooa, and proceeded to Bhanderea for

\* Criminal Appeal, No. 401 of 1870, from the order passed by the Sessions Judge of Backergunge, dated the 11th May 1870.

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the express purpose of making her granddaughter a prostitute; that she afterwards went and lived with the girl at the house of a professional public woman, and allowed her granddaughter to follow the ways of the house and receive visitors. It appears to me that she did all this in furtherance of her original intention, and that, when she thought her granddaughter sufficiently initiated into her new trade, she, in company with Jaggat Tara, took the girl to the thanna to have her name entered on the list of public women. Nourjan appears to me to have taken an active part throughout in this most shameful business; and it was by her own individual act that the girl went to Jaggat Tara's, and lived there as a prostitute. I think she was properly convicted.

Jaggat Tara has been convicted under both ss. 372 and 373. If the evidence be credible, and I have already said that I think it is, both these offences are brought home to this prisoner. She certainly obtained possession of the girl Shonaban, and that too for the purpose of prostitution, even if she did not actually hire the girl of her grandmother; and, having so obtained her, it is clear that she made money by the transaction, and received from the girl's visitors the hire of the girl's person.

I would reject the appeals of both prisoners.

JACKSON, J.—In this case I have the misfortune to differ from Mr. Justice Glover; the question in which we differ being a point of law, that is to say, whether the facts established by the evidence are sufficient to support the conviction under the 372nd and 373rd sections of the Indian Penal Code.

I think we may most safely take the facts of the case from the evidence of the girl Shona. This girl is the daughter of an adopted son of the prisoner Nourjan. She appears to be under the age of 16, but has been for some years married to a Mahomedan named Rahim. She has occasionally resided with her husband for short periods, and the marriage appears to have been consummated, but she generally lives with her grandmother; and, while she so lived, it seemed that she formed an adulterous intrigue with two Hindus.

These persons appear to have considered that scandal would arise if it became known that they visited a Mahomedan married girl for the purpose of illicit intercourse, and they persuaded the girl and her grandmother that it would be advisable that the girl should take up the trade of a prostitute, and that, if she did so, they could visit her without disgrace or inconvenient consequences. Thereupon, the girl herself and her grandmother proceeded to a village at some distance, where they went to the Kutcheri of the zemindar. There they met the other prisoner, Jaggat Tara. An arrangement was arrived at between them, under which the girl and her grandmother took up their abode for some days at the house of Jaggat Tara; that the girl assumed the dress and appearance of a courtesan, and received visitors on the introduction of Jaggat Tara, who received the money paid by these men for the girl's favours, and by whom the girl and her grandmother were fed. At the end of a few days, she proposed to take the girl to the nearest thanna for the purpose of registration as a prostitute, and there enquiry was made by the police-officers, who sent for the girl's husband, and made her over to his charge.

On these facts, the grandmother has been convicted under the 372nd section of disposing of a minor for the purpose of prostitution, and sentenced to three years' rigorous imprisonment; and Jaggat Tara has been convicted under the 373rd section, of obtaining possession of a minor for the purpose of prostitu-

tion, on which charge she has been sentenced to two years' rigorous imprisonment, and also under s. 372, of letting for hire a minor for the purpose of prostitution; on which charge she has been sentenced to further imprisonment for one year.

As to the case of Nourjan, it seems to me clear that she has not disposed of the person of her granddaughter. The girl appears to have acted entirely as a free agent upon the persuasion of the two Hindu men I have mentioned; of her own choice, primarily for the purpose of the more conveniently carrying on the intrigue with them, but ultimately for her own ends, she leaves her home, and goes to reside in another village. The conduct of the grandmother in consenting to conniving at, and in some degree profiting by, this arrangement, is morally, no doubt, infamous, but it does not, so far as I can see, amount either to the offence of which she has been convicted, or to any other offence under the Penal Code.

As to Jaggat Tara, in like manner, it seems to me that neither of the two offences of which she has been convicted is made out. She has not, I think, obtained possession of any minor, because, as I have stated, she met the girl; the girl accompanied her to her house, and acted entirely as a free agent. She certainly had not let her out for hire. That which she did, was to receive the sums of money paid by the girl's visitors, apparently in exchange for the board and lodging which she gave. That which s. 372 contemplates, is the selling, letting to hire, or otherwise disposing of any minor with intent that such minor should be employed as stated, that is to say, making over to a person either in perpetuity, or for a term, for a consideration, or otherwise transferring the possession of a minor. Nothing of the sort has taken place here. That which did happen is, I believe, a common arrangement enough; that is to say, that prostitutes, the younger women, live with a brothel-keeper, and receive such visitors as she introduces, are fed and clothed by her, and allow her to receive the wages of their shame.

I think, therefore, that the conviction of the prisoners has been erroneous, and that the sentence which has been passed on them must be reversed.

*Before Mr. Justice Phear and Mr. Justice Miller.*

IN THE MATTER OF THE PETITION OF RAJNARAIN SEIN.\*

*Penal Code (Act XLV. of 1860), s. 499—Defamation.*

The accused, an inspector of police, was sent to enquire if it was true that one Brojonath was a leader of dacoits. He reported that it was false, and that the Banias of the village were trying to get him punished from an ill-feeling. He added: "I learnt from private enquiries that there is scarcely a woman in the houses of the Banias who has not passed a night or two with the defendant Brojonath." Commitment of the accused for trial for defamation under s. 499 of the Penal Code supported under the circumstances of the case.

Mr. *M. L. Sandel* for the petitioner.

*Baboo Ausholosh Dhur, contra.*

The accused, an inspector of police, was sent to enquire whether it was true that one Brojonath Saha was a leader of dacoits. He reported that it was false. He says in his report: "There are in the village of Juggutbullubhpore

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July 23.

6 B. L. R.

App. 42.

[14 W. R. 22.]

\* Miscellaneous Criminal Case, No. 75 of 1870, from an order made by the Sessions Judge of Hooghly, dated the 6th June 1870.



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a great number of Banias, who are inhabitants of the village, and are wealthy men; also there are Sha Baboos, who are wealthier than the Banias. For a long time past law-suits are going on between the two parties; but as Brojonath is a rich and influential man, he gained almost all the cases, and now the Banias are trying to get him punished some way or other. Especially the moral character of Brojonath has been the main cause of this petition. I learnt from private inquiries that there is scarcely a woman in the houses of the Banias who has not passed a night or two with the defendant Brojonath. So some of the Banias are trying to beat him down, although they cannot give out the character of their own females, and have therefore given such a form to the petition as to make out a case cognizable by the police."

Deejobur Pal complained to the Magistrate on behalf of two of the females of the village of Juggutbullubhpore of the Bania cast. The Magistrate dismissed the case.

The Sessions Judge of the 24-Pergunnahs, on the petition of the complainants, remarked that the imputation was calculated to do harm to the Bania females of Juggutbullubhpore as a collection of females; that, according to the case of *Staly v. Ramnarain Bose*,\* it lay on the speaker to prove that he made the statement with due care and attention; that the statement was, on the face of it, made without due care and attention; that it was not for the public good to make such a sweeping imputation; and that it was sufficient, as far as the public advantage of defeating a false charge, that the existence of intrigues with certain females, not further described, or with any particular females of whom the inspector could make the statement with certainty, should be alleged. He therefore directed the Magistrate to commit the prisoner to the Sessions for trial for defamation under s. 499 of the Indian Penal Code.

The prisoner then petitioned the High Court to have the order of commitment set aside.

The judgment of the High Court was delivered by

PHEAR, J.—If there were no other grounds wherewith to support a commitment than those which have been set forth by the Judge, we should think it exceedingly difficult to say that a commitment would be a good exercise of the discretion which the Legislature has reposed in the Sessions Court under s. 435, Criminal Procedure Code. For if we look at the report which is said to be defamatory, it certainly has been made by an officer in execution of his duty; in truth, made directly as a result of an order from his superior; and, notwithstanding that the accusations or imputations against the Bania women are sweeping, it does not, as I think, appear from the document itself that they were made recklessly or unjustifiably; so that, if there were no further evidence appearing in the case of the prosecution than the document itself, I think the accused would be covered by the 9th exception to s. 499 of the Indian Penal Code. He would appear to be almost precisely the subject of illustration *b* to that section. But we have had some other portion of the evidence read to us, to which the Judge made no reference; and from that it certainly does seem to us that there are materials on which the accused may well enough be sent to trial on the charge for which the Sessions Judge commits him.

We cannot therefore interfere with his commitment, and we accordingly reject this petition.

\* 4 W. R., Cr., 22.

*Before Mr. Justice Loch and Justice Sir C. P. Hobhouse, Bart.*

1870.  
Sept. 10.

**THE QUEEN v. RAMJAI MAZUMDAR.\***

*Private Prosecutor—Counsel—Pleader—Criminal Procedure Code  
(Act XXV. of 1861), ss. 419, 434.*

6 B. L. R.  
App. 46.  
[14 W. R. 51.]

Private prosecutor not allowed to appear on a reference to the High Court under s. 434 of the Criminal Procedure Code.†

RAMJAI MAZUMDAR was charged with having dishonestly misappropriated Rs. 2,887-8, being the property of his employer, Rani Saratsundari. The Deputy Magistrate, on the 19th July 1870, discharged the accused under s. 225 of the Code of Criminal Procedure; but, by mistake, a printed charge-sheet was filed with the record. On appeal by the complainant, the Officiating Judge, finding the charge-sheet bearing the signature and seal of the Deputy Magistrate, and dated 18th July 1870, declared that the order of the Deputy Magistrate discharging the accused was passed without jurisdiction, and therefore void, and accordingly directed the Magistrate to instruct the Deputy Magistrate to complete the commitment proceedings, and to forward the record for trial at the next ensuing Sessions. On the explanation by the Deputy Magistrate that the charge-sheet had been drawn up, signed, and filed under mistake, the Sessions Judge of Rajshahi referred the case to the High Court for an order that the order of the Deputy Magistrate, dated 18th July 1870, and the order of the Officiating Sessions Judge, directing the Deputy Magistrate to commit the accused to the Sessions Court for trial, be quashed.

*Baboo Mohini Mohan Roy* for the accused.

*Baboo Mahendra Lall Shome*, for Rani Saratsundari's sirkar, sought to address the Court; but being stopped on the ground that the private prosecutor had no right under the law to appear by counsel, and be heard in support of the prosecution, he contended that, on general principles, and under the 419th section of the Code of Criminal Procedure, his client had a right to be represented. He contended that the word "plaintiff" in that section was not to be read "appellant." The Rani's sirkar first set justice in motion by his complaint before the Magistrate, and it was on his motion that the Sessions Judge interfered in the matter, and therefore he had a right to support the order he had obtained. He referred to *Chandi Charan Chatterjee v. Chandra Kumar Ghose*.‡

LOCH, J.—I think in this case the private prosecutor has not a right to appear, first, because he was not a party to the rule; and, secondly, he cannot come under s. 419 of the Criminal Procedure Code; for whatever may be the interpretation put upon the word "plaintiff" in that section, and whether that word is rightly used or not in that section, it is a section which relates simply to cases of appeal, which is not the case here. In certain cases the private prosecutor might, under the provisions of s. 435, move the Court of Session, but there is nothing in that section which says that he may come up to this Court; and, looking at the circumstances of this case, it is clear that he cannot come up here and be heard. He could not appear in the Court of Session, because the

\* Reference to the High Court, under s. 434 of the Code of Criminal Procedure, by the Sessions Judge of Rajshahi, under his letter No. 430, dated the 5th September 1870.

† See *In the Matter of Chandi Charn Chatterjee v. Chandra Kumar Ghose*, 5 B. L. R. App. 70 (see p. 233, of this book).

‡ 5 B. L. R. App. 70 (see p. 233 of this book).

1870.

QUEEN  
v.RAMJAI  
MAZUMDAR,  
6 B. L. R.App. 46.  
[14 W. R. 51.]

case was one in which that Court could not interfere under the provisions of s. 435; and if he could not appear there, he cannot have a right to come up to this Court to be heard on the reference. If he be heard at all, he can be heard only by the permission of the Court.

The order of the Magistrate of the 18th July 1870, committing the petitioner to the Court of Session, must be set aside; and also the order of the Judge of the 12th August 1870, directing the Deputy Magistrate to re-commit the petitioner, must be set aside.

1870.

Nov. 21.  
6 B. L. R.App. 47.  
[14 W. R. 72.]

*Before Mr. Justice Loch and Mr. Justice Miller.*

IN THE MATTER OF THE PETITION OF H. B. FENWICK.\*

*Act VI. of 1857, s. 8—Right of Way.*

When land is taken by the Government under Act VI. of 1857, the land is absolutely vested in the Government under s. 8, free from any right of way previously enjoyed by the public over such land.

THE following reference was made to the High Court by the Sessions Judge of the 24-Pergunnas:—

"Within the boundaries of the land acquired by Government under the provisions of Act VI. of 1857, and made over to the Justices for the purposes of the water-works at Manirampur, is a spot on the river-bank known as the Karbala Ghat, to which the residents of the neighbourhood were in the habit of resorting for the purposes of bathing. It is not a masonry-built ghat; but it is said in the evidence to be the most convenient spot for bathing in the immediate neighbourhood. The fence which the Justices lately made round the land, and which extends to the river-side, excludes the public, and prevents access to the spot in question. It seems that complaints were made to the Magistrate regarding this exclusion; and that, after some proceedings (to which it is unnecessary to refer), he tried the case under the provisions of s. 320 of the Criminal Procedure Code, and by his order, dated the 27th September 1870, held that the public had always enjoyed the right of way over the land to the ghat, and that the Justices were not entitled to possession of the land to the exclusion of the public. He seems to have considered that he could not look beyond the evidence which established the previous use of the land, and that the Justices must establish in the Civil Court their right to exclude the public.

"Mr. Fenwick, it appears, under the instruction of the Justices, refused compliance with the order, and consequently, the Magistrate, by his order dated the 20th of the same month, under s. 188 of the Penal Code, sentenced him to a fine of Rs. 51. From that order he preferred an appeal to the Judge of the 24-Pergunnas, who was of opinion that the appellant was bound by law to obey the order of the Magistrate, and therefore he was properly held liable to the penalty of fine.

"On his intimating this opinion, the appellant presented a petition praying for a reference to the High Court in regard to the order passed under s. 320. The Judge accordingly referred the matter to the High Court, with a recom-

\* Reference to the High Court, under s. 434 of the Code of Criminal Procedure, by the Sessions Judge of 24-Pergunnas, under his letter No. 130, dated the 16th November 1870.

mendation that the order of the Magistrate, dated the 27th September, under s. 320 of the Code of Criminal Procedure, should be set aside as being erroneous, on the ground that the acquisition of land by the Government, under the provisions of Act VI. of 1857, divested the public of the right of way. He referred to the case of *The Collector of the 24-Pergunnas v. Nobin Chunder Ghose*\* as being a case of greater hardship. The Judge also recommended that the order of the Magistrate, imposing a fine of Rs. 51 on Mr. Fenwick, should be quashed, and the fine remitted.

Mr. *Adkin* for the petitioner.

The judgment of the High Court was delivered by

LOCH, J.—It is clear from the provisions of s. 8, Act VI. of 1857, that the title to the land is absolutely vested in the Government. That section sets forth that, “when the Collector or other officer has made an award, or directed a reference to arbitration, he may take immediate possession of the land, which shall thenceforward be vested absolutely in the Government, free from all other estates, rights, titles, and interests.”

We concur, therefore, in the view expressed by the Sessions Judge, and set aside the order passed by the Magistrate on the 27th September last under s. 320 of the Criminal Procedure Code, and also set aside the order of the 29th idem, imposing fine under s. 188 of the Indian Penal Code.

1870.

IN THE  
MATTER OF  
THE PETI-  
TION OF  
H. B.  
FENWICK,  
6 B. L. R.  
App. 47.  
[14 W. R. 72.]

Before Mr. Justice Loch and Mr. Justice Mitter.

IN THE MATTER OF THE PETITION OF SHIB PRASAD PANDA.†

*Evidence—Documents—Prisoner, Right of, on Trial.*

A prisoner applied for copies of certain documents filed in Court for the purpose of his defence. *Held*, the Magistrate had erred in refusing his application.

*Per* LOCH, J.—A prisoner is entitled to have copies of all documents for which he asks, and which he thinks necessary for his defence. And it is for the officer trying the case, whether Magistrate or Judge, to determine at the hearing whether the documents filed by the prisoner are or are not admissible as evidence.

THE petitioner was convicted by the Magistrate of Balasore, under s. 116 of the Indian Penal Code, of having offered a bribe to the Sub-Inspector of Police, Mangal Sing, and sentenced to imprisonment for a period of nine months. This finding and sentence were confirmed by the Sessions Judge of Cuttack on appeal.

The case came before the High Court under the provisions of s. 405 of the Criminal Procedure Code, and the point of law urged for the prisoner was, that the prisoner was prevented from making use of certain records or documents which were necessary for his defence, and therefore the conviction should be set aside.

It appeared that, after the prisoner's examination by the Magistrate, the case was postponed till the 5th August to enable the prisoner to produce evidence for the defence. Before that date arrived, he applied to the Magistrate for copies

1870.

Nov. 23.

6 B. L. R.

App. 59.

[14 W. R. 77.]

\* 3 W. R. 27.

† Application No. 122 of 1870, for revision of proceedings under s. 405 of the Code of Criminal Procedure.

1870.

IN THE  
MATTER OF  
THE PETI-  
TION OF  
SHIB PRASAD  
PANDA,  
6 B. L. R.  
App. 59.  
[14 W. R. 77.

of ten papers, consisting of proceedings of Court and petitions. The Magistrate, it was alleged, sent only for six of these documents; at any rate, only six were before him on the trial. Two subsequent petitions were put in on the part of the prisoner before the day of trial, praying that the other four documents might be sent for; but the Magistrate refused to comply with the prayer of the prisoner, and, after reading a petition put in by him on the 5th August as a written defence, pointing out certain reasons for concluding the charge to have been falsely got up, the Magistrate, for reasons stated in his proceeding of the 5th August, convicted the prisoner under the provisions of s. 116 of the Indian Penal Code.

The prisoner preferred an appeal, and in his petition stated that he had asked to be supplied with copies of certain documents necessary for his defence, which the Magistrate refused to grant him. The Sessions Judge called for the record, and directed the Magistrate to supply the copies required by the prisoner, adding, however, to his order that, should there be any objection to the copies being granted, the Magistrate should submit an explanation. The explanation submitted by the Magistrate was to the effect that copies of the documents were unnecessary, as they had nothing to do with the case. The Judge then disposed of the appeal, and confirmed the sentence passed by the Magistrate on the prisoner.

Mr. *Money* (with him Baboo *Taruknath Sein*) for the petitioner.

LOCH, J. (after stating the facts as above, continued):—We think the Magistrate acted contrary to law when he determined whether the documents, of which copies were required by the prisoner, were necessary or not. A prisoner is entitled to have copies of all documents for which he asks, and which he thinks necessary for his defence; and it is for the authority trying the case, whether Magistrate or Judge, to determine at the hearing whether the documents filed by a prisoner are or are not admissible as evidence. We think also that the Judge was wrong in being satisfied with the so-called explanation given by the Magistrate.

On referring to the documents, of which copies were required by the prisoner, we find that six were before the Court. These were—

1. A judgment of 21st March 1870, in which the prisoner's son had been fined on the report of the Sub-Inspector Mangal Sing for obstructing an enquiry into a case of abortion.

2, 3, and 4, were judgments of the Joint-Magistrate and Sessions Judge, dismissing charges of bribery brought against certain parties by the Sub-Inspector Mangal Sing.

5. The result of an inquiry made into the character of one Gadda Das, a notorious bad character, on the representation of the prisoner and other persons, the result of the inquiry being that Gadda Dass was bound down to good behaviour for three years.

6. A judgment dismissing a charge brought against the prisoner for theft of paddy at the instigation of the said Gadda Dass.

The four documents not before the Court were—

7. Copy of a petition sent to the Commissioner by the prisoner and others, praying for an investigation into the characters of Gadda Dass and others, and denouncing them as bad characters.

8. Copy of a petition of 24th July 1870, presented by Gadda Das to the Magistrate in this case, to the effect that the prisoner had offered the Sub-Inspector Rs. 100 to let off Berno Naik, Sonatan Utter, and Darsan Satputtya, apprehended in a case of robbery, and to have him, Gadda Dass, substituted in his stead.

9. A petition to the Magistrate against the Sub-Inspector Mangal Sing for having illegally confined the prisoner's son and gomashta in a case of abortion.

10. Deposition of Sonatan Uttar given in the charge of theft brought against the prisoner at the instigation of Gadda Dass.

The object of filing documents 1 and 9 was to show that there existed an ill-feeling between the prisoner and the Sub-Inspector Mangal Sing. Documents 2, 3, and 4, were required to show that Mangal Sing was in the habit of getting up charges of bribery against zemindars and other respectable people, and had failed. Documents 5 and 7 were to show that one Gadda Dass was a notorious robber and bad character, and that Sonatan Uttar, one of the parties arrested by the Sub-Inspector, and for whose release it was said the prisoner had offered the bribe of Rs. 100, had also been denounced by the prisoner, and that consequently it was very unlikely he would pay his own money or enter upon terms to have him released, particularly as the said Sonatan Uttar had also given evidence against him in the paddy-theft case as shown by documents 6 and 10.

Now, there can be no doubt that the prisoner has been prejudiced from the want of the documents 7 and 10, which might have been of material assistance to him in his defence. He was charged with offering a bribe to Mangal Sing, Sub-Inspector, to obtain the release of three persons then arrested on a charge of robbery, one of whom was Sonatan Uttar, and he urges in his defence the improbability of his taking such a step, when he had, with other respectable people, denounced in a petition to the Commissioner this very Sonatan as a pest to society and a follower of the notorious bad character, Gadda Dass, and who, in collusion with Gadda Das, had given false evidence against him, charging him with the theft or forcible removal of certain paddy crops; and we think this plea was deserving of the consideration of both the lower Courts. We think that it is unnecessary to return the record to the Judge for a consideration of these documents, for, after reading the evidence in the case, we think that little reliance can be placed on it, the complainant, Mangal Sing, as apparent from the copies of proceedings 2, 3, and 4, filed by the prisoner, being very much in the habit of getting up cases of bribery against respectable persons, and the judgment of the Magistrate in this case appears to be based on his general knowledge of the character of the prisoner, whom he describes as an intriguing man.

The sentence and order passed by the lower Court are set aside, and the prisoner will be released.

MITTER, J.—I am of the same opinion. I think the Magistrate was wrong in refusing to grant to the petitioner copies of the papers referred to in the petition. Three of those papers at least would have been of considerable use to the petitioner in establishing his defence, and I am therefore of opinion that he has been seriously prejudiced by the refusal of the Magistrate to grant him copies thereof. I would accordingly set aside the decisions of both the lower Courts, and direct the immediate release of the petitioner. I have gone through the whole evidence on the record, and I am clearly of opinion that it is utterly unworthy of credit.

1870.

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MATTER OF  
THE PETI-  
TION OF  
SHIB PRASAD  
PANDA,  
6 B. L. R.  
App. 59.  
[14 W. R. 77.]

1871.

*Before Justice L. S. Jackson and Mr. Justice Ainslie.*

Jan. 20.  
6 B. L. R.  
App. 65.

RAM SHAHAI CHOWDHRY *v.* SANKER BAHADUR.\*

[15 W. R. 7.]

*Evidence—Particeps Criminis—Refusal to summon Witnesses for the Defence.*

Refusal to summon witnesses cited by an accused, on the ground of their being implicated in the charge, vitiates the trial and conviction.†

THE following reference was made by the Sessions Judge of Tirhoot:—

The facts of the case are simple. The prisoners are charged with cutting a Government road, and were punished by fine under s. 431. They denied the charge, and called certain witnesses in their defence. The Deputy Magistrate did not think it necessary to summon their witnesses, as they had been named as being implicated in the cutting. As this is an error which vitiates the trial, and an application has been made to me to refer the case under s. 434, I accordingly request that the High Court will pass such order as they may think proper.

The following was the judgment of the Court:—

JACKSON, J.—We concur with the Sessions Judge in thinking that the accused persons were entitled to have the witnesses named by them for their defence examined. It does not appear that the Magistrate thought it worth while to prosecute those persons as parties to the offence, even if he had grounds for so doing; and he could not legally declare beforehand that he would not believe them on their oath. We must quash the conviction.

1871.

Feb. 4.

*Before Mr. Justice E. Jackson and Mr. Justice Mookerjee.*JAHABAX *v.* GOVERNMENT.‡

6 B. L. R.  
App. 66.

[15 W. R. 14.]

*Forfeiture of Recognizance—Recognizance to keep the Peace.*

On the application of A, a recognizance was taken from B that he would keep the peace for six months under a penalty of Rs. 500. Before the expiry of the period, B assaulted C.

*Held*, that there was a forfeiture of the recognizance.

Baboo *Ram Charan Mitter* for Jahabax.

THE facts of the case sufficiently appear in the judgment of the Court, which was delivered by

JACKSON, J.—In this case one Jahabax was called upon to give recognizances for Rs. 500 that he would not break the peace for a term of six months. It appears that, within that time, he was charged with assault. He was fined for the assault, and he was called upon to pay up the amount of the recognizances. He appealed to the Sessions Judge, and the Sessions Judge has sent the case up to this Court for revision, on the ground that the breach of

\* Reference, under s. 434 of the Code of Criminal Procedure, from the Sessions Judge of Tirhoot, under his letter No. 38, dated the 31st December 1870.

† *In the matter of the Petition of Mahima Chandra Shah*, *post*, p. 78 (see p. 335 of this book).

‡ Reference, under s. 434 of the Code of Criminal Procedure, from the Sessions Judge of Dacca, under his letter No. 20, dated the 10th January 1871.

the peace which actually occurred, and upon which the recognizances were forfeited, was a very small matter, and that the actual applicant on the occasion, when the recognizances were taken from Jaha Bax, was a different person from the person who was afterwards assaulted. The Sessions Judge thinks that the recognizances to keep the peace having been obtained by one Kadir Bax, they cannot be escheated if the defendant assaults somebody else. There is no warrant in law, however, for any such ruling. The bond is general. It is a bond to keep the peace generally, and the amount can be escheated if the peace is broken under any circumstances.

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Jaha Bux  
v.  
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MENT,  
6 B. L. R.  
App. 66.  
[15 W. R. 14.]

The Sessions Judge is also wrong in saying that this bond was only taken from the defendant in consequence of one breach of the peace against Kadir Bax. It was taken in consequence of repeated breaches of the peace, and in consequence of the notorious character of the defendant as a breaker of the peace. There is no doubt that the amount of the recognizances is somewhat heavy in comparison with the actual assault which has now been committed. But it is admitted that we have no authority to interfere on that point.

We differ from the Sessions Judge, and think that there is nothing wrong in law in the order of the Joint Magistrate. We therefore decline to interfere.

◆ ◆ ◆

*Before Mr. Justice Loch and Mr. Justice Markby.*

IN THE MATTER OF THE PETITION OF RAMJAI MAZUMDAR.\*

*Criminal Procedure Code (Act XXV. of 1861 and Act VIII. of 1869), ss. 68, 225, 404, 435—Fresh Proceedings after Discharge.*

1870.  
Nov. 24.  
6 B. L. R.  
App. 67.  
[14 W. R. 65.]

Where an accused person was discharged by a Deputy Magistrate under s. 225 of the Code of Criminal Procedure after a preliminary enquiry, the Magistrate of the district may proceed against him afresh under s. 68 of the Criminal Procedure Code.

*Per* MARKBY, J.—S. 435 (Act VIII. of 1869) provides for the revision of proceedings which have already been commenced; s. 68 (Act XXV. of 1861) provides for the institution of proceedings *de novo*.†

*Mr. Piffard* (with him Baboo Chandramadhab Ghose) for the petitioner.

*Loch, J.*—The question we are asked to determine is whether the proceedings held by the Magistrate in this matter on the 28th September 1870 were without jurisdiction. The order which he made on that date was under the provisions of s. 68 of the Code of Criminal Procedure.

The case, divested of all extraneous matter, is simply this: the party for whose arrest the Magistrate has now issued a warrant was formerly under trial before the Deputy Magistrate in charge of a sub-division of the district, and he was discharged under s. 225 of the Criminal Procedure Code. The Magistrate now, as the Magistrate of the district, has taken up the case under the provisions of s. 68 of the Criminal Procedure Code, and has ordered his arrest, considering that, from his own knowledge, the party has committed an offence triable under the provisions of the Indian Penal Code.

\* Criminal motion case, No 137 of 1870.

† See *In re Jagabandhu Myti v. Gobardhan Bera*, 4 B. L. R. A. Cr. 1 (see p. 153 of this book).



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TION OF  
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[14 W. R. 65.]

It is urged that the Magistrate has no jurisdiction to act according to that section; that the Deputy Magistrate who tried the case and discharged the petitioner could alone act in this case, and therefore the proceedings of the Magistrate should be set aside.

The application to this Court is made under the provisions of s. 404 of the Criminal Procedure Code, in order that the order passed by the Magistrate may be quashed. It has also been pointed out to us that the Magistrate might have proceeded under the provisions of s. 435 of the Criminal Procedure Code, but that section is not applicable, because in this case the Subordinate Magistrate had made an enquiry, and was not satisfied with the result of that enquiry; whereas that section gives authority to the Magistrate to interfere only when an accused person is discharged, or the complaint is dismissed without enquiry. When the Magistrate of the district passed this order, there was no complaint before him, and, as he states in his proceedings, he acted upon his own knowledge. The mere fact that there had been a proceeding held before a Deputy Magistrate previously, under which the petitioner had been discharged, does not, in my opinion, prevent the Magistrate of the district from taking up this case under the provisions of s. 68.

I think, therefore, that the present application must be rejected.

MARKBY, J.—I also think that we cannot grant the application. The order complained against is legal. The history of the case is certainly involved in some confusion; but I entirely agree with Mr. Justice Loch that we ought to treat this case as he has treated it in his judgment—that is to say, as simply one in which a complaint had been made before a Magistrate in charge of a subdivision, and that complaint was dismissed; then, subsequent to that, the Magistrate of the district resolved to take up the case under s. 68, no person at that time appearing to prosecute; and the question we have to decide is whether that course could lawfully be taken.

Now, the first objection which Mr. Piffard advanced in this case was a very broad one; it was that the powers conferred by s. 68 can only be exercised in cases where there has been no complaint by any person before a Magistrate. But I think that that objection is disposed of by the decision upon which I rely for my judgment in this case—*The Queen v. Tilkoo Goala*.<sup>\*</sup> It was there held that the discharge of a person accused of an offence triable by a Court of Session was no bar to his being apprehended and brought before a Magistrate under s. 68 with a view to commitment; and I think that that case proceeds upon a right principle—namely, that the mere discharge of a person upon a preliminary inquiry before a Magistrate in no way affects the legality of fresh proceedings against him, whether those proceedings be taken at the instance of a private prosecutor, or under s. 68 at the instance of the Magistrate himself.

It was then argued that, at any rate, the Magistrate of the district could not proceed under s. 68 in any case in which the more special provisions of s. 435 for revising cases on which a discharge has been given by an inferior Magistrate apply. It seems to me that the same argument was used in the case to which I have referred; and I entirely concur in the opinion which was there expressed by Mr. Justice Jackson, that the powers given by s. 435, and the powers given by s. 68, are distinct and independent powers. Therefore it seems to me in this case quite unnecessary to enquire into the question whether or not

<sup>\*</sup> 8 W. R., Cr., 61.

this is a case to which the provisions of s. 435 apply. Whether they do apply, or whether they do not, I think the power under s. 68 remains the same; s. 435 provides for the revision of proceedings which have already been commenced; s. 68 provides for the institution of proceedings *de novo*.

I think it has not been shown to us that the Magistrate's proceedings were illegal; that is the only point which we have to consider; I think, therefore, that we should not set them aside.

*Before Mr. Justice E. Jackson and Mr. Justice Mookerjee.*

IN THE MATTER OF THE PETITION OF MAHIMA CHANDRA SHAH.\*

*Evidence—Summoning of Witnesses for the Defence—Criminal Procedure Code (Act XXV. of 1861), s. 253.*

It is the Magistrate's duty to summon witnesses for the accused who can speak to the facts of the case, and he ought not to determine beforehand what credit he will give to their evidence.†

Mr. Montrieu (with him Baboos Srinath Das and Kalidas Bhunf) for the petitioner.

JACKSON, J.—This is an application, on behalf of one Mahima Chandra Shah, who was tried by Baboo Purna Chandra Ghose, the Deputy Magistrate of Dacca, and convicted, on the 14th December 1870, under s. 342 of the Indian Penal Code, and also under s. 384 of that Code, and who has been sentenced to imprisonment and fine. The charge against him was, wrongfully confining the complainant and committing extortion.

It is said that a number of the dependants of the applicant, Mahima Chandra Shah, and of his relation, Sita Nath Shah, went to the house of the complainants, and forcibly seized them and carried them off to the house of the said Sita Nath Shah and Mahima Chandra Shah, and there confined them, and extorted from them the sum of Rs. 110.

The Deputy Magistrate, who tried this case, states that the witnesses for the prosecution were examined before him on the 9th and the 10th of December, and a portion on the 12th; and that, when the case was about to close, an application was made to him, on behalf of Mahima Chandra Shah, that two witnesses, who were considered by him to be important for the defence, should be summoned and examined. These two witnesses were, one a man of the name of Kalikinkar, who had been said by the case for the prosecution to be a dependant in some way of some of the defendants, but who was stated to have been a person who interceded on behalf of the complainants, and who lent them the money which was paid to the defendants, and which formed the subject of the charge of extortion. The other witness was one Rai Charn Chowkidar, who was also mentioned by the witnesses for the prosecution and the complainants as having seen them being dragged to the *kutcherry* of the defendants. The Deputy Magistrate was of opinion that Kalikinkar's evidence was not material, because he

\* Criminal Miscellaneous Case, No. 4 of 1870, against the order of the Sessions Judge of Dacca, dated the 29th December 1870, confirming the sentence passed by the Deputy Magistrate on the 14th December 1870.

† See *Ram Shahai Chowdhry v. Sanker Bahadur*, ante, p. 65 (see p. 332 of this book).

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Feb. 4.  
6 B. L. R.  
App. 78.  
[15 W. R. 15.]

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 MATTER OF  
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 MAHIMA  
 CHANDRA  
 SHAH,  
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 App. 78.

was not said to have been actually present when the money was paid. And as regards Rai Charn Chowkidar, the Deputy Magistrate states that he would not believe his denial, even if he gave evidence that he had not seen what the witnesses for the prosecution stated had occurred.

There was an appeal subsequently from the order of the Deputy Magistrate to the Judge; and the Judge also, in passing orders in the case, stated that, in his opinion, it was not necessary to call these witnesses, because, as far as he could see from the case before him, even if they did give evidence for the defence, he would not believe them. The application to us has reference more especially to these applications to the lower Courts to examine these two witnesses for the defence.

The law as regards the summoning of the witnesses for the defendant in a case of this description is to be found in Chapter XIV., s. 253, Criminal Procedure Code. It is as follows: "The Magistrate shall summon any witness and examine any evidence that may be offered in behalf of the accused person to answer or disprove the evidence against him, and may, for this purpose, at his discretion, adjourn the trial from time to time, as may be necessary." The first question then for the Magistrate to consider was, whether these witnesses were, upon the facts stated for the prosecution important witnesses upon the trial, and such as the defendant was entitled to have summoned and their evidence taken in order to disprove the evidence offered against him. There can be no doubt upon the evidence for the prosecution, that these witnesses were, if the story for the prosecution is true, eye-witnesses of the offence which was alleged against the defendant. It is impossible to state beforehand what credit will be given to the evidence of the witnesses. We think, therefore, that under the law the Magistrate was bound to summon these two witnesses for the defence, and to have them examined. He has a discretion to adjourn the trial from time to time as may be necessary for the summoning of such witnesses. But if those witnesses are really witnesses who can speak in any way to the facts of the case, and who may be material for the defence, the Magistrate should exercise that discretion, and should summon them.

The Sessions Judge was also, we think, wrong in law in rejecting the application of the defendant that these two witnesses should be examined. The Appellate Court has power, under the law, to order that further evidence shall be taken if it is necessary. And we think that our proper course in this case is to order the Appellate Court to send down directions to the Magistrate to have the evidence of these two witnesses taken in the presence of the defendant, and to have their evidence sent up to the Appellate Court; and that the Appellate Court, after considering that evidence, as well as all the rest of the evidence in the case, will record a fresh judgment and decision as regards the defendant Mahima Chandra Shah.

I may add that, although in this case there has been already a conviction, and to some extent an opinion given by the Judge that he would not believe the evidence of these two witnesses whatever they may say, I have no doubt whatever that the Sessions Judge will, notwithstanding, give a full and fair consideration to whatever evidence may be given by these witnesses; and, after taking their evidence into proper consideration, will pass fresh orders upon the appeal of the defendant.

As regards the remaining defendants, although no application has been made before us, the learned Counsel for the defendant, Mahima Chandra Shah, has pressed upon the Court that the further trial, as regards them, should also

be allowed before the Appellate Court ; we think it is not necessary at present to pass any order as regards them. Should the result of this further trial before the Appellate Court be that Mahima Chandra Shah is held to be guiltless, it may possibly be that that may have some effect upon the case as against the other defendants. If so, their case can be taken into consideration when any application is made on their behalf. But it by no means follows that, even if Mahima Chandra Shah is guiltless, all the other defendants are innocent.

Mahima Chandra Shah will remain upon the bail which has been already ordered, until the Appellate Court has decided the case as regards him.

1871.  
IN THE  
MATTER OF  
THE PETI-  
TION OF  
MAHIMA  
CHANDRA  
SHAH,  
6 B. L. R.  
App. 78.

Before Mr. Justice Norman, Offg. Chief Justice, and Mr. Justice Loch.

IN THE MATTER OF THE PETITION OF PRANKRISHNA CHANDRA  
AND ANOTHER.\*

1870.  
Jan. 21.

*Penal Code (Act XLV. of 1860), ss. 380-447—Criminal Trespass.*

Entrance of a member of a Hindu joint family into the family dwelling-house is not criminal trespass.

6 B. L. R.  
App. 80.  
[15 W. R. 6.]

The entry of a stranger into a family dwelling-house, with the permission and license of one of the members, is not criminal trespass.

On the 8th of August 1870, Prankrishna Chandra applied to the Joint-Magistrate of the 24-Pergunnas for an order that his adoptive mother, Srimati Puspamani Dasi, and his wife, Srimati Kamini Dasi, who (he alleged) had been wrongfully confined by Biswanath Chandra at the family dwelling-house at Behala, be at liberty to come out from the said dwelling-house with their personal property. Thereupon the Joint-Magistrate passed an order, directing Biswanath Chandra to allow the ladies their liberty, unless there was special authority or reason to the contrary. After the passing of the order, Prankrishna Chandra informed the sub-inspector of police that Biswanath had collected a number of lattials to commit a breach of the peace. The sub-inspector proceeded to Behala to see that the Joint-Magistrate's order was executed without a breach of the peace. Upon the arrival of the police, Prankrishna, with Jadab Chandra Haldar, entered the family dwelling-house, and came out of the zenana, accompanied by the ladies, with their personal property. On objection being made by Biswanath to the removal of the personal property, it was left there agreeably to the direction of the sub-inspector.

On the following day Biswanath Chandra preferred a charge against Prankrishna, Jadab Chandra, and Madhusudan Kurmocar, under ss. 380 and 447 of the Indian Penal Code. The Magistrate convicted them of an offence punishable under s. 448 of the Penal Code, and passed a sentence that each of the accused do pay a fine of Rs. 200. On appeal, the Sessions Judge confirmed the sentence of the Magistrate. Prankrishna and Jadab Chandra applied to the High Court for a reversal of the sentence (*inter alia*) on the following grounds:—

1. That as the complainant Biswanath and the accused Prankrishna were in joint possession of the family dwelling-house, the entry of the latter into the said dwelling-house was not criminal trespass.

\* Criminal Motion Case, No. 163 of 1870, from an order of the Sessions Judge of 24-Pergunnas, dated the 3rd December 1870.

1870.

IN THE  
MATTER OF  
THE PETI-  
TION OF  
PRAN-  
KRISHNACHANDRA,  
6 B. L. R.

App. 80.

[15 W. R. 6.]

2. That as Jadab Chandra had entered the said family dwelling-house with the permission and at the special request of the said Prankrishna, he was not legally guilty of the offence defined in s. 441 of the Indian Penal Code.

Baboos *Rames Chandra Mitter and Shyama Lal Mitter* for the petitioners.

Baboos *Ashutosh Dhur and Nilmadhab Sen contra.*

The judgment of the Court was delivered by

NORMAN, J.—This case does not appear to have been tried either by the Joint-Magistrate or the Judge on appeal with a sufficiently careful advertence to the definition of criminal trespass in s. 441. Prankrishna, being a member of the joint family, committed no trespass by entering the house, which was the joint property of himself and the complainant, Biswanath Chandra. Nor did Jadab Chandra, who entered with Prankrishna and by his license, commit the offence of trespass by merely entering the joint family-house.

Prankrishna entered the room which was ordinarily occupied by Biswanath Chandra, and that entry into Biswanath's room was, we think, rightly treated by the Joint-Magistrate as a trespass. To make it a criminal trespass, the entry must have been "with intent to commit an offence, or to intimidate, insult, or annoy" Biswanath. The Joint-Magistrate says that "there can be no doubt that this was done with the intention, as legally understood, of annoying Biswanath." We do not understand what the Magistrate means by the qualification of the term "annoying." It he means something less than annoyance, as the term is ordinarily understood, we think it is not sufficient.

It was contended for the defendants that they acted in good faith. If they did so act in good faith with intent to vindicate Prankrishna's supposed rights, or those of the ladies of his immediate family, though under a mistaken notion as to the rights of Prankrishna, they certainly cannot be said to have acted with intent to annoy Biswanath. The Joint-Magistrate seems to leave out of the question the supposition that they intended "to commit an offence," which, if anything, would, we suppose, be the offence of theft.

We notice that Jadab Chandra did not enter the room of Biswanath. If guilty at all, he can only be so as a person aiding and abetting the offence of Prankrishna.

We think that there should be a new trial of the appeal before the Judge.

*Before Mr. Justice Kemp and Mr. Justice Glover.*

IN THE MATTER OF THE PETITION OF GOLAB KHAN.

*Mooktear—Act XX. of 1865, s. 16—Charge, copy of—Magistrate, power of, to suspend Mooktear.*

Mr. S. Veriannes for the petitioner.

The judgment of the High Court was delivered by

KEMP, J.—It appears that the Officiating Magistrate of Midnapore has suspended Golab Khan, a mooktear, from practice in his Court, or in any Court

\* Appeal against the order of the Sessions Judge of Midnapore, confirming that of the Magistrate of that district, directing the petitioner, Golab Khan, to cease to practise as mooktear.

subordinate to him in that zilla. The Judge forwards the letter of the Magistrate, with the remark that he thinks the mooktear deserves to lose his sanad. Mr. Vertannes, who appears for Golab Khan, has drawn the attention of the Court to s. 16, Act XX. of 1865; and he urges that, under that section, it was necessary for the Magistrate to send a copy of the charge to his client, and also a notice that, on a day to be therein appointed, such charge would be taken into consideration.

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MATTER OF  
THE PETI-  
TION OF  
GOLAB KHAN,  
6 R. L. R.  
App. 83.

[16 W. R. 15.]

It appears from the record that the only notice Golab Khan received was one dated the 16th November 1870, in which he is directed to show cause why he ought not to be suspended from practising as a mooktear. No charge was set out in this notice, and therefore the requirements of s. 16 have not been complied with. We, therefore, direct that the Magistrate will proceed according to law, and send a copy of any charge he may wish to make, or that may be made against the mooktear, to the mooktear, and also a notice fixing the day on which such charge will be taken into consideration. The day appointed should be within a reasonable time, so as to give the mooktear an opportunity to prepare his defence. In the meantime, pending the investigation, Golab Khan will remain under suspension.

*Before Mr. Justice Bayley and Mr. Justice Miller.*

IN THE MATTER OF THE PETITION OF C. G. D. BETTS AND MAHOMED

ISMAIL CHOWDRI.\*

*Evidence—Records—Conviction quashed.*

1871.

Jan. 21.

6 B. L. R.  
App. 83.

[15 W. R. 6.]

The prisoners were convicted, under s. 154 of the Indian Penal Code, upon evidence taken in another case to which the prisoners were not parties. The conviction was set aside.

*Mr. R. T. Allen and Baboo Mahim Mohan Roy for the petitioners.*

*Baboo Juggadnanand Mookerjee for the Crown.*

The judgment of the Court was delivered by

BAYLEY, J.—It is clear (and the Government Advocate does not contend that it is otherwise) that the conviction in these two cases has been had on the evidence taken in the original riot case, in which these petitioners were not before the Court; at any rate, they were neither convicted nor acquitted in that case.

Now, a charge under s. 154 of the Indian Penal Code ought to be a clear and distinct charge of the offence specified in that section. After such charge, the prisoner should be called on to plead, and, if his plea is 'not guilty,' then legal evidence for the prosecution should be gone into. The records of another case would not of themselves be legal evidence for the conviction. This separate evidence, in support of the charge under s. 154, being given, and a *prima facie* case being made out for the prosecution, the prisoner must then be allowed opportunity to rebut that evidence; after which, judgment should be passed. In this case, however, no such procedure has been observed, and there is no

\* Revision of Proceedings, under s. 404 of the Code of Criminal Procedure, in the Criminal Motion Cases, Nos. 147 and 148 of 1870.

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IN THE  
MATTER OF  
THE PETI-  
TION OF  
C. G. D.  
BETTS,  
6 B. L. R.  
App. 83.  
  
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Feb. 11.  
6 B. L. R.  
App. 86.  
15 W. R. 17.]

evidence to support the charge, except the reference to the records of the riot case, and the presumptions arising therefrom.

The proceedings of the lower Courts are set aside, and the fines ordered to be refunded.

—→←—  
*Before Mr. Justice Mitter and Mr. Justice Ainslie.*

THE QUEEN *v.* KALI CHARAN DAS AND OTHERS (APPELLANTS).  
*Penal Code (Act XLV. of 1860), s. 304—Culpable Homicide not amounting to Murder—Mitigation of Sentence.*

In his charge to the jury, the Judge should draw a distinction between the two classes of culpable homicide mentioned in s. 304 of the Penal Code, and direct them to find specially under which, if either, the prisoner was guilty.

Eaboos *Mahini Mohan Roy* and *Bipradas Mookerjee* for the appellants.

The judgment of the Court was delivered by

MITTER, J.—The prisoners in this case were found guilty by a jury of culpable homicide not amounting to murder, and sentenced by the Judge to transportation for life, under the provisions of s. 304 of the Indian Penal Code. It appears, however, that the Judge, in charging the jury, did not ask them to find, specifically, whether the prisoners had done the act with the intention of causing death, or of causing such bodily injury as was likely to cause death; or whether they had done it simply with knowledge that it was likely to cause death, but without any intention to cause death, or to cause such bodily injury as was likely to cause death. S. 304 evidently draws a distinction between these two classes of culpable homicide, for, in the one case, the offender is liable to be sentenced to transportation for life, whereas the maximum punishment that can be inflicted in the other is a sentence of rigorous imprisonment for ten years.

Under these circumstances it is quite clear that it was the duty of the Judge to point out this distinction to the jury; and as that has not been done in this case, we must take it for granted that the prisoners have been found guilty of the lighter description of culpable homicide not amounting to murder. This view is supported by a decision of this Court in *The Queen v. Amir Khan*,† and we therefore reduce the sentence passed on each and all of the prisoners to one of rigorous imprisonment for ten years. We see no reason to mitigate the sentence any further.

\* Criminal Appeal, No. 877 of 1870, against the order of the Sessions Judge of Nuddea, dated the 8th November 1870.

† *Before Mr. Justice E. Jackson and Mr. Justice Mitter.*

THE QUEEN *v.* AMIR KHAN AND OTHERS (APPELLANTS).(a)  
*The 22nd July 1869.*

[12 W. R. 35.]

Baboo *Rasbehari Ghose* for Amir Khan.

JACKSON, J.—It has not been shown that there was any misdirection to the jury on any point of law which could in any way vitiate the proceedings of this trial.

The pleader for the appellant, Amir Khan, urges several points, which, he says, amount to a misdirection; but he has not satisfied us that there has been any error in law in the course of the summing up by the Judge to the jury.

The jury found the prisoner, Amir Khan, guilty of culpable homicide not amounting to murder under s. 304 of the Indian Penal Code; and the Judge has sentenced this prisoner to trans-

(a) Criminal Appeal, No. 425 of 1869, from an order passed by the Sessions Judge of East Burdwan, dated the 6th May 1869.

*Before Mr. Justice Kemp and Mr. Justice Glover.*

THE QUEEN *v.* ISHAN DUTT (AND OTHERS), APPELLANTS.\*

*Evidence—Cross-examination—Witness for Defence.†*

Baboo Mahendra Lal Seal for the appellants.

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App. 88.

[15 W. R. 34.]

KEMP, J.—I think it right to remand this case to the Sessions Judge, with directions to insist upon the attendance of the witness Saudamini Naptini. It appears on the record that this woman was named before the Magistrate by the prisoners as a witness for their defence in the Sessions Court. A summons was issued; but it appears from the return to that summons that the witness Saudamini refused to accept service, and that she absconded. On this return the Magistrate passed a formal order “that it be kept with the record,” and no further steps appear to have been taken by him to enforce the attendance of this witness. At the trial before the Sessions Court the prisoners, through their pleader, demanded as a right to have this witness summoned. I think that they were entitled to do so under s. 375 of the Code of Criminal Procedure, which enacts that “an accused person shall not be entitled of right to have any other witnesses summoned than the witnesses named in the list delivered to the Magistrate by whom he was committed. Now, it is clear that in this case this witness was named in the list delivered to the Magistrate by the accused, and therefore the prisoners, as a right, were entitled to have her examined. Moreover, she appears to be a material witness, and we cannot dispose of the

portation for life. The pleader for the prisoner has referred us to s. 304, and has pointed out very correctly that the punishment laid down in that section for culpable homicide not amounting to murder differs in different cases. The sentence may be one of transportation for life or imprisonment of either description for a term which may extend to ten years, and also fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death; or imprisonment of either description for a term which may extend to ten years, or fine, or both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death. The Judge should, therefore, have called upon the jury to state which description of culpable homicide the jury considered proved against the prisoner; and as the Judge did not do so, we think it must be held that the conviction was for the lighter offence. Looking also to the circumstances of the case, it does not appear that the sentence passed is more severe than the offence warranted.

There seems to have been only one blow struck, and the blow was inflicted in a moment of passion and anger; and although there was no real provocation, there was some cause to excite the prisoner's rage. But the prisoner's conduct, after he struck down Madhab Mandal, was extremely bad. He made no attempt to raise him up, or restore him, but only thought of how he was to get rid of the body.

After finding that Madhab was dead, he, with the assistance of others, carried off the corpse, cut off the head, and threw both the head and body into a neighbouring tank.

The sentence we would pass on the prisoner is rigorous imprisonment for ten years. The Judge will see that a warrant to that effect is issued.

The two other prisoners, Nekra Dome and Narayan Dome, have also appealed, and the pleader for the prisoner, Amir Khan, was allowed to address the Court on their behalf. But we see no reason to interfere with the conviction and sentence in their case. They were chowkidars; and as they assisted the first prisoner in trying to escape from justice, they have been very properly severely punished.

Their appeal is therefore rejected.

\* Criminal Appeal, No. 48 of 1871, from an order passed by the Sessions Judge of Beerbhoom, dated the 2nd December 1870.

† See *Ramdhan Mandal v. Rajballab Paramanick*, ante App., p. 10; *Ram Sahai Chowdhry v. Sanker Bahadur*, ante, App., p. 65 (see p. 332 of this book); and *In the Matter of the Petition of Mahima Chandra Shah*, ante, App., p. 78 (see p. 335 of this book).



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[15 W. R. 34.]

case satisfactorily without her evidence being taken. The case is, therefore, remanded for the purpose of enforcing the attendance of Saudamini and taking her evidence. After taking her evidence, the Judge will call upon the prisoners for their defence, take a fresh opinion from the assessors, and pass a fresh decision.

The next point taken by the pleader for the prisoners is that the Judge is wrong in not having permitted the pleader for the prisoners to cross-examine the witness Kedarnath Mitter, Sub-Assistant Surgeon of Rampore Haut. The Judge says in his judgment "that the prisoners' pleader wished to cross-examine this witness as to the result of any conversation he might have had with his patient, but that the Court demurred to this, as the witness was only examined in chief as to his professional examination and treatment of the wounds." "Any examination," the Judge observes, "of this witness as to the facts of the case could only be carried on by the prisoners' pleader on the witness being called as a witness for the defence, and not in cross-examination of his evidence given as a medical man on behalf of the prosecution." The pleader for the prisoners, in support of his contention, has called our attention to several passages of Taylor on Evidence.\* It appears from that authority that, in America, a party has no right to cross-examine any witness except as to circumstances connected with matters stated in his direct examination; and that, if he wishes to examine him respecting other matters, he must do so by making him his own witness, and by calling him, as such, in the subsequent progress of the cause. Now, in this case, the Sub-Assistant Surgeon stated circumstances in his direct examination which were connected solely with the injuries inflicted upon the witness Becharam, and the points upon which the pleader for the prisoners wished to examine the said witness Kedarnath are not connected with any circumstances stated in the direct examination of the witness, and therefore, if we were to apply the rule which obtains in America, the prisoners would have to make Kedarnath Mitter their own witness by calling him for the defence, and then examining him respecting other matters than those connected with the circumstances stated in his direct examination; but there is another passage to be found in p. 1155 of the same work,† which lays down that, if a witness called by one of the parties is a competent witness, the opposite party has, in strictness, a right to cross-examine him, though the party calling him has declined to ask a single question. I think that in this case, as the witness Kedarnath Mitter was a competent witness, and as he was called by the prosecution, although he was questioned by the prosecution only as to such matters as came within his professional knowledge, and he refers only to his professional examination of the wounds inflicted upon Becharam, and to their treatment, the Judge ought to have allowed the pleader for the prisoners to cross-examine that witness without making him a witness for the defence. We therefore direct that, on the re-trial of the case which we have ordered with reference to the evidence of the witness Saudamini, the Judge will recall the Sub-Assistant Surgeon, and permit the pleader for the prisoners, or the accused themselves, if no pleader should appear on their behalf, to cross-examine this witness.

GLOVER, J.—I concur in sending back this case. The prisoners did all they were bound to do in summoning their witnesses, and if one of the most important of them evaded summons, as it appears from the Nazir's return that she did, it was the Magistrate's duty to have taken all the measures required

\* 5th Ed., p. 1243.

† Id. p. 1240.

by the Procedure Code to enforce that witness's attendance. The prisoners were in jail at the time, and are not to be supposed to have known of the return, and could not therefore have applied to the Court sooner than they did. I think that Saudamini's evidence should be taken, and that the Sessions Judge should pass a fresh decision in the case after recording that evidence.

As to the other point raised—namely, the right of the prisoners to cross-examine the Sub-Assistant Surgeon—I have some doubts as to the correctness of the objection. As, however, Mr. Justice Kemp thinks that the Sub-Assistant Surgeon might have been so cross-examined, I do not desire to object to the case being remanded on this point also.

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15 W. R. 34.

*Before Mr. Justice Loch and Mr. Justice Miller.*

THE QUEEN v. BANDA ALI (PRISONER).\*

*Punishment; Enhancement of—Commutation of Sentence—Whipping—Rigorous Imprisonment.*

1871.

Jan. 24.

6 B. L. R.  
App. 95.  
15 W. R. 7.

Upon conviction of the offence of house-breaking, the accused was sentenced by the Deputy Magistrate to six months' rigorous imprisonment, and to be whipped. On appeal, the Judge found that, as this was the first offence, the additional punishment of whipping was illegal, and, setting aside so much of the sentence, passed a sentence of three months' rigorous imprisonment, in addition to the six months' rigorous imprisonment passed by the Deputy Magistrate.

*Held that the commutation of the punishment was illegal.*

LOCH, J.—It appears to me that the view taken by the Sessions Judge is not correct, and that his order is in effect an enhancement of the sentence passed upon the prisoner by the Deputy Magistrate. The prisoner was convicted of house-breaking, and sentenced to rigorous imprisonment for six months, and to be whipped. As this was a first offence of the kind, so much of the sentence as directed the prisoner to be whipped, passed by the Deputy Magistrate, was illegal, and has rightly been set aside by the Sessions Judge; but when the Sessions Judge went further, and sentenced the prisoner to three months' imprisonment in addition to the six months already given him by the Deputy Magistrate, his order was, undoubtedly, an enhancement of the sentence passed upon the prisoner by the Deputy Magistrate. The whipping was in addition to any other punishment to which the prisoner might be liable under the Penal Code. This additional punishment was illegal in the present case, and the Judge could not legally, as in fact he has done, commute it to further imprisonment of three months.

I think the order of the Sessions Judge as regards the additional imprisonment for three months, to which he has sentenced the prisoner, must be set aside.

MITTER, J.—I am of opinion that the additional sentence of three months' rigorous imprisonment passed by the Sessions Judge in this case is contrary to law.

S. 419 of the Code of Criminal Procedure says: "The Appellate Court may, after perusing the proceedings of the lower Court, and after hearing the

\* Revision of proceedings held by the Sessions Judge of 24 Pergamas under s. 404 of the Code of Criminal Procedure.

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plaintiff or his counsel or agent, reverse or alter the sentence of that Court, but not so as to enhance the punishment that shall have been awarded."

I think that the Appellate Court is bound, under this section, to satisfy itself beyond all reasonable doubt that the alteration which it proposes to make in the sentence of the lower Court, would not amount to an enhancement of the punishment already awarded by that Court. If the alteration is restricted merely to the degree of the sentence, no difficulty whatever can possibly arise. But if, on the other hand, it goes to affect the nature of the sentence, as in the present case, the difficulty becomes almost insurmountable. Things dissimilar in nature do not admit of any direct comparison with one another; and if there is no fixed scale or standard by which the comparison can be made, the task must be given up as a hopeless one.

The learned Judge says that a sentence of rigorous imprisonment for nine months is equivalent to one of rigorous imprisonment for six months, coupled with whipping. But from what materials this calculation has been made, I am wholly unable to make out. Granting that whipping is generally looked upon as a more degrading punishment than imprisonment, it does not necessarily follow that the substitution of rigorous imprisonment for whipping would not, under any circumstances, amount to enhancement of punishment. A poor wretch, who has got a large family to support, might prefer to be let off with a few stripes, instead of being incarcerated in jail for any lengthened period of time; and in his case at least the Appellate Court is bound to show satisfactorily that it is not really enhancing the punishment, before it undertakes to substitute the one punishment for the other without his consent.

But, be this as it may, it seems to be perfectly clear that the Legislature has not supplied us with any data from which the comparative severity of the two sentences under our consideration can be determined; and it is, therefore, impossible to say how many strokes of the cat-o'-nine-tails would be equivalent to a sentence of rigorous imprisonment for a given period of time. It cannot be contended for one moment that each individual Judge is at liberty, in a case of this kind, to act according to an arbitrary standard of his own. Every discretion vested in a Court of Justice must be exercised in a reasonable manner and upon reasonable grounds; and the power of altering the sentence conferred upon the Appellate Court by the provisions of the section above quoted is, by no means, an exception to this rule. If we hold with the learned Judge that a sentence of twenty stripes is equivalent to one of rigorous imprisonment for three months, there seems to be no reason whatever why another Judge should not be permitted to hold that the same sentence is equivalent to one of rigorous imprisonment for as many years. An Appellate Court can alter the sentence of the lower Court, it is true; but if it is not in a position to say, upon some reasonable grounds, that the alteration which it proposes to make would not amount to enhancement of punishment, it is bound to reject that alteration as contrary to the express provisions of the law.

Whether a sentence of fine can be substituted for one of imprisonment or not is a question upon which I wish to express no opinion. The Legislature has, in some cases, laid down the limits within which those two punishments can be awarded in the alternative, and within those limits the Appellate Court may make any alteration in the sentence of the lower Court it may think proper. But the case now before us stands on a quite different footing. Here there is no legal or rational standard of comparison of any kind whatever; and in the ab-

sence of such a standard, the learned Judge had no power to take it for granted that a sentence of twenty stripes was equivalent to one of rigorous imprisonment for three months.

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[15 W. R. 7.]

But there is another ground upon which the Judge's view appears to me to be erroneous. It is admitted on all sides that the sentence of whipping passed by the Deputy Magistrate in this case was altogether illegal. Such a sentence is, in the eye of the law, an absolute nullity; and the learned Judge ought to have, therefore, excluded it from his consideration in estimating the amount of punishment awarded by the Deputy Magistrate. That punishment was one of six months' rigorous imprisonment, and it was this punishment only that the learned Judge had to deal with in fixing the final sentence, the other punishment—namely, that of whipping—being absolutely null and void, and therefore liable to be considered as if it had never been passed at all. If the Deputy Magistrate had not sentenced the prisoner to whipping, in addition to rigorous imprisonment for six months, it is perfectly clear that the learned Judge could not have added a single day to the period of imprisonment. How then can it be contended that the mere fact of the Deputy Magistrate having passed the additional sentence of whipping, which sentence was wholly illegal and void, enabled the learned Judge to increase that period from six to nine months. The learned Judge admits that he did so, because he thought that six months' rigorous imprisonment would not be sufficient to meet the gravity of the offence committed. But if this is not tantamount to enhancement of punishment, it is difficult to say what enhancement of punishment means. It may be that the Deputy Magistrate might have sentenced the prisoner to a term of imprisonment longer than six months, if he had been aware of the fact that he had no power to pass the additional sentence of whipping. But all speculations of this nature are beyond the province of an Appellate Court, for I see no reason whatever why that Court should be permitted upon the basis of such speculations to do what it could never have done if the lower Court had not, in passing the sentence, gone beyond the limits fixed by the law. The addition of the illegal sentence of whipping by the Deputy Magistrate could not have possibly increased the powers of the learned Judge sitting as a Court of Appeal; and the prisoner was, therefore, entitled to stand before him as if that addition had never been made at all. To hold otherwise, would be to take advantage of an illegality committed by the Deputy Magistrate, and the prisoner has therefore every right to contend that no such advantage ought to be taken against him in dealing with his appeal.

The case put by the learned Judge, in which the sentence of the lower Court is found to be altogether illegal, stands on a quite different footing. It may be that the Appellate Court may in such cases quash the sentence as absolutely null and void, and direct the lower Court to pass a new sentence according to law, or it may even pass such a sentence upon its own authority. But I do not wish to express any opinion on this point, one way or the other. It is sufficient for me to say that the three months of rigorous imprisonment added in this case to the six months already awarded by the Deputy Magistrate clearly amounted to enhancement of punishment, and that the case falls, therefore, within the express words used in the last portion of s. 419.

In conclusion, I have simply to observe that the argument based upon the provisions of s. 12 of the Whipping Act has no bearing upon this case. That section refers to the Court by which the case is tried in the first instance, and not to a Court of Appeal.

For the above reasons I would reduce the sentence passed by the Sessions Judge to one of rigorous imprisonment for six months only.

1871.

Jan. 17.

6 B. L. R.

App. 98.

[15 W. R. 2.]

*Before Mr. Justice Norman, Offg. Chief Justice, and Mr. Justice Loch.*

THE QUEEN *v.* NGA CHO.\*

*Act XXVII. of 1870, s. 10, 294A—Lottery Office.*

No charge for the offence (of keeping a lottery office) under s. 10, Act XXVII. of 1870, 294A, can be entertained without the authority of the Local Government.

The judgment of the High Court was delivered by

LOCH, J.—This case appears to have been taken up and disposed of by the Magistrate without the authority of the Local Government having been obtained to the institution of the proceedings. Now, though it be an offence under s. 10, Act XXVII. of 1870, 294A, to keep a lottery office not authorized by Government, &c., &c., yet s. 14 of the Act provides that no charge under 294A shall be entertained by any Court, unless the prosecution be instituted by order of, or under the authority from, the Local Government. The proceedings in this case must consequently be set aside.

*Before Mr. Justice E. Jackson and Mr. Justice Mookerjee.*

THE QUEEN *v.* MAHIMA CHANDRA DAS AND OTHERS (APPELLANTS).†

*Evidence of Accomplices—Judge's Summing up—Evidence of Accused's Bad Character—Improper Admission of Evidence—Discharge of Prisoner on Appeal—Recording Depositions.*

1871.

Mar. 8.

6 B. L. R.

App. 108.

[15 W. R. 37.]

Mr. *M. Ghose* (with him *Baboos Nalit Chandra Sen, Hari Mohan Chuckerbutty*, and *Tarakanto Chuckerbutty*) for Mahima Chandra Das.

Baboo *Jogendra Nath Bose* for Nagar Bansi.

Baboo *Jagadanand Mookerjee* for the Crown.

THE facts are fully stated in the judgment of the Court, which was delivered by

JACKSON, J.—These prisoners have been convicted of several dacoities upon boats, which took place on the river Padda about the 14th or 15th Asar of last year (27th or 28th June 1870), and have been sentenced to different terms of imprisonment. The trial was held by the Sessions Judge of Dacca with a jury, who were unanimous in finding a verdict of guilty. The prisoners have appealed to this Court. Mr. Ghose appeared on behalf of Mahima Chandra Das, and a vakeel of this Court for Nagar Bansi. The remaining prisoners were unrepresented.

The verdict of the jury is final on all questions of fact, and the only question for consideration is whether there is legally sufficient evidence to support the conviction, or whether there has been such illegality in the proceedings, in the course of the trial, as requires this Court to annul the conviction.

As regards some of the prisoners, there is ample evidence, and there can be no doubt, in the mind of any reasonable person, of their guilt. The fact of the occurrence of the dacoities is clearly proved. They were reported to the police immediately after their occurrence. There is some evidence that the prisoners were, at the time, associated together, being dependents and servants of the pri-

\* Reference under s. 434 of the Code of Criminal Procedure, from the Recorder of Moulmein, under cover of his Registrar's letter No. 59, dated the 23rd December 1870.

† Criminal Appeals, Nos. 38 and 53 of 1871, against the order of the Sessions Judge of Dacca, dated the 22nd November 1870.

soner, Mahima Chandra Das, though, upon this point, the witnesses should have been required to give more distinct and exact information. An approver witness, Gabind Sirkar, has given a detailed account of the manner in which the prisoners assembled and went about in a boat from place to place committing these dacoities at night. There is corroboration to his evidence as regards several of the prisoners. There is evidence that, previous to the dacoities in two boats, which were tied to the bank near each other, the prisoners, Afazuddin and Kalai, went on board one of the boats on the pretence of asking for fire. They were, therefore, together on the spot about the time when the dacoities took place. There is further evidence that the day after the dacoity the prisoners, Afazuddin, Panchu Hajam, and Ibrahim, were seen together in a boat; were observed, on being hailed, to throw money into the river; that when the attention of the chowkidar was turned to them, and attempts were made to arrest them, Afazuddin and Panchu Hajam jumped into the river, and swam to the other side; that Afazuddin, when seized, admitted that he had thrown into the river money which he had obtained in the dacoity, and offered to dive for it, and pick it up. The evidence of the approver is further confirmed by the admissions made by the prisoners, Ibrahim, Kalai, Panchu Hajam, Mahes Hajari, and Nagar Bansi, not only before the police, when they each gave up a share of the money which each had obtained in the dacoity, but also before the Deputy Magistrate, before whom they were taken. It is also confirmed by the discovery of a cloth in the house of Afazuddin, which was proved to be a portion of the property stolen in one of the dacoities. As regards all these prisoners, there is, therefore, ample evidence that they were engaged in the dacoity. As against the prisoners, Mahima Chandra Das, Guru Charan, and Dhonai, the evidence is not so clear as against the two latter; there is not that corroboration of the approver's evidence which it is the rule to require; and though there is some corroboration as against Mahima Chandra Das, it is not of a very distinct and certain character.

The first point which Mr. Ghose argued on behalf of Mahima Chandra Das, but which, in fact, affects also the cases of Guru Charan and Dhonai, is that the Sessions Judge did not place sufficiently strongly before the jury the necessity for requiring corroboration of an approver's evidence before convicting upon it. The Sessions Judge stated the law to the jury in the following terms: "There can be no doubt that, in a case like the present, the evidence of a pardoned accomplice requires corroboration before it can suffice to sustain a conviction. But the prosecution maintains that this corroboration exists in the evidence of many other witnesses as to the acts and circumstances related by them." The Sessions Judge details these facts, and then adds: "I do not think that corroboration of the approver's evidence, where he speaks of wholly innocent and legal acts, relieves the prosecution of the necessity of producing something corroborative of the statement made by him as to the dacoities on Karhai's and Dhopai's boats. I think that the approver's evidence respecting the transactions should be corroborated by something connected with those particular transactions." The Sessions Judge then points out against which of the prisoners there is corroboration, leaving out, however, one important item of the evidence; and he adds that there is some reason to doubt the whole truth of the approver's story on account of its strangeness; and finally he concludes: "You should consider very carefully the evidence given by Gabind, approver, before accepting it as conclusive of the guilt of any of the prisoners." I think that, in these remarks to the jury, the Sessions Judge did distinctly point out to them that they ought to require corroboration of the approver's evidence before they convicted upon it; and that that corroboration should be upon some point relating to the dacoities, and

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 [15 W. R. 37.]

not to other facts, which were innocent and legal. This latter remark especially alluded to Mahima Chandra Das, because the prosecution had adduced evidence to prove that, about the time when the dacoities took place, the prisoner, Mahima Chandra Das, was with the approver Gabind Sirkar and other persons going about in a boat on the river, collecting rents from his villages, and stopping at Bohor on his way to Dacca. Mr. Ghose argued that the Sessions Judge should have pointed out to the jury that they could not convict without further corroboration. I think that he performed his duty in telling them that they ought not to convict without sufficient corroboration; and therefore, upon this ground, I should not have interfered with the conviction of the prisoners. The law upon the subject has been clearly laid down in the case of *Elahi Buksh*.\* It was there ruled, firstly, "that a conviction may be legally had on the uncorroborated evidence of one or more accomplices;" secondly, "that it is necessary that the evidence of accomplices should not be left to a jury without such directions and observations from the Judge as the circumstances of the case may require." Mr. Ghose pointed to the illustrations of the law given in that case, and contended that the Sessions Judge had acted against the rules there laid down. But the Sessions Judge, in this case, did not tell the jury that the evidence of the approver alone was sufficient to justify them in finding the prisoners guilty. He did advise them not to convict upon the uncorroborated evidence of a pardoned accomplice. He did not tell them that the uncorroborated evidence of an accomplice, given under a tender of pardon, was admissible, and that it was for them alone to form an opinion upon it; that a conviction founded upon such evidence would be legal, and that such evidence, without corroboration, might be acted upon with as much safety as that of any other accomplice. On the contrary, the Sessions Judge distinctly pointed out to the jury the necessity for corroboration, and the necessity that that corroboration should be upon circumstances implicating the prisoners in the crimes charged upon them. The Sessions Judge then clearly performed his duty. If the jury, notwithstanding his charge, convict upon the uncorroborated evidence of an accomplice, this Court cannot, upon the view of the law laid down in the Full Bench decision referred to, interfere with that conviction. Such convictions have been held to be legal even in England where the jury system has been long in force. They are not illegal here.

But Mr. Ghose, on behalf of the prisoner, Mahima Chandra Das, has taken further objections to the summing up of the Sessions Judge as against his client. Firstly, he urges that the different portions of the evidence which affected his client were not distinctly stated to the jury, and observations made upon those portions of the evidence; secondly, he points out that evidence of an inadmissible character, such as that his client was a notorious dacoit, and hearsay evidence, was allowed by the Sessions Judge to be given, and no remark was made by the Sessions Judge that this should not be allowed to have any weight in the decision of the jury; thirdly, that the Sessions Judge omitted to point out to the jury the evidence of the prisoner's witnesses, and passed them over with the remark that that evidence was not important, whereas it was of the most vital importance to the prisoner, proving as it did, if believed, that the prisoner could not have been present, as alleged by the approver, at the dacoities with which he was charged. It seems to us that the evidence, as given in the trial and summing up of the Sessions Judge, is open to these remarks. The Sessions Judge did allude to the evidence for the defence, and did pass it over with the remark that it was of no importance. The evidence

\* Criminal Appeal, No. 75 of 1866: May 29, 1866.

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was the more important, because, although several of the dacoits, when first arrested and taken before the Deputy Magistrate, confessed their guilt, and named their accomplices, they distinctly stated that the prisoner, Mahima Chandra Das, had gone with them to Dacca, and had left the boat there, and remained at Dacca, and that the dacoities were committed after he had left the boat, and on their return from Dacca. It is not as if they had merely left out his name, or as if they wished to screen him as their master from all implication in the dacoities, because they not only mention his name, but some of them state that a portion of the plunder was set apart to be made over to him. Still their statements are that he was not present at the dacoities; and so far they confirm the fact that the prisoner was at Dacca at the time the dacoities were committed. The approver, Gabind Sirkar, is the sole individual among the dacoits, who alleges that Mahima Chandra Das was present, and took part in the dacoities. The Sessions Judge should have pointed out all these facts to the jury, and their bearing upon the evidence for the defence. Again, the Sessions Judge should not have allowed the witness, Loknath, head-constable, to give hearsay evidence and evidence to character. He says that, on the report of the dacoity, he proceeded to the spot, and there he "learned that Mahima, Guru Charan, who used to be one of a noted gang of dacoits, Dhonai Khan, and Panchu Hajam, had gone out together in a boat on the day before the night of the dacoity;" that he went next morning to the house of Guru Charan, and was informed that he had gone with Mahima Chandra to Dacca, and at Komerpur he was informed that Afazuddin and Kalai had gone with Mahima; and, lastly, that he knew well that Mahima was a *badmash* himself, and that he had taken Guru Charan, who is a notorious dacoit, to be a riyot close to his own house. S. 57, Act II. of 1855, enacts that the improper admission of evidence shall not of itself be ground for a new trial in any case if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision. Had the Sessions Judge, in his summing up, pointed out that this was not proper evidence, and that the jury, in coming to their verdict, must shut it out from their minds, its admission alone might have formed no ground for a new trial. But the absence of any such remarks, coupled with its improper admission, is very likely to have prejudiced the prisoner in the minds of the jury. Coupling this with the fact that the Sessions Judge told the jury that the evidence of the witnesses for the defence was of no importance, whereas that evidence was to some extent corroborated by other facts proved upon the trial, we are of opinion that the conviction of the prisoner upon this trial cannot stand.

Mr. Ghose has asked us to acquit the prisoner. The mode in which this Court should act upon appeal in cases of this description is laid down in the case of *Elahi Buksh*\* above alluded to. It was ruled that "this Court may, in all cases in which a finding of guilty is set aside upon appeal, if it considers it necessary, order a new trial. But if the Court is satisfied that the evidence is wholly insufficient to support any conviction against the prisoner, and would, upon the same evidence, have reversed a conviction, if the case had been tried without the intervention of a jury, there is no necessity, and it would be improper, to grant a new trial. In such a case the Court, having set aside the verdict, may order the prisoner to be discharged." Now, it seems to me that, upon the evidence on the record, the conviction of Mahima Chandra Das could not be confirmed if there was an appeal before us on the

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\* Criminal Appeal, No. 75 of 1866: May 29, 1866.



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facts. Independent of the corroboration to his defence, which has been above alluded to, there is no trustworthy corroboration of the evidence of the approver. The evidence as to his presence with the approvers, when collecting rents the day after the dacoities took place, is supported by a pretended receipt for rent, which is produced. The Judge seems to have placed no reliance upon the evidence on the point. He does not allude to it in his summing up. If true, it contradicts the prisoner's *alibi*, and so far is very important. But we are satisfied that no reliance can be placed upon it. It is very probable that Gabind Sirkar went and gave the receipts which are ascribed to him; but the receipt in the handwriting of the prisoner, Mahima, is evidently a made-up document, and no inference can be drawn from it. We think then that we ought not to direct a new trial in the case of this prisoner, but should order his discharge. The cases of Gurn Charan and Dhonai are different. They have not attempted any defence. The account of their presence at the dacoities charged has been from first to last the same, and there is no reason to doubt their having been present, and having taken part in the dacoities charged; and although, as regards Guru Charan, evidence has been admitted, which should not have been allowed, still there can be no doubt of his guilt.

We dismiss the appeal of all the prisoners, except Mahima Chandra Das, and we direct his discharge.

The Sessions Judge is requested to point out to the Deputy Magistrate, before whom these prisoners came in the first instance, and who recorded their admissions, that the record of the examination shows that such examination was, if properly conducted, not properly taken down. The questions put should have been recorded, as well as the answers; and a proper certificate appended to each examination. The utter disregard of the provisions of the law upon this point, and as to the attestation of examinations, evinced by some of the Deputy Magistrates in the Dacca district, is deserving of severe censure. This is not the first time we have been obliged to notice it. The result of the carelessness of the authorities on this subject is that the confessions are open to question as evidence in consequence of the illegal manner in which they are recorded. The provisions of the law, being distinct, should be distinctly carried out.

MOOKERJEE, J.—I am of the same opinion. I think also that the Sessions Judge had properly warned the jury, and had brought to their notice the fact that the approver, Gabind, was an accomplice witness deposing under an offer of pardon. The Sessions Judge has therefore acted according to the directions laid down in the case of *Elahi Buksh*;<sup>\*</sup> but I quite concur with my learned colleague in holding that the Sessions Judge should have put the evidence for the defence properly before the jury, instead of saying that that evidence is not important. He was also wrong in laying before them evidence to the character of the accused. The jury might have been, in all probability, prejudiced against the prisoners. Evidence to character should be only taken and considered by the Sessions Judge, and should influence him in awarding punishment. If the accused are persons of notorious bad character, the Sessions Judge, in passing sentence, should see what punishment is adequate and sufficient. That evidence should not be laid before a jury. If the conviction had been bad by the assistance of assessors, I would have had no hesitation in discharging the prisoner, Mahima Chandra. Under the circumstances of this case, I see no

\* Criminal Appeal, No. 75 of 1866: May 29, 1866.

reason to direct a new trial of the prisoner Mahima. I would direct his release. As regards the other prisoners, I quite agree with Mr. Justice E. Jackson in upholding the conviction and sentence.

Before Mr. Justice Norman, Offg. Chief Justice, and Mr. Justice Loch.

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GABIND CHANDRA BISWAS *v.* HEM CHANDRA BARDER AND  
OTHERS.\*

Mar. 4.  
6 B. L. R.  
App. 115.

*Criminal Procedure Code (Act XXV. of 1861), s. 273—Jurisdiction—Grievous Hurt.*

A Magistrate has no power, under s. 273 of the Code of Criminal Procedure, to refer a case of grievous hurt for trial to a Deputy Magistrate having only the powers of a Subordinate Magistrate of the second class.

THE following reference was made to the High Court by the Officiating Magistrate of Jessore :—

“The defendants, Hem Chandra Barder and two others, came to the house of Gabind Chandra, complainant, and struck him with a bamboo on his head, also on his arm, hand, side, and back. The Joint-Magistrate, who received the complaint, requested the sub-assistant surgeon to examine the complainant, and give his opinion of the nature and cause of the injuries from which he was suffering. Accordingly, the sub-assistant surgeon reported that he had found a depression on the left side of the head; that the outer layer of the bone of the head was broken; and that there was probability of the man’s getting disease of the head from the injuries he had received.

“Mr. Ellis, Deputy Magistrate, dismissed the case, and discharged the accused under s. 250, Code of Criminal Procedure, as the evidence was suspicious and contradictory.

“I consider it to be an undoubted fact that the man Gabind Biswas received a dangerous wound upon the skull, and the medical report leaves it beyond a doubt that the man has been severely beaten. The case was therefore originally not triable by Mr. Ellis, who has only second-grade power. It is clearly a case falling under s. 324. I therefore solicit the order of the Court to revive the trial.

“The reference is made under s. 404, Code of Criminal Procedure, as I consider there has been an error in law in the dismissal by a Magistrate of a man accused of an offence which that Magistrate had no power to try.”

The judgment of the High Court was delivered by

NORMAN, J.—It appears that, at the time when the Joint-Magistrate, Mr. Quinn, made over the case for trial to the Deputy Magistrate, Mr. Ellis, he had notice by the report of the sub-assistant surgeon that the complainant, if his story was true, had suffered injury amounting to grievous hurt. The case was therefore not triable by a Deputy Magistrate having only the powers of a Subordinate Magistrate of the second class. Mr. Quinn had therefore no power under s. 273 to refer the case to Mr. Ellis, and Mr. Ellis’ orders on the case must be quashed, he having had no jurisdiction to enquire into or try the case.

\* Reference to the High Court, under s. 434 of the Code of Criminal Procedure, from the Officiating Magistrate of Jessore, under the cover of his letter No. 84], dated the 21st February 1871.

1871.

Feb. 13.

6 B. L. R.

App. 116.

[15 W. R. 18.]

*Before Mr. Justice Norman, Offg. Chief Justice, and Mr. Justice Loch.*THE QUEEN *v.* KALINATH BISWAS.\**Criminal Procedure Code (Act XXV. of 1861), s. 298—Recognizance to keep the Peace.*

A was bound over to keep the peace for a year. Before the expiry of the period, he was involved in fresh disputes with other persons. The Deputy Magistrate, instead of referring the case to the Court of Session under s. 298 of the Code of Criminal Procedure, directed A to enter into another recognizance for a further period of one year.

*Held*, the order was illegal.

On the 19th February 1870 the then Deputy Magistrate of Ferozepur ordered Kalinath Biswas to enter into a recognizance to keep the peace for one year.

On the 10th November 1870 the present Deputy Magistrate found it necessary to bind Kalinath Biswas for a further period of one year in the same sum, and directed that another recognizance should be executed.

This order of the 10th November appearing to the Sessions Judge to be illegal, he referred the case to the High Court that the order of the Deputy Magistrate might be quashed.

The judgment of the Court was delivered by

NORMAN, J.—Kalinath Biswas, being bound over to keep the peace under s. 281, shortly before the expiration of the recognizance, was found by the Deputy Magistrate of Ferozepur to be involved in fresh disputes likely to involve a breach of the peace with parties other than those in respect of disputes with whom he was already bound. The Deputy Magistrate ordered him to enter into fresh recognizances to keep the peace for one year.

The Sessions Judge, under s. 434, has sent up the order, being of opinion that the Deputy Magistrate had no power to make it. In that opinion we concur. We think that the Magistrate, finding that Kalinath was involved in fresh disputes with other persons, making it necessary, with a view to securing the peace of the district, that he should be bound over for a period extending beyond one year, should have proceeded to refer the case to the Court of Session under the provisions of the 298th section.

We quash the order of the Deputy Magistrate.

*Before Mr. Justice Ainslie and Mr. Justice Paul.*THE QUEEN *v.* BISWAMBHAR DAS.\**Criminal Procedure Code (Act XXV. of 1861), s. 370—Report of Chemical Examiner.*

1871.

April 6.

6 B. L. R.

App. 122.

[15 W. R. 49.]

PAUL, J.— . . . Under s. 370 of Act XXV. of 1861, a report from the Chemical Examiner is evidence in a criminal trial, if it bear the signature of the examiner; and, according to this section, the original report, bearing the signature of the examiner, should be put in evidence. On the present occasion we observe that a copy of the report has been sent up by the Magistrate; this is wholly irregular. In future care should be taken that the original report be submitted.

\* Reference, under s. 434 of the Code of Criminal Procedure, from the Officiating Sessions Judge of Backergunge, by his letter No. 4, dated the 24th January 1871.

† Criminal Appeal, No. 162 of 1871, against the order of the Sessions Judge of Beerbhoom.

Before Mr. Justice E. Jackson and Mr. Justice Mookerjee.

IN THE MATTER OF THE PETITION OF SRIMATI BIDHUMUKHI DEBI  
AND OTHERS.\*

Warrant, issue of—Sufficient Evidence—Specification of offence—Abduction per  
se no offence.

1871.  
Jan. 21.  
6 B. L. R.  
App. 129.  
[15 W. R. 4.]

A warrant, which did not specify a punishable offence, and which had been issued upon a statement not sufficient to make out any offence, quashed.

One Srinath Halder complained to the Magistrate of Dacca that Baroda Kant Halder and Prasanna Gupta had carried away, from his lawful guardianship and custody, a minor girl named Bidhumukhi. On this the Magistrate at once issued warrants for the arrest of the two men as well as of the girl. The warrants were as follows: "Whereas Baroda Kant (*alias* Nath) Halder and Prasanna Gupta stand charged with the offence of abducting a girl named Bidhumukhi, you are hereby directed to apprehend the said Baroda Kant Halder and Prasanna Gupta and the girl Bidhumukhi. Herein fail not. . . ."

The Magistrate had also provided Srinath Halder, the complainant, with an order that the girl, when arrested, should be placed on his charge.

On the 20th September last Mr. Ghose (with him Mr. Bonnerjee and Mr. Sandel) applied to the High Court (Couch, C.J., and Loch, J.) for an order calling for the proceedings of the Magistrate of Dacca, in order that the warrants issued by that office might be quashed as being contrary to law, and that, pending the ultimate decision of the High Court, the execution of the several warrants issued be suspended. Mr. Ghose contended that there was no legal evidence before the Magistrate to justify the issue of a warrant; that as the warrant charged Bidhumukhi with having committed no offence, and charged the others with only having abducted a girl, abduction *per se* being no offence punishable under the Penal Code, the warrant was illegal. The order prayed for was granted.

On the case coming on for hearing again, after the arrival of the proceedings of the Magistrate, before E. Jackson and Mookerjee, JJ., Mr. Ghose (with him Mr. Sandel) urged the same reasons which were advanced on the occasion of the first application.

The judgment of the Court was delivered by

JACKSON, J.—We think the warrants in this case, as they stand, are upon the face of them illegal. In the first place, there is not sufficient on the deposition of the complainant, Srinath Halder, to make out that any offence has taken place. In the second place, there is no such offence as abduction under the Indian Penal Code, but abduction with certain intent is an offence. The warrants for the arrest of the persons without stating the intent are accordingly bad. Lastly, we think that the orders of the Magistrate of Dacca directing the apprehension of the girl Bidhumukhi, and that she should be made over to Srinath Halder, the prosecutor, her grand-uncle, are equally illegal. They seem to have been passed in great haste, and without sufficient cause. There is nothing to show that Srinath Halder is the lady's lawful guardian. We think that the warrants, as they stand, must be set aside.

We pass no further order in the case, as we are told that no further proceedings are to be taken in the matter.

\* Application under s. 404 of the Code of Criminal Procedure.

1871.

April 15.

6 B. L. R.

App. 133.

[15 W. R. 51.]

*Before Mr. Justice Norman, Offg. Chief Justice, and Mr. Justice Loch.***KIAMUDDIN v. ALLAH BAKSH.\****Theft—Penal Code, s. 378.*

NORMAN, C.J.—The point in this case is as follows: Kiamuddin, the gomasta of a shop called the shop of Mozoffer Meah, was coming out of the Small Cause Court with some books, a khatian and a jumma-kharach account, belonging to that shop. Allah Baksh, who had a share in that shop, took these books out of the possession of Kiamuddin, and kept them against the will of Kiamuddin, saying they were his.

The Deputy Magistrate says: "The fact of Allah Baksh having a right to the papers is not questioned in this case. He may have every right to them; but so long as they are legally in the possession of another person, he cannot get possession of them except through the Civil Court. It matters little either whether he is any special gainer by taking possession of the papers, when the fact remains that he did take them, and that against the will of the complainant."

The Deputy Magistrate found Allah Baksh guilty of theft, and sentenced him to a fine of ten rupees, and ordered the papers to be returned to the complainant. It appears to me that this conviction cannot be sustained. Kiamuddin was the servant of the prisoner, Allah Baksh, and his partners. By s. 27 of the Indian Penal Code, it is declared that, "when property is in the possession of a person's servant, it is in that person's possession" within the meaning of that Code. The khatian and jumma-kharach account must therefore be taken to have been in the possession of Allah Baksh and his co-sharers at the time when Allah Baksh took them from Kiamuddin. S. 378 does not include under the offence of theft the case where one joint proprietor takes into his own sole possession property belonging to himself and his co-proprietors, which had been previously in their joint custody. If the law were as supposed by the Magistrate, no master could safely take a rupee from the hand of his servant. No partner in a business could safely take a rupee from the till for the most urgent necessity. It may be that the accused did, or intended to do, some wrong to his co-sharers in taking possession of the books; but, if so, the offence, if any, is not theft. I am of opinion that the conviction and order of the Deputy Magistrate must be quashed, and the fine refunded.

LOCH, J.—To constitute the offence of theft, there must be not only a taking against the will of the person in possession, but a taking dishonestly. The definition of "dishonestly," as given in s. 24 of the Penal Code, is the doing anything "with the intention of causing wrongful gain to one person or wrongful loss to another person." Did Allah Baksh take the book from the gomasta dishonestly as defined above? He does not appear to have done so with any intent to injure his co-partners or to derive gain to himself. It is true that the gomasta says in his examination that the papers showed an entry of Rs. 500, by not showing which the accused would gain. But there is nothing to show that Allah Baksh intended to make away with these papers, and the gomasta admits that they were heretofore in the possession of Allah Baksh and his two co-sharers. I do not think the charge of theft is made out, and I con-

\* Reference to the High Court, under s. 434 of the Code of Criminal Procedure, by the Offg. Magistrate of Backergunge, in his letter No. 222, dated the 27th March 1871.

[This case is distinguished in *Gour Benode Dutt, Petitioners*, 21 W. R. 10; 13 B. L. R. 308N.; and is referred to in *Queen v. Okhoy Coomar Shaw*, 13 B. L. R. 307; 21 W. R. 59.—Ed.]

cur with the Chief Justice in quashing the conviction and directing the repayment of the fine.

*Before Mr. Justice Bayley and Mr. Justice Miller.*

ABHAYA CHOWDHRY v. T. BRAE.\*

*Recognisance to keep the Peace—Judicial Enquiry—Evidence—Report of Police-officer.*

1871.  
March 18.  
6 B. L. R.  
App. 148.

The existence of a dispute likely to cause a breach of the peace must be first proved by legal evidence before the Magistrate can proceed to call upon the parties to enter into recognizances to keep the peace.

The report made by a police-officer that there is a likelihood of there being a breach of the peace is not legal evidence to prove the existence of any dispute likely to cause a breach of the peace.

Upon the report of a police-officer, the Magistrate of Pubna passed an order directing Abhaya Charan Chowdhry to enter into a recognizance to keep the peace.

Upon the application of Abhaya Chowdhry, on the ground that the order of the Magistrate was illegal, inasmuch as he held no judicial enquiry as to there being a probability of a breach of the peace, the Judge of Rajshahye referred the case for the opinion of the High Court.

Baboo *Mahini Mohan Roy* for Abhaya Chowdhry.

Mr. *Rochfort* for T. Brae.

The opinion of the High Court was expressed by

BAYLEY, J.—We think that in this case the order of the Magistrate is illegal, and must be set aside. His proceedings should be guided by the judgment in *Kashi Kishor Roy v. Tarini Kant Lahori*,† in which the other judgments of this Court on this point have been reviewed, and where the decision of the Officiating Chief Justice and Mr. Justice Kemp has been very clearly recorded in the following terms: “We are of opinion that there is a clear reason for requiring a distinct adjudication as to the existence of dispute likely to occasion a breach of the peace before the Magistrate proceeds further.” Now, the term “adjudication” in the above passage means a finding on legal evidence. The finding of the Magistrate in this case is only on a police-report, which Mr. Rochfort for the opposite party very properly admits, and which *per se* is no legal evidence in the case. Legal evidence must be something upon oath or something to which the Magistrate himself deposes as having seen with his own eyes, but what he has acted upon in this case is no such legal evidence, and therefore no judicial adjudication can be said to have been come to in this case.

It is pressed upon us that there are many other cases on the file showing that there were disputes with regard to this land, but those other cases can be no evidence of an intended breach of peace on this special occasion, nor was any document connected with any of those cases referred to by the Magistrate as the ground of his action. Each case must be decided upon legal evidence bearing upon its own facts and with reference to its own surrounding circumstances.

We set aside the order of the Magistrate, but we express no opinion as to any title or possession of either party under decrees or otherwise. That is a

\* Reference to the High Court, under s. 434 of the Code of Criminal Procedure, from the Offg. Sessions Judge of Rajshahye, under the cover of his letter No. 146, dated the 1st March 1871.

† 3 B. L. R., A. Cr. 76 (see p. 136 of this book).

matter beyond the scope of this reference under s. 434, or motion under s. 405 of the Criminal Procedure Code.

The order of the Magistrate is set aside.

1871.  
*April 22.*

6 B. L. R.

App. 151.

[15 W. R. 53.]

*Before Mr. Justice Kemp and Mr. Justice Glover.*

THE QUEEN *v.* SHEIKH RAMZAN.\*

*Evidence of Previous Conviction—Kaifut.*

A kaifut or report from the record-office that A had been convicted of a crime is no evidence of a previous conviction.

THE judgment of the Court was delivered by

KEMP, J.—There can be no doubt that the prisoner has been properly convicted of theft under s. 380, Penal Code. There may be a question as to how much he stole, but it is clear that he took at least two rupees.

The prisoner has been sentenced to four years' rigorous imprisonment, apparently on account of his having been twice before convicted of theft in June 1870; but there is no evidence on the record of these convictions. It is not enough for the prosecution to file a kaifut from the record-office, setting forth the fact that one Sheikh Ramzan had been twice before convicted of theft. There should have been sworn testimony to the fact and also to the identification of the prisoner before the Court with the Sheikh Ramzan previously convicted.

If the fact of the two previous convictions be expunged from the record, the offence of which the prisoner has been convicted does not seem to call for such a severe sentence as four years' rigorous imprisonment. We reduce it to two years' rigorous imprisonment.

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\* Criminal Appeal, No. 193 of 1871, from an order of the Deputy Commissioner of Singbhoon, dated the 17th March 1871.

## BENGAL LAW REPORTS.

## [APPELLATE CRIMINAL.]

*Before Mr. Justice Norman, Offg. Chief Justice, and Mr. Justice Ainslie.*

**TAKI MAHOMED MANDAL v. KRISHNA NATH RAI AND OTHERS.\***

*Charge, Dismissal of, for Default—Discharge of an Accused Person for Want of Evidence.*

1871.

April 24.

7 B. L. R. 7.

[15 W. R. 53.]

In answer to a reference from a Sessions Judge, the Court were of opinion that, in a case where the accused has been duly summoned or arrested under a warrant, and is present to meet any charge, and the complainant and his witnesses negligently fail to appear against him, if it be not shown to the Magistrate that the case is one in which he ought to adjourn the inquiry under s. 224, Code of Criminal Procedure, the accused person ought to be discharged. But also held that the question did not arise under the circumstances of the case, and the case must go back to the Magistrate for investigation.

THIS case was referred to the High Court under the following circumstances:—

The prosecutor brought a charge of wrongful confinement, which was triable under Chapter XIV. of the Criminal Procedure Code, against the accused.

The Deputy Magistrate dismissed the case, because the prosecutor and his witnesses were not present when the case was called on for trial.

The Judge considered that it had been held more than once that, as a charge of that description would render the prisoner liable to imprisonment for more than six months, the Deputy Magistrate had not the power to dismiss the case for the reasons stated.

The Deputy Magistrate stated, in explanation of his order of dismissal, that his order was not illegal, but was in accordance with the order of the High Court, dated 2nd March 1870, in the case of *The Queen v. Abdul Biswas*,† which case also he, the Deputy Magistrate, had dismissed for the non-attendance of the prosecutor and his witnesses.

Followed in  
*Bishoo Barik*,  
16 W. R. 67.

\* Reference to the High Court, under s. 434 of the Code of Criminal Procedure, by the Officiating Sessions Judge of Jessore, in his letter No. 43, dated the 10th March 1871.

† *Before Mr. Justice Loch and Justice Sir C. P. Hobhouse, Bart.*

**THE QUEEN v. ABDUL BISWAS AND OTHERS. (a)**

*The 2nd March 1870.*

Also reported  
in  
13 W. R. 35.

In this case the complainants preferred a charge against the accused under ss. 143 and 342 of the Indian Penal Code for wrongfully and unlawfully confining them.

The case was referred on the 13th December by the Magistrate of Jessore to the Deputy Magistrate of that place, who, on that day, ordered that recognizances should be taken from the parties, and fixed 23rd December for the trial of the case. The complainants being absent on the 23rd December, the Deputy Magistrate struck off the case, and discharged the defendants.

Subsequently the complainants applied to the Magistrate, praying that their evidence might be heard, and the case tried, whereupon the Magistrate called for an explanation from the

(a) Reference under s. 434 of the Code of Criminal Procedure by the Sessions Judge of Jessore.



1871.

TAKI  
MAHOMED  
MANDAL  
v.  
KRISHNA  
NATH RAI,

On receiving this explanation, the Judge, on the 18th March 1871, recorded the following remarks:—

The Magistrate has given very good grounds for his proceeding in the explanation herewith; but as the ruling he quotes appears to me to clash with the High Court ruling of 24th August 1868,\* as well as with that of 10th July 1869,† I am of opinion that these remarks must be sent on to the High Court.

7 B. L. R. 7.  
[15 W. R. 53.]

Deputy Magistrate, and referred the case to the High Court, stating that the order was an erroneous order, for, the case being triable under Chapter XIV., the Deputy Magistrate should have forfeited complainant's recognizances, but should not have dismissed the case.

On the above grounds he recommended that the Deputy Magistrate should be directed to re-hear the cause.

The Deputy Magistrate, in submitting an explanation to the Magistrate, stated that the defendants were charged with offences under ss. 143 and 342, Indian Penal Code. Though the offence under s. 342 is punishable with imprisonment exceeding six months, the offence under s. 143 is punishable with imprisonment not exceeding six months, and for which a summons may ordinarily be issued; and that upon the day appointed for the appearance of the accused person the complainant did not appear, and, the witnesses also not being present, the case was struck off.

HOBHOUSE, J. (after stating the facts briefly).—It is said that the Deputy Magistrate should rather have escheated the complainant's recognizances. We suppose it is meant to be said that he should, by this way or by some other, have compelled the complainant and his witnesses to come into Court, and should then have proceeded with and concluded the trial.

But if a complainant and his witnesses do not attend on the day fixed for the trial, the order of the Magistrate, discharging the accused, even if it be not warranted by the Procedure Code, is certainly not an order with which we should think it right to interfere under the extraordinary power of revision given to us. We think the order may stand.

LOCH, J.—The reference appears to me to be unnecessary. There has been no trial. The accused was simply discharged because the complainant and his witnesses were not in attendance on the day fixed for the trial, and the order made by the Deputy Magistrate does not appear to be illegal. He might, it is true, have escheated the recognizances of the complainant and his witnesses. The record may be returned.

\* *Before Mr. Justice Loch and Mr. Justice Glover.*

*The 24th August 1868.*

Also reported  
in  
10 W. R. 31.

THE QUEEN v. BHAGABATI SUTHRAN AND OTHERS. (a.)

JUDGMENT was delivered by

GLOVER, J.—The Deputy Magistrate's order of the 13th of May, dismissing the complaint under s. 259 of the Criminal Procedure Code, is clearly illegal.

The charge made was one of criminal misappropriation, in which the Deputy Magistrate exercised the discretion allowed him by s. 248 of the Code, and issued a summons, in the first instance, against the persons complained against, instead of a warrant.

But the mere fact of a summons having been issued did not bring the case within the purview of Chapter XV. of the Code, or allow the Deputy Magistrate to dismiss the complaint under s. 259, because the complainants do not appear on the day appointed. The case remained subject to the rules laid down in Chapter XIV. of the Code, and there is no provision in that chapter for the dismissal of complaints on account of non-attendance of complainants.

The Deputy Magistrate's order is therefore quashed, and the charge will be proceeded with in the usual course.

† *Before Mr. Justice L. S. Jackson and Mr. Justice Markby.*

*The 10th July 1869.*

Also reported  
in  
12 W. R. 27.

THE QUEEN v. BIDUR GHOSÉ. (b.)

THE facts of this case were as follow:—One Dhan Chang, on the 18th March, complained at the Chattak police-station that Bidur Ghose, Sheikh Adil, and others, had wrongfully confined

(a) Reference under s. 434 of the Code of Criminal Procedure and Circular Order No. 18, dated the 15th July 1853, by the Sessions Judge of Beerbhoom.

(b) Reference under s. 434 of the Code of Criminal Procedure and Circular Order No. 18, dated the 15th July 1853, by the Sessions Judge of Sylhet.

Norman, J.—The point referred to the High Court in this case is whether a Deputy Magistrate, in dealing with a charge of wrongful confinement under s. 342 of the Indian Penal Code, under ch. XIV. of the Code of Criminal Procedure has power to discharge the accused if the prosecutor and witnesses are not present on the day fixed for the hearing.

Notwithstanding the case cited—*The Queen v. Bhagabati Suthran*\*—I think that there is no doubt but that, where the accused, having been duly summoned or arrested under a warrant, is present to meet any charge, and no evidence is forthcoming against him, if it be not shown to the Magistrate that the case is one in which he ought to adjourn the inquiry under s. 224, the Magistrate is not only authorized, but is empowered, and, in fact, required, to discharge such accused person.

The case of the accused stands thus: On the day of trial, not only has no offence been proved, but there is no evidence on which a Magistrate could possibly find that an offence had been proved.

The point, however, does not arise on the facts of the case before us. On the 28th of December a complaint appears to have been preferred by the pro-

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TAKI  
MAHOMED  
MANDAL  
v.  
KRISHNA  
NATH RAI  
7 B. L. R. 7.

his relative Lochan Chang for the purpose of extorting money. The police entered the case under s. 342, and, though they reported it true, sent it up in B form, as they said it was not proved. On April 1st, the Acting Magistrate, Mr. Peterson, ordered the papers to be filed, but on April 2nd Lochan Chang himself presented a petition, stating that he had been confined in various places to make him pay his rent, and, having been released by the police, now brought a charge under ss. 342 and 347.

The police-reports were examined, and on April 6th the deposition on oath of Lochan was taken, and summonses on five men, named Bidur, Mathan, Naru, Adil, and Bipari, were issued, and April 16th was fixed for the trial.

On that day, all the parties being present, the case was made over to the Deputy Magistrate, who, on the 17th and 19th, took the evidence of the prosecutor and his witnesses; and, on the 19th, holding the accused to bail, postponed the case till May 13th for the evidence of two persons whose evidence was considered necessary by the Court.

On May 13th, he dismissed the case, and discharged the accused, because the complainant was not present. On that same day (May 13th), the complainant, Lochan Chang, applied to the Joint-Magistrate (who was in charge of the current duties of the Judge's office) stating that he had been present all day in the Deputy Magistrate's office, and that, not his name, but that of Dhan Chang (the original informant at the police-station), had been called out, and because he had not answered it, the case had been dismissed.

The Sessions Judge of Sylhet, who referred the case, considered there were three illegalities at least in the Deputy Magistrate's proceedings:—

(1) He had no power to dismiss, in default of prosecution, a charge laid under s. 347.

(2) Having taken the evidence of a prosecutor, and postponed the case for the evidence of other parties to a future date, he had no power to dismiss any case in default of prosecution, the prosecutor having given his deposition in the presence of the accused; and having produced his witnesses, the case should then have been decided on its merits.

(3) The prosecutor's name entered on the fly-leaf of the case was Dhan Chang, the actual prosecutor was Lochan Chang, and Lochan's name ought to have been cried, not Dhan's. In the matter of calling the names, the Judge stated that he fully believed Lochan's story, as it is corroborated by his subsequent behaviour and by the record.

Under these circumstances he referred the case to the High Court, under s. 434, in order that the Deputy Magistrate's order of dismissal might be quashed.

The irregular proceedings of the Deputy Magistrate, in delaying the examination of the witnesses from April 16th to 19th, were also noticed.

The judgment of the High Court was delivered by

JACKSON, J.—We agree with the Magistrate and the Sessions Judge. We quash the order of the Deputy Magistrate, dismissing the complaint for default, and direct that he proceed therewith according to law.

*Ante* p. 9 note (see p. 426 of this book).

1871.

TAKI  
MAHOMED  
MANDAL

v.

KRISHNA  
NATH RAI,  
7 B. L. R. 7.

[15 W. R. 53.]

secutor to the officer in charge of the police-station, which resulted in an inquiry, which must have been by order of the Magistrate, and a report that the charge of wrongful confinement was a false one. Dissatisfied with the result of the police-inquiry, on the 16th of January the prosecutor made his complaint, under s. 66, before the Joint-Magistrate, who examined the prosecutor on the 17th, but his only order on that complaint was: "Let this be put with the police-papers." There seems to be an order of the Joint-Magistrate on the police-report, on the 16th, that witnesses should be in attendance on the 21st.

On the 21st the case was adjourned to the 28th. The complainant's witnesses had been summoned, by what authority I know not, and were in fact then in attendance. On the 28th the case was made over to the Deputy Magistrate, who, in an order stating that he had no time to take up the case on that day, fixed the 1st of February for hearing the complainant's witnesses. On the 1st of February the complainant and his witnesses not being in attendance, the case was dismissed by the Deputy Magistrate. Down to this time, no summons or warrant had issued against the defendant. The Joint-Magistrate did not decide that there was no sufficient ground for proceeding. All that we know on that point is that the Joint-Magistrate and the Deputy-Magistrate between them have burked the case, and got rid of a troublesome complainant. I think the Joint-Magistrate's proceedings were illegal and oppressive.

The law contemplates no such delays as those which the Joint-Magistrate has interposed between the complaint and the adjudication upon such complaint.

I do not think that s. 180 was ever intended to enable the Magistrate in ordinary cases to examine witnesses in the absence of the accused. I do not say that a case may not be supposed in which such a course may be necessary.

On the 17th of January, with the police-report and the examination of the complainant before him, it is very difficult to see why the Joint-Magistrate should not have proceeded at once to pass orders under s. 67. The reference to the Subordinate Magistrate on the 28th must have been an additional cause of vexation and expense to the unfortunate complainant.

Delay in the adjudication upon complaints in small criminal cases is a great hardship to poor people, who may be debarred from resorting to Courts of Justice by finding that the remedy is an evil more grievous than the wrong.

The complainant had, and has, a right to an adjudication under s. 67, upon the point whether, in the judgment of the Magistrate, there is sufficient ground for proceeding. I think it may be very well be that the complainant's absence on the day of hearing may have been caused by the utter weariness of hanging about the police-station in the first place, and the Court afterwards with his witnesses, in the hope of getting a proper hearing.

I think the Joint-Magistrate should be directed to restore the case to his own file, and to do now what he ought to have done at latest within a few days after the 31st of last December.

AINSLIE, J.—It appears to me that the question referred to this Court does not arise in this case. The Magistrate had not issued, nor had he made any order to issue, any warrant or summons to bring the accused person before the Court.

The matter was in that stage to which the provisions of s. 180 of the Criminal Procedure Code apply. By s. 249, as amended by Act VIII. of 1869, the provisions of s. 180 are extended to cases triable by the Magistrate under Chapter XIV. of the Code. The Magistrate had before him a report by the police, on the charge preferred by the complainant at the police-station, to the effect that it was a false charge.

On the 16th of January 1871 he directed that a limited number of witnesses should be sent in for examination. Whether he had before him at this time the complainant's petition, which bears date 4th Magh 1277, corresponding to the 16th January 1871, is uncertain ; but this is not material. When the complainant had been examined on the 17th, he made an order that his complaint should be put up with the police-papers ; and as he made no further order on it, I think his order of the 16th must be taken as intended to be a sufficient order in the matter, and as made under s. 180.

By the order of the 16th January, the 21st idem was fixed for proceeding with the preliminary inquiry under s. 180. Apparently no steps were taken to bring in the witnesses, and on the 21st the Magistrate made a further order that they should be summoned to attend on the 28th.

On the 28th certain witnesses attended under the summons ; and on that day the Magistrate made over the case to the Deputy Magistrate, with instructions to satisfy himself by examining the witnesses whether there were sufficient grounds for proceeding further, and to go on with the case, or dismiss it summarily accordingly. On the same day, the Deputy Magistrate recorded an order to the effect that he was unable to proceed with the case on that day, and directed that the witnesses should be discharged on recognizances to appear again on the 1st of February. On the 1st of February the case was called on, but neither complainant nor witnesses were in attendance, and it was dismissed on default. Such being the facts, it appears to me that the ruling quoted by the Sessions Judge, *The Queen v. Bhagabati Suthran*,\* does not apply ; still less does the ruling in *The Queen v. Bidur Ghose*\* do so.

This was a case in which the complaint had not been admitted : the issue of process against the accused was dependent on the Court being satisfied of the propriety of making any order in the matter. If the complainant negligently failed to appear and satisfy the Court, there was nothing to make it incumbent on the Deputy Magistrate to proceed further with the complaint. But under the circumstances of this case, I concur in thinking that the non-attendance of the complainant on the 1st February ought not to have been treated as a wilful act of negligence, and that the Deputy Magistrate's order of that date, dismissing the complaint, should be set aside.

Before Mr. Justice Loch and Mr. Justice Macpherson.

THE QUEEN *v.* MAHIMA CHANDRA CHUCKERBUTTY,

APPELLANT.†

*Criminal Procedure Code (Act XXV. of 1861), ss. 170, 426.*

In a suit by A for arrears of rent above Rs. 100, a decree was passed against B, C, and D, wherein certain documents filed by them were held to be forgeries. A applied for, and obtained, an order from the Deputy Collector who tried the suit for leave to prosecute B and C in the Criminal Court. A afterwards applied to the Collector for leave to prosecute B, C, and D, whereupon the Collector passed the following order : "Sanction has already been given once by the Deputy Collector. I, however, have no objection to give it a second time, as the petitioner desires it."

\* *Ante*, p. 9 note (see p. 358 of this book).

† Criminal Appeal, No. 102 of 1871, from an order of the Sessions Judge of Backergunge, dated the 10th January 1871.

1871.

TAKI  
MAHOMED  
MANDAL

7.  
KRISHNA  
NATH RAI,  
7 B. L. R. 7.  
[15 W. R. 53.]

1871.

March. 25.

7 B. L. R. 26.

[15 W. R. 45.]

1871.

D was convicted by the Sessions Judge on a charge under s. 471 of the Penal Code. On appeal by D—

QUEEN

v.

MAHIMA

CHANDRA

CHUCKER-

BUTTY,

7 B. L. R. 26.

[15 W. R. 45.]

*Held*, that no proper leave had been obtained to prosecute D, and this defect was not cured by the subsequent proceedings, and the conviction must be quashed.

ISWAR CHANDRA ROY CHOWDHRY instituted a suit for arrears of rent for the years 1271—1273 (1864—1866) before the Deputy Collector, against Nabin Chandra Das, Guru Charan Das, and the prisoner, appellant before the Court. The defendants pleaded payment, and filed six receipts in proof of the same. The receipts were found to be not proved, and the case was decreed in favour of the plaintiff on the 17th June 1870. The suit was valued at a sum above 100 rupees, and no appeal having been filed by the defendants against the judgment of the Deputy Collector, the plaintiff applied to the Deputy Collector for permission to prosecute Guru Charan and Nabin Chandra in the Criminal Court under s. 471 of the Indian Penal Code. The Deputy Collector, on the 30th July 1870, gave the desired sanction under s. 170 of the Criminal Procedure Code. On the 29th August, the plaintiff Iswar Chandra presented another petition to the Collector, praying that he might be allowed to prosecute Guru Charan, Nabin Chandra, and Mahima Chandra, and others, and the Collector made the following order on the petition: "Sanction has already been given once by the Deputy Collector. I, however, have no objection to give it a second time, as the petitioner desires it." The plaintiff then instituted this criminal prosecution against Nabin, Guru Charan, and Mahima Chandra, and the case having been referred to the Joint-Magistrate of Backergunge for trial, that officer discharged the accused Nabin and Guru Charan, and committed the prisoner to the Sessions on a charge under s. 471 of the Indian Penal Code, and the Sessions Judge, after overruling the preliminary objection that was taken on behalf of the prisoner, *viz.*, that no sanction had been given by a competent Court to prosecute the charge, and consequently the Sessions Court had no jurisdiction to try the case, agreed with the assessors in finding the prisoner guilty, and sentenced him as before mentioned.

Baboo *Durga Mohan Das* for the prisoner contended, first, that the sanction of the Deputy Collector having been obtained only as regards Nabin and Guru Charan, the commitment of Mahima Chandra was made without jurisdiction—*The Queen v. Gabind Chandra Ghose*.<sup>\*</sup> The sanction of the Collector is insufficient, first, because the case having been laid at above 100 rupees, the appeal lay to the Judge, and not to the Collector, and the proper officer to

Also reported  
in  
10 W. R. 41.

<sup>\*</sup> Before Mr. Justice E. Jackson and Mr. Justice Hobhouse.

The 11th September 1868.

THE QUEEN v. GABIND CHANDRA GHOSE AND OTHERS. (a)

HOBHOUSE, J.—We think that the Additional Sessions Judge is right in this case. Four persons were severally charged with offences under ss. 471 and 193 of the Indian Penal Code. Those offences were committed in proceedings before the Civil Court; and so, under ss. 169 and 170 of the Criminal Procedure Code, before proceedings against these persons could have been entertained by the Magistrate at all, there should have been previous sanction for such entertainment on the part of the Civil Court before which the offences were committed. In the case of *Deno Bandhu Sircar*, the Civil Court does give some sort of sanction. It makes use of these words, that the defendant may, if he wishes, proceed "against the plaintiff for forgery." This, we think, is not a sufficient permission under the law. The Civil Court, in giving permission to

(a) Reference to the High Court under s. 434 of the Code of Criminal Procedure by the Officiating Additional Sessions Judge of 24-Pergunnas.

sanction these proceedings was the Zilla Judge, and not the Collector,\* and, secondly, it was not clear that the Collector intended to sanction proceedings against Mahima, inasmuch as that officer only seemed to repeat the sanction which was once before given by the Deputy Collector. The mere fact of the prisoner's name having been mentioned in the second petition, while it was omitted in the first, showed nothing, as there was nothing in the record to show that the Collector was aware of this when passing the order. The sanction of the Judge, after the trial in the Sessions had commenced, was not legally sufficient, because under s. 170 of Criminal Procedure Code, the sanction must be given before the institution of charge. The words, "sanction may be given at any time," mean at any time before the institution of the case—*Kirti Ojha v. Rajkumar*;† *The Queen v. Gabind Chandra Ghose*.‡ The Zilla Judge was sitting as a Sessions Judge, and not as a Civil Judge.

Baboo Jaggadanand Mookerjee contended that, when a charge is sent to a Magistrate for investigation, the Magistrate can thereupon commit for trial any person against whom he may consider an offence proved, although that person may not have been named in the order of reference—*Essan Chunder Dutt v. Baboo Prannath Chowdry*,§ and that, under s. 426 of the Criminal

prosecute, should have distinctly stated what the document was for which a prosecution for forgery might be entertained.

In the case of the three other prisoners no permission of the Civil Court seems to have been accorded at all. Under these circumstances, we agree with the Additional Sessions Judge that the commitments are void *ab initio*, and we direct that they be set aside, and we further direct that the Additional Sessions Judge do return the commitments to the Magistrate, and direct him, before he recommits the prisoners for trial before the Sessions Judge, to obtain the requisite sanction of the Civil Court in the case of each of the prisoners. Should the Civil Court see fit to direct any prosecution, that Court will, no doubt, specify the particular act or acts of forgery, and the particular words which constitute the perjury for which permission will be given to prosecute.

\* 2 S. D. A., N. W. P., 373.

† Before Mr. Justice Loch and Justice Sir C. P. Hobhouse, Bart.  
The 30th April 1870.

KIRTI OJHA v. RAJKUMAR.(a)

THIS case was submitted for the order of the High Court under s. 434 of the Code of Criminal Procedure by the Sessions Judge of Tirhoot, who states the case as follows :—

"One Mr. Falkner presented a petition to the District Superintendent of Police, requesting him to investigate a case in which some of his servants had been badly treated and confined, whereupon Keola Prasad, Inspector of Police, was directed to enquire into it.

"During the local investigation of the police, three of Mr. Falkner's servants, *vis.*, Kirti Ojha, Salamat, and Ramdulal, appeared on the 20th October last, and showed marks on their bodies, said to have been caused by *latti* blows by Rajkumar, Jhumuk, and Bhatu.

"The police sent in the said three persons for examination by the Medical Officer, who reported that the marks appeared to him to have been caused by the application of some caustic substance, and not by *latti* blows as alleged.

"On this the case was struck off the file by the Officiating Joint-Magistrate on the 30th October 1869, and at the same time the defendant was informed that, if he liked, he could bring a charge against the plaintiff under s. 211, Indian Penal Code.

"Accordingly, Rajkumar complained to the Joint-Magistrate on the last November 1869, charging Gopal and Kirti Ojha with bringing a false complaint against him.

† See *ante*, p. 28 note (see p. 362 of this book).

§ Marsh. Rep. 270.

(a) Reference to the High Court under s. 434 of the Code of Criminal Procedure by the Sessions Judge of Tirhoot.

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1871. Procedure Code, such a defect cannot be held to have vitiated the whole judgment.

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Baboo *Durgamohan Das*, in reply, contended that the case of *Essan Chunder Dutt v. Baboo Prannauth Chowdry*\* did not apply, inasmuch as it referred to a case under s. 171 of the Criminal Procedure Code; and that s. 426 did not apply, inasmuch as it was not "an error or defect in the charge or in the proceedings or trial," and the Court which committed the prisoner, and the Court which tried him, were equally without jurisdiction on account of the legal and necessary sanction not having been previously obtained. In the case of *The Queen v. Mahim Chandra Chuckerbutty*,† it was said that "it never was intended that this sanction should be used to the extent of doing away altogether with the procedure laid down by the Code, and to rendering convictions valid when the proceedings prescribed as preliminary to the institution of criminal prosecutions were altogether omitted. If carried to this extent, Magistrates might altogether desert the Code of Criminal Procedure."

The judgment of the Court was delivered by

LOCH, J.—In a suit for arrears of rent for 1271—1273 (1864—1866) instituted before the Deputy Collector, Moulvie Dilwar Hossein Khan, by one Iswar Chandra Roy, the defendant, Mahima Chandra Chuckerbutty, pleaded

"The Joint-Magistrate released the first-named defendant, Gopal, as it was apparent that he made no mention of Rajkumar in his deposition before the police, and convicted Kirti under s. 182, Indian Penal Code.

"The Joint-Magistrate's order was to pay a fine of 30 rupees, or in default be imprisoned for one month (rigorous imprisonment)."

The grounds upon which the whole order of the Joint-Magistrate should be reversed are stated by the Judge as follows :—

"The conviction appears to me illegal on several grounds :—

"1st.—The petitioner, Kirti Ojha, was charged by Rajkumar with bringing a false charge against him on the 16th October, Rajkumar having obtained sanction from the Officiating Joint-Magistrate to prosecute Kirti under s. 211, Indian Penal Code. But the Joint-Magistrate changed the prosecution from a private one under s. 211 into a public one under s. 182. This, I conceive, he had not power to do.

"2nd.—If, however, it were said that the Joint-Magistrate had this power, it is certain from the evidence of Dowlut Lal, head-constable, that Kirti Ojha gave no information at all on the 16th October.

"3rd.—The Joint-Magistrate, in the course of the proceedings, changed the date of the offence under s. 182 from the 16th to the 20th October, on which latter date Kirti Ojha is said to have given false information to Inspector Keola Prasad.

"It appears to me that, if Kirti Ojha did not make any false charge or give any false information on the 16th October, the prosecution ought to have dropped; but, even admitting that the Magistrate had power to alter the date of the offence charged, and insert the name of Keola Prasad as the Inspector to whom the false information was given, I conceive that even this charge would not lie under s. 182, for this reason, that Kirti Ojha is not the person who gave the information. Keola Prasad in his deposition states that it was Mr. Falkner who put in a petition to the District Superintendent on the 19th October, on which petition he was deputed to enquire into the case, and all that Kirti Ojha did on the 20th October was in the course of the Inspector's investigation to inform him that he had been beaten by Rajkumar Roy. It appears to me that an information, such as is contemplated by s. 182, must be that which puts the police in motion, not a statement made to a police-officer in course of investigation."

The Joint-Magistrate, being called upon for an explanation from the Sessions Judge, submitted the following explanation :—

"With reference to the Judge's order \* \* \* "I beg to state that I have no power to cancel my order sentencing the accused person to a fine. When once a Magistrate has given sentence, he cannot alter it, I believe; but it can be altered by the Appellate Court. The charge was not altered; only one charge was drawn out by me.

\* Marsh. Rep. 270.

† 3 B. L. R. A. Cr. 67 (see p. 131 of this book).

payment, and filed six receipts. The case, however, was ultimately decreed in favour of the plaintiff. In that case there were three defendants, and no appeal was preferred from the decree passed by the Deputy Collector on the 17th June 1870. Subsequent to the making of that decree, the plaintiff, Iswar Chandra Roy, applied to the Deputy Collector for permission to prosecute Guru Charan and Nobin Chandra criminally, and the Deputy Collector, on the 30th July 1870, made this order: "The judgment shows that the dakhilas filed by the defendants are false. Sanction is therefore given to the petitioner to prosecute the defendants "criminally." It is clear that this petition and its sanction related only to the parties mentioned therein, namely, Guru Charan and Nabin Chandra.

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"It is not necessary that a Magistrate trying a case should, in framing a charge, stick to the section on which the accused has been prosecuted. If he considers that an offence has been proved by the evidence for the prosecution, he can charge the accused with having committed such offence. The accused in this case did give information to a public servant which he did know to be false, intending thereby to cause such public servant to use his lawful power as such to the injury and annoyance of the complainant. I consider that first I had every right to charge the accused under s. 182, Indian Penal Code, and, secondly, that s. 182 is perfectly applicable to the case. These points should be decided for guidance in future similar cases."

The judgment of the Court was delivered by

HOBHOUSE, J.—The facts of this reference are these:—

The accused presented himself before the police, and subsequently before the Joint-Magistrate of the district, and charged Rajkumar, the complainant in the case before us, with having assaulted him with a *latti*, and committed other offences against him; and at the time of making the charge the accused showed certain marks upon his person, which, he said, were the marks of the blows which Rajkumar had inflicted upon him.

The Joint-Magistrate before whom the charge was tried considered that it was a false charge, and, on the application of the present complainant, gave him permission to prosecute the accused for an offence coming under the provisions of s. 211 of the Indian Penal Code. This permission was given with reference to the provisions of s. 169 of the Code of Criminal Procedure. Hereafter the Joint-Magistrate, Mr. Doily, tried the present complaint, made by the complainant, Rajkumar, as if, in the first instance, it were a complaint laid under the provisions of s. 211 of the Indian Penal Code. But, after hearing the complainant and his witnesses, and specially the evidence of the Inspector of Police, the Joint-Magistrate framed a charge against the accused under the provisions of s. 182 of the Indian Penal Code, and under the provisions of that section sentenced the accused to pay a fine of 30 rupees, or in default to imprisonment for one month.

The Judge submits this order to be quashed by this Court, on the ground that it is an order contrary to law. The Magistrate contends that he had a right to make the order in question, and that it was good in law. We think the order, as it stands, is a bad order. Had the charge been a charge of the ordinary nature made by complainant in an ordinary manner, or made by the Magistrate himself, under the powers which he possesses under the Code of Criminal Procedure, no doubt he would not have been bound to frame any charge at all, until after he had heard the evidence of the complainant and the witnesses for the prosecution, and had taken such examination of the accused as he should have considered necessary. The charge in this instance, whether it was a charge under s. 182 or under s. 211, would equally be triable under the provisions of chapter 14 of the Code of Criminal Procedure; and s. 250 of that chapter lays it down that the charge shall be made at the time we have been referring to. But in this instance the charge was not made by the Magistrate himself, neither was it made by the complainant in the ordinary manner; but it was a charge which, whether we take it to be a charge under s. 211 or a charge under s. 182, required the previous sanction of the Criminal Court which had heard the previous complaint of the person who is now the accused before us.

By the provisions of s. 168, it is distinctly laid down that "a charge of a contempt of the lawful authority of any Court or public servant, or of any other offence against a public servant as such described in chapter 10 of the Indian Penal Code not falling within s. 163 of this Act, shall not be entertained in any Criminal Court, except with the sanction or on the complaint of the Court or public servant concerned." Now a charge under s. 182 is a charge of an offence against a public servant as such, and as described in chapter 10 of the Indian Penal Code. Therefore no Criminal Court was competent to entertain any such charge except, in the words of the Act, "with the previous sanction of, in this instance, the public servant concerned, or of his official superior." Therefore the Magistrate was wrong in framing the present charge, and in finding the accused guilty thereof, and in punishing him for the same.



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Subsequently, on the 29th August 1870, Iswar Chandra Roy presented a second petition to the Collector, praying that he might be allowed to prosecute Guru Charan, Nabin Chandra, Mahima Chandra, the prisoner now before us, and others; and the Collector upon that petition made the following order:—

“Sanction has already been given once by the Deputy Collector. I, however, have no objection to give it a second time, as the petitioner desires it. Sanction therefore is hereby given to the petitioner to institute a charge of forgery, &c.”

This sanction is given under s. 170 of the Criminal Procedure Code. It is evident that this order relates to and confirms the sanction given by the Deputy Collector on the 30th July 1870, and goes no further. The Collector repeats the sanction already given by the Deputy Collector, and there is nothing to show that the Collector intended to extend it to the other persons mentioned in the petition.

It has been urged before us that the error, if any, is one which can be cured by the terms of s. 426 of the Criminal Procedure Code. The words of that section are to this effect: “No finding or sentence passed by a Court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error or defect either in the charge or in the proceedings on trial, unless the accused person shall have been sentenced to a larger amount of punishment than could be awarded for the offence,” and so on. But the error in this case has been committed neither in the charge nor in the proceedings on trial. The error has been committed at the commencement, and no proceedings should have taken place previous to sanction being given.

It has been further contended that, as this suit was for an amount of rent above Rs. 100, the Collector's Court was not the proper Court to which application should have been made for permission to prosecute the defendants criminally; and that the proper Court is the Judge's Court to which the appeal

But it does not follow that we must on that account direct that the Magistrate's order should be set aside. For by the provisions of s. 426 of the Code of Criminal Procedure it is distinctly laid down that “no finding or sentence passed by a Court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error or defect either in the charge or in the proceedings on trial, unless the accused person shall have been sentenced to a larger amount of punishment than could be awarded for the offence of which, in the judgment of the Appellate Court, the accused person ought, upon the evidence, to have been found guilty, or unless, in the judgment of the Appellate Court, the accused person shall have been prejudiced by such error or defect.” The question, therefore, that we have to consider is whether the accused in this instance should more properly have been found guilty of an offence coming within the provisions of s. 211 of the Indian Penal Code; and, if he should, whether the sentence is appropriate, and whether the accused person has been prejudiced by the error in the charge, and by being found guilty of an offence within the provisions of s. 182.

Now, by s. 211 it is provided that “whoever, with intent to cause injury to any person, institutes or causes to be instituted any criminal proceeding against that person, or falsely charges any person with having committed an offence, knowing that there is no just or lawful ground for such proceeding or charge against that person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.” \* \* \* Now, here, upon the finding of the Magistrate, it is quite clear, and also upon the evidence on the record, that the accused, in this instance, did institute a criminal proceeding against the complainant, and falsely charged the complainant with having committed the offence of assault, &c., upon him, knowing that he had no just or lawful ground for his proceeding on that charge; and we must, of course, infer from the conduct of the accused in making such charge that he made it with intent to cause injury to the complainant. Whether, therefore, or not the punishment was adequate to the offence, the accused was certainly guilty of an offence coming within s. 211 of the Indian Penal Code, and so therefore should properly have been punished under the provisions of that section. And, as we have seen above, he was rightly charged with an offence under the provisions of that section. Although, therefore, we think the judgment of the Magistrate to be technically wrong, yet we also think it to be substantially right, and, seeing that the accused has not been prejudiced in the trial, we do not deem it necessary to interfere with his sentence.

would lie. As we think, however, that no sanction has been given as regards the prisoner now before us, it is unnecessary for us to determine that point. The sanction given by the Sessions Judge, after the case had been committed, and the prisoner pleaded to the charge, and the trial had actually commenced, is clearly not a sanction contemplated by the law.

Such being the case, we think that the proceedings taken against the prisoner before us must be quashed, and the prisoner discharged.

*Conviction quashed.*

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*Before Mr. Justice Norman, Offg. Chief Justice, and Mr. Justice Bayley.*

THE QUEEN v. AMIRUDDIN (APPELLANT).\*

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*Summing up to Assessors by the Judge—Waging War against the Queen—Conspiracy to wage War—Treason—Misprison of Treason—Limitation of Period of Prosecution—Documents, Admissibility of, in Evidence—Penal Code (Act XLV. of 1860), s. 121—Code of Criminal Procedure (Act XXV. of 1861), s. 379—7 Will. III., c. 3, s. 5.*

7 B. L. R. 63.  
[15 W. R. 25.]

Although the Code of Criminal Procedure does not expressly provide for summing up of the evidence in a trial with the aid of assessors, there is nothing in the Code to prevent a Judge from summing up the evidence to the assessors.

Where one of the two assessors says that he thinks it proved that a war was waged against the Queen, that there was a conspiracy to carry on that war, and that the prisoner is guilty of all the acts charged, and the other assessor concurs with him, it cannot be said that the assessors have given no reason for their opinion.

The offence of engaging in a conspiracy to wage war, and that of abetting the waging of war against the Queen, under s. 121 of the Indian Penal Code, are offences under the Penal Code only, and are not treason or misprison of treason; and therefore the provisions of the Statute 7 Will. III., c. 3, s. 5,† are not applicable.

The *Gazette of India*, or *Calcutta Gazette*, containing official letters on the subject of hostilities between the British Crown and Mahomedan fanatics on the frontier, were rightly admitted in evidence, under ss. 6 and 8 of Act II. of 1855,‡ as proof of the commencement, continuation, and determination of hostilities. Similarly, under s. 6, a printed letter from the Secretary to the Government of the Punjab, to the Secretary to the Government of India, was properly resorted to by the Court for its aid as a document of reference.

It was not necessary that these documents should be interpreted to the prisoner. It was sufficient that the purposes for which they were put in were explained.

\* Criminal Appeal, No. 784 of 1870, from an order of the Sessions Judge of Dinapore, dated the 27th August 1870.

† 7 Will. III., c. 3, s. 5.—“From and after the said 25th day of March 1696, no person or persons whatsoever shall be indicted, tried, or prosecuted, for any such treason as aforesaid, or for misprison of such treason, that shall be committed or done within the Kingdom of England, Dominion of Wales, or town of Berwick-upon-Tweed, after the said 25th day of March 1696, unless the same indictment be found by a grand jury within three years next after the treason or offence done or committed.”

‡ Act II. of 1855, s. 6.—“All such Courts and persons aforesaid shall take judicial notice of all divisions of time, of the geographical divisions of the world, of the territories under the dominion of the British Crown, of the commencement, continuation, and termination of hostilities between the British Crown and any other State, and also of the existence, title, and national flag of every Sovereign or State recognized by the British Crown. In all the above cases such Court or person may resort for its aid to appropriate books or documents of reference.”

S. 8.—“All proclamations, Acts of State, whether legislative or executive, nominations, appointments, and other official communications of the Government appearing in any such Gazette” (any Government Gazette of any country, colony, or dependency under the dominion of the British Crown), “may be proved by the production of such Gazette, and shall be *prima facie* proof of any fact of a public nature which they were intended to notify.”

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THE prisoner was tried, before the Judge of Dinapore, upon seventeen different charges, under s. 121 of the Indian Penal Code, of abetting the waging of war against the Queen, and was convicted by the Judge, concurring with assessors, on twelve of these charges, and was sentenced to transportation for life and forfeiture of all his property. Of these twelve charges it is necessary only to notice four—*viz.*, the 6th, the 13th, the 14th, and the 15th.

6th.—That he, in or about the years 1862-63, abetted the waging of war against the Queen by engaging in a conspiracy with Ibrahim Mandal of Islampore, Abdulla of Patna, and others, for the purpose of waging such war; and in pursuance of such conspiracy, at divers times and places, instigated divers persons—*viz.*, Martaza, Manulla, and Baboo Sheikh—to the waging of such war; and that he has thereby committed an offence punishable under s. 121 of the Indian Penal Code, and within the cognizance of the Court of Session.

13th.—That he, in or about the years 1862-63-64-66-68, abetted the waging of war against the Queen by entering into a conspiracy with Ibrahim Mandal of Islampore, Abdulla of Patna, and others, for the purpose of waging such war; and in pursuance of such conspiracy, at divers times and places, procuring divers persons—*viz.*, Shiki Mandal, Shariatulla, Myatulla, Abdulla Mandal, and Salim Mandal—to contribute money in order to the waging of such war; and that he has thereby committed an offence punishable under s. 121 of the Indian Penal Code, and within the cognizance of the Court of Session.

14th.—That he, in or about the year 1865, at or near Kamlabari, abetted the waging of war against the Queen by entering into a conspiracy with Ibrahim Mandal of Islampore, Abdulla of Patna, and others, for the purpose of waging such war; and, in pursuance of such conspiracy, forwarding money to Ibrahim Mandal of Islampore, in order to the waging of such war; and that he has thereby committed an offence punishable under s. 121 of the Indian Penal Code, and within the cognizance of the Court of Session.

15th.—That he, in or about the year 1868, at or near Narainpore, abetted the waging of war against the Queen by entering into a conspiracy with Ibrahim Mandal of Islampore, Abdulla of Patna, and others, for the purpose of waging such war; and, in pursuance of such conspiracy, collecting property for defraying the expense of such war, in order to the waging of such war; and that he has thereby committed an offence punishable under s. 121 of the Indian Penal Code, and within the cognizance of the Court of Session.

Among the documentary evidence adduced and admitted against the prisoner, were the following :—

The *Calcutta Gazette* of the 16th of June 1858, containing a Despatch from the Deputy Adjutant-General of the Army, dated 27th May 1858, forwarding a Report from Major W. Middleton, 17th Madras Native Infantry, of the successful operations of the Column under his command, on the banks of the Jumna, near the village of Gharra, on the 9th May, published by the order of the Governor-General.

The *Gazette of India* of the 30th January 1864, containing a General Order by the Governor-General of India in Council, dated 29th January 1864, and several Reports and Despatches from the Commanding Officers, detailing military operations undertaken against the rebels on the North-Western Frontier, and reporting their result for the information of the Governor-General in Council and the Commander-in-Chief.

The *Gazette of India* of the 9th November 1868, containing a letter from the Quarter-Master-General, dated the 5th instant, forwarding, by direction of the Commander-in-Chief, copies of Despatches from Major-General A. T. Wilde, C.B., C.S.I., Commanding the Hazra Field Force, detailing the operations of the force under his command, published by the direction of the Viceroy and Governor-General in Council.

Also a printed official letter from the Secretary to the Government of the Panjab, to the Secretary to the Government of India.

The prisoner appealed from the conviction and sentence.

Mr. *M. Ghose* for the prisoner.

The *Standing Counsel* appeared on behalf of the Crown, but was not called upon.

The arguments raised on behalf of the prisoner appear from the judgment of the Court, which was delivered by

NORMAN, J. (who, after stating the conviction, reciting the 6th, 13th, 14th, and 15th charges, continued) :—

Mr. Ghose, as counsel for the prisoner, after making an objection to the validity of the conviction, on the ground of alleged irregularity in the conduct of the trial, and contending that certain classes of evidence admitted by the Judge had been improperly received, went into a most elaborate and careful examination of the evidence, both oral and documentary, in detail.

The first point raised by him was that the trial was not conducted in accordance with the provisions of the Code of Criminal Procedure, inasmuch as it appears that the Judge, at the conclusion of the reply of the Government prosecutor, and before calling upon the assessors to give their opinions, summed up the case to the assessors.

No statement as to the terms in which the Judge summed up appears on the record. Mr. Ghose pointed out that while, by s. 379 of the Criminal Procedure Code, in trials by jury, the Court requires the Judge to sum up the evidence, no such provision is made for the case of trials by the Court of Session with the aid of assessors. He referred to some observations of Mr. Justice L. S. Jackson in *The Queen v. Poly*,\* where this distinction is adverted to.

\* Before Mr. Justice Loch and Mr. Justice L. S. Jackson.

The 14th April 1869.

THE QUEEN v. JOGE POLY, APPELLANT.(a)

THE judgment of the Court was delivered by

JACKSON, J.—We think the prisoner has been properly convicted, and we see no reason to interfere with the sentence.

There are two points connected with the proceedings at the trial on which it is proper to remark.

One is that, but for the prisoner's admission before the Court of Session that his statement before the Magistrate had been voluntarily made, the Judge would have required evidence of that fact, s. 336. The attestation of the Magistrate is *prima facie* proof of such examination, and it is to be presumed, until the contrary be shown, that the proceedings were regular.

Secondly.—The Judge appears to have addressed the assessors in the way of summing up the evidence. This is not in accordance with the Procedure Code. The assessors are members of the Court, and are to give their opinions orally for the consideration of the Judge, who afterwards gives his decision. In the case of a Jury, who have the final decision on the facts, it is the duty of the Judge to sum up, and, when necessary, to direct them.

(a) Appeal, No. 114 of 1869, from the order of the Sessions Judge of Dinapore, dated the 26th January 1869.

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We may observe that although the Code of Criminal Procedure does not expressly provide for summing up the evidence in a trial with the aid of assessors, there is nothing in the Code to prevent a Judge from summing up the evidence, which is, in fact, only a mode of going through and discussing it with the assessors. In a case like the present, where the prisoner was being tried on seventeen charges, where the evidence was very voluminous—fifty-five witnesses having been examined for the prosecution, and upwards of thirty for the defence—we think that a Judge sitting with assessors would have failed in his duty, or at least showed a want of sound discretion, if he had not indicated the matters necessary to be established by proof in order to convict the prisoner of the offence or offences charged. With full notes of the evidence and all the documents before him, we should have been surprised if we had found that the Judge had failed to assist the assessors by reminding them of the results of the evidence, and pointing out the bearing of the several parts of such evidence on the questions to be considered.

In cases of trial by jury, the summing up is all-important, because there is no appeal from the decision of a jury. In order to know what is the proposition which the jury have affirmed, what it is that they have really decided in finding a verdict of guilty, it is generally necessary to look to the questions left to them by the Judge in summing up; and therefore, in order that it might appear whether the conviction is legal and proper, it was necessary in the Code of Criminal Procedure to provide that in trials by jury a statement of the Judge's direction should form part of the record. A provision to that effect is contained in s. 379. In trials before a Judge sitting with assessors, there is an appeal on the facts. The Appellate Court can examine the grounds of the finding of the Judge and assessors. It is, therefore, not necessary to preserve any record of the discussion between the Judge and the assessors. But because the Code is silent as to such discussion, it does not follow that nothing of the sort is to take place. Mr. Ghose urged that the object of appointing assessors was to assist the Judge, not for the Judge to assist, or by such assistance to influence, the assessors. But the real object of appointing assessors is to assist the Court, and the discussion and statement of points by a Judge sitting with assessors cannot be said to be otherwise than in furtherance of the object of getting the best assistance for the proper adjudication of the case.

Mr. Ghose next contended that, as there is no record of the Judge's summing up to the assessors, the Court is not in a position to know how far the assessors may have been influenced by the Judge's observations, and that therefore less weight is to be attributed in this case than in ordinary cases to the fact that the assessors have concurred with the Judge in finding the prisoner guilty.

Mr. Ghose further contended that the assessors had given no reasons for their opinion—the last observation is not quite well-founded. The assessors do not merely find the prisoner guilty. The first assessor, with whom the other concurs, says: "I think it proved that a war was waged against the Queen, that there was a conspiracy to carry on that war, and that the prisoner is guilty of all the acts charged." It is clear then that the assessors knew what were the points which they had to consider, and there is nothing on the record to lead us to think that they did not form an independent judgment on the evidence.

Mr. Ghose next pointed out that all the acts with which the prisoner is charged took place more than three years ago. He contended that by English law, as embodied in Statute 7 Will. III., c. 3, s. 5, no person can be indicted or prosecuted for treason, unless within three years after the commission of the

offence. He argued that this law had been introduced as part of the law of England, at least as regards persons liable to be tried in the High Court in its Original Criminal Jurisdiction, by the Charter, and that, before the passing of the Penal Code, the English law of treason was applicable to offences committed against the Sovereign by natives of India otherwise than within the limits of the town of Calcutta; and that, if this provision was in force at the time of the passing of the Penal Code, it has not been repealed by anything in that Code.

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The answer to this argument is that the offences with which the prisoner stands charged are not treason or misprison of treason, to which alone the provisions of 7 Will. III., c. 3, s. 5, are applicable, but offences against the Penal Code.

In taking upon itself the administration of criminal justice in Bengal, Behar, and Orissa, the English Government, so far from abrogating the existing law of the land, and introducing English criminal law, undertook to administer the law as it stood—that is, the Mahomedan criminal law—subject to such modifications as might be found necessary. Accordingly, we find that crimes committed by natives of India against the State, as by levying war against the Crown and the like, outside the town of Calcutta, were formerly punished, not as treason under English law, but as offences against the law of the land—i. e., Mahomedan law—after taking the *futwas* of the Mahomedan law-officers. See the case of *Meersa Beg*, who was declared liable to *taseer* at the discretion of the rulers of the country, and sentenced to death, in 1799—Harrington's Analysis, Volume I., p. 336—340, note; Regulation IV. of 1799.

The special limitation of the period of prosecution in cases of treason and misprison of treason under Statute 7 Will. III., c. 3, s. 5, is an exception to the general rule in criminal cases; and in enacting s. 121 of the Indian Penal Code, the Legislature has not thought fit to limit in any way the period within which a prosecution for an offence against that enactment may be commenced, and consequently such limitation does not form part of the Penal Code, under which the prisoner has been convicted by the Sessions Judge and assessors.

Mr. Ghose next objected that the Calcutta Gazette of the 16th of June 1858, and the Gazette of India of the 30th January 1864 and of the 9th of November 1868, had been improperly received in evidence.

They are, however, clearly admissible in evidence, under s. 8 of Act II. of 1855, to prove the proclamation and official communications of the Government relating to the war on the frontier.

By s. 6 the Court is bound to take judicial notice of the commencement, continuation, and termination of hostilities between the British Crown and any other State, and is empowered to resort to appropriate books and documents of reference. It is to this end that the Exhibit D 1, a printed official letter from the Secretary to the Government of the Panjab, to the Secretary to the Government of India, also objected to by Mr. Ghose, is admissible in evidence. Of course, it is not evidence of the facts mentioned in detail by the writer of the letter.

These several documents are evidence, and may be referred to under s. 6, Act II. of 1855, as to the commencement and continuation of the war between the Government and the Mahomedan fanatics on the frontier, at Malka, Sittang, Umbeyla, and other places.

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Mr. Ghose next objected that there had been an irregularity in the trial, because the Government Gazettes and the letter of the Secretary to the Government of the Panjab were not read at length and interpreted to the prisoner in open Court in a language understood by him, which he contended was required by the 200th section of the Code of Criminal Procedure.

S. 200 relates to the oral evidence of the witnesses. As to the documentary evidence, we are of opinion that, although, undoubtedly, a prisoner has a right to have all or any part of any document used on his trial translated or interpreted to him, yet, put in, as these Gazettes were, for the purpose of merely giving formal proof of that which was an incontestable fact, that the Government was issuing proclamations as to the war on the frontier, it would not be necessary to interpret them at length. It would be sufficient if the prisoner was made to understand what they were, and for what purpose they were used.

To interpret them at length from beginning to end would have been a mere useless waste of time, and would have probably embarrassed the prisoner, because it would be difficult, or almost impossible, to make him understand that the detailed statements read to him were not being used against him as proof of the several detailed facts stated therein. We have no reason to believe that the prisoner was not made fully aware of their nature, and of the object with which they were put in, and it is stated in the proceedings that the prosecutor addressed the Court in Urdu, a language understood by the prisoner.

Mr. Ghose next referred to the 28th section of Act II. of 1855, and contended that, the prisoner being charged with treason, no offence charged against him could be proved by the evidence of a single witness. It is not necessary to discuss or determine what rule of evidence applies to trials for offences against the State under the Penal Code. Even if the Statute 7 Will. III., or the earlier English law, applied, which it certainly does not, the evidence we have to deal with is sufficient in quantity to satisfy the strictest rule.

(After noticing the objections by the counsel for the prisoner to the admission in evidence of two letters produced against the prisoner, and stating the facts relating to them, His Lordship proceeded):—

Mr. Ghose argued that the discredit thrown on the evidence for the prosecution by the falsity of this part of the case ought to lead us to disbelieve the rest of the evidence against the prisoner.

To that there are two answers: first, that though we distrust the evidence relating to the two letters very much—though we could not rely upon it or accept it as true—it is not proved to be false; secondly, the facts to which those letters relate are insulated, and stand quite apart from the general current of the evidence. Omitting, as we have, all further allusion to the evidence of the witnesses who speak to the letters, the general case against the prisoners stands untouched. Suppose it be true that Tafiulla concocted the letter produced by him to ruin a man whom he considers to be his enemy, there is no ground for supposing that other witnesses wholly unconnected with him are not speaking the truth.

(His Lordship here commented on the evidence of the witnesses in detail—lastly of one Martaza—and proceeded):—

Mr. Ghose's chief point as to the evidence of Martaza was that the offence was not shown to have taken place since the commencement of 1862, when the Penal Code came into operation. But, according to the evidence, Martaza was only four or five months with the crescentaders, and while, at Malka, he heard of the affair at Tupi Miani, which took place in 1863. Martaza seems

to have come straight from the prisoner's house. This would make it probable that it could hardly have been much earlier than the middle of 1862 when Martaza left the prisoner's house, and that Martaza and the witnesses are right when they put his departure from that house about eight years before the trial, or, in other words, in the middle of 1862.

Mr. Ghose attempted to show that there were discrepancies in the evidence of these witnesses. But the evidence as regards Martaza appears to us to be reliable.

(His Lordship continued to comment on the evidence of the witnesses in detail, and proceeded): This evidence appears to us abundantly sufficient to justify the finding of the Judge and assessors that the prisoner is guilty on the 6th charge—*viz.*, that he abetted the waging of war against the Queen by engaging in a conspiracy with Ibrahim Mandal and others, and in pursuance of that conspiracy instigated Martaza, Manulla, and others to the waging of such war.

The next subject we propose to consider is the 13th charge, which relates to the collecting of money to forward the objects of the conspiracy.

(After further commenting on the evidence in detail, His Lordship proceeded): The evidence seems to us full and clear. The Judge and assessors could scarcely have come to any other conclusion than that at which they arrived—*viz.*, that the 13th and 15th charges were brought home to the prisoner.

(After further commenting on the evidence in detail, His Lordship proceeded): The prisoner is shown to belong to a peculiar sect distinct from the great classes, Sunnis and Shias, to which the Mahomedans of this country chiefly belong, to be a religious enthusiast, a zealot who goes round from village to village telling people to fast and pray, not to commit evil, to abstain from superstitious observances such as offerings at the tombs of saints, to give alms, to go on pilgrimages, and to contribute, if but a handful of rice out of each meal, to the expenses of war against infidels. It cannot be supposed that a man of such character would be guilty of the dishonesty of habitually appropriating the collections so made to his own purposes. Unless we are to assume that he was guilty of embezzlement, the money collected must have been forwarded by the prisoner to the heads of the conspiracy.

I think then that it is impossible to say that the Judge and assessors were not right in convicting the prisoner on the 14th charge.

It is not necessary to go into the other charges, which are merely subordinate.

Great stress was laid by Mr. Ghose on the fact of the animosity or supposed enmity arising out of religious differences of certain persons named Abbas Ali, Tafiulla, Nasral-Huq, and Itwari.

But the evidence in this case shows graver motives than even the hot dispute on matters of ceremonial such as "ameen," "ruffadun," "buratikhana," for the hostility which many of his neighbours may entertain towards the prisoner.

He is shown to have worked on the feelings of boys of fifteen or sixteen, many of whom were enticed away from their homes, and induced to join in the jihad. Some of these have been followed, and have been brought back by their parents. Of those who persevered, considerable numbers appear never to have returned or been heard of again. These, no doubt, if not killed in battle, have either perished from exposure or disease, or fallen in conflicts with jealous or hostile tribes on the North-West Frontier.

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The offences of which the prisoner has been convicted are punishable under the 121st section of the Indian Penal Code with death or with transportation for life, with forfeiture of property. The sentence of transportation for life, with forfeiture of property, appears to us to be proper.

We reject the appeal.

*Appeal dismissed.*

[FULL BENCH.]

*Before Mr. Justice Norman, Offg. Chief Justice, Mr. Justice Loch,*

*Mr. Justice Bayley, Mr. Justice Kemp, Mr. Justice Phear,*

*Mr. Justice Macpherson, and Mr. Justice Miller.*

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May 30.

MANIRUDDIN AND ANOTHER v. GAUR CHANDRA SHAMADAR.\*

7 B. L. R.

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[15 W. R. 89.]

*Whipping—Indian Penal Code (Act XLV. of 1860)—Criminal Procedure Code (Act XXV. of 1861), s. 46—Act VI. of 1864.*

Where the prisoner was convicted by the Magistrate of three distinct and separate offences, and was sentenced to a month's imprisonment for the offence of wrongful confinement under s. 342, six months' imprisonment for the offence of voluntarily causing grievous hurt under s. 325, and to whipping with 20 stripes for the offence of theft under s. 378 of the Indian Penal Code, it was *held* (Kemp and Phear, JJ., *dissenting*) that the sentence was legal.

Where a person is convicted at the same time of two or more offences punishable under the Indian Penal Code, *held* (Kemp and Phear, JJ., *dissenting*) that it is lawful for the Court, in addition to the penalties prescribed by the Penal Code, to sentence the prisoner to whipping.

*Nassir v. Chunder* † not followed.

On the morning of the 9th Chaitra (22nd March), Gaur Chandra Shamadar carried off a cow belonging to Maniruddin, under circumstances which, in the opinion of the Magistrate, constituted the offence of theft. On the evening of the same day, Maniruddin went to complain to the talookdar whose ryot he was.

Gaur Chandra, who lived near the talookdar, on seeing Maniruddin, seized him, carried him inside the veranda of his house, and beat him.

Gopal Shamadar, hearing the outcries of Maniruddin, remonstrated with Gaur Chandra, upon which Gaur Chandra attacked Gopal, and struck him with a *lathi*, breaking his arm.

The Magistrate convicted Gaur Chandra on three charges :—

1st, of theft, under s. 378; 2nd, of illegal confinement of Maniruddin, under s. 342; and, 3rd, of causing grievous hurt to Gopal Shamadar, under s. 325.

For the first offence Gaur Chandra was sentenced to and received 20 stripes; for the second, to one month's rigorous imprisonment; and for the third, to six months' rigorous imprisonment.

The prisoner appealed to the Sessions Judge, on the ground that the Magistrate's sentences of imprisonment, in addition to whipping, were illegal, and cited *Nassir v. Chunder*, † and referred to Act VI. of 1864, s. 9.

\* Reference, under s. 434 of the Code of Criminal Procedure, by the Sessions Judge of Backergunge.

† Reference by the Sessions Judge of Mymensing under Circular Order (No. 17, dated 17th June 1863), March 12, 1868.

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The Judge considered that the charges against the prisoner were well proved; but the prisoner was wrong in referring to Act VI. of 1864, s. 9, as the sentence under s. 379 was whipping, and not "whipping *plus* imprisonment," and the next sentence was to commence after the whipping.

With reference to the case cited, he considered that the sentences of imprisonment could not stand; and as the sentence for one month under s. 342 was not within his cognizance as an Appellate Court, he requested the opinion and order of the High Court with reference to the sentences.

On the 13th May 1871, the case was referred to a Full Bench by Norman and Loch, JJ., who thought that the rule laid down in *Nassir v. Chunder*\* required further consideration.

The following judgments were delivered:—

**NORMAN, J.**—Gaur Chandra Shamadar was tried by the Magistrate of Backergunge, and convicted at the same time of three totally distinct and separate offences. He was sentenced to a month's imprisonment for the offence of wrongful confinement under s. 342; six months' imprisonment for the offence of voluntarily causing grievous hurt under s. 325; and to whipping with 20 stripes for the offence of theft, as defined in s. 378 of the Penal Code.

Each of these sentences, taken by itself, is a legal punishment for the offence in respect of which it was pronounced. As regards the sentence of whipping, the 2nd section of Act VI. of 1864 enacts that "whoever commits any of the following offences," of which theft is one, "may be punished with whipping in lieu of any punishment to which he may, for such offence, be liable under the Indian Penal Code." The punishment of whipping was therefore legally substituted for the punishment to which Gaur Chandra would have been liable for the offence of theft.

If the trial for each offence had taken place separately, there would have been no possible doubt of the legality of the three separate sentences.

Let us now see on what principle it can be said that if, instead of trying the charges separately, a Criminal Court of competent jurisdiction tries the prisoner on the three charges at the same time, it is incompetent to pronounce that the accused shall suffer for each offence the penalty prescribed by the law. I leave aside for the moment the question of the jurisdiction of the Magistrate, to which I propose to come hereafter. Sir Barnes Peacock says: "The question is whether, if a person is convicted at the same time of two or more offences punishable under the Indian Penal Code, it is lawful for the Court, in addition to the penalties prescribed by the Penal Code, to sentence the prisoner to whipping." I confess I do not understand why not if the sentence for each offence is itself legal. The 1st section of Act VI. of 1864 enacts that, "in addition to the punishments prescribed in s. 53 of the Indian Penal Code, offenders are also liable to whipping under the provisions of that Code." Sir Barnes Peacock refers to s. 46 of the Code of Criminal Procedure. He says: "It does not say that, when a prisoner shall be convicted of two or more offences, it shall be lawful for the Court to sentence such person for the offences for which he shall have been convicted to the several penalties prescribed by any subsequent Act." He assumes, Mr. Justice Phear states more directly, that "a Magistrate" (or Criminal Court, for the same argument must apply to all Criminal Courts) "cannot pass simultaneously several sentences which shall take effect in succession to one another. That provision is given solely by the Code of Criminal Procedure." Again, he says: "I think a Magistrate has no

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power to inflict a succession of punishments, except under the provisions of s. 46 of the Code of Criminal Procedure." Now, by s. 22, a Magistrate is declared competent to pass sentence, in respect of the offences triable by him, within the limit of "imprisonment of either description not exceeding the term of two years, including such solitary confinement as is authorized by law, or fine to the extent of Rs. 1,000, or both imprisonment and fine in all cases in which both punishments are authorized by the Indian Penal Code." Suppose s. 46 had never been enacted, and a Magistrate, having convicted a prisoner of theft and violent assault on the police attempting to arrest him, had sentenced him to six months' imprisonment for each offence, the second sentence to take effect at the expiration of the first, what objection would there be to the sentence? The amount of punishment would be within the limit which the Magistrate was competent to inflict, and in each case a sentence of imprisonment for six months would be legal. It is not easy to understand why the prisoner should not suffer the full penalty of the offences committed by him.

It the sentence would be illegal, it must be because there is some rule of law which prevents a judicial officer from passing a sentence of imprisonment to take effect in future after the expiration of an existing sentence, or sentence for another offence pronounced at the same time.

The question was raised upon a writ of error argued in the House of Lords in the year 1769 in the case of *John Wilkes v. The King*,\* where the House of Lords, affirming the judgment of the Court of King's Bench, in accordance with the unanimous opinion of the Judges, held that a sentence of imprisonment against a defendant to commence from and after the determination of an imprisonment to which he was before sentenced for another offence was good in law. See also 1 Chitty's Criminal Law, 718.

In my opinion it is clear that s. 46 of the Code of Criminal Procedure (which is analogous to the English enactment, 7 & 8 Geo. IV., c. 26, s. 10, and to the 23rd section of 9 Geo. IV., c. 74, rendered applicable to offences under the Penal Code triable on the original side of the High Court by Act XVIII. of 1862) was not necessary in order to create, but was passed in order to regulate and extend, the power of Courts in passing such sentences.

Sir Barnes Peacock thinks that s. 46 must be construed strictly, and treats it as not applying to penalties imposed by any subsequent Act. I confess I do not understand that view of the case. It seems to me that s. 46 is part of a general Code of Criminal Procedure applicable not only to offences created by the Penal Code, but presumably to all offences created by subsequent legislation; and that, if s. 46 does not apply to offences or penalties created after the passing of the Code of Criminal Procedure, the same argument must apply to any other portion of that Code. From the date of the passing of Act VI. of 1864 whipping is made one of the penalties which, by the Indian Penal Code, are prescribed for the punishment of offenders. I think that the Indian Penal Code and the Code of Criminal Procedure must be read as if the Whipping Act formed a part of the Penal Code from the date of its enactment. In passing a sentence of whipping, a Magistrate is not exercising any extraordinary jurisdiction. It is a sentence which, since the passing of Act VI. of 1864, he is competent to inflict in the exercise of his ordinary jurisdiction. I think it plain that we must read s. 46 as applying to all offences and punishments as prescribed by the Indian Penal Code in its present and amended form.

The 46th section consists of two parts or clauses: the first part, an empowering or enabling clause, the power being limited by the second part or proviso.

\* 4 Brown's Par. Cas., 367; S. C., 4 Burrows' Rep., 2577.

The first clause is as follows: "When a person shall be convicted at one time of two or more offences, punishable under the same or different sections of the Indian Penal Code, it shall be lawful for the Court to sentence such person for the offences of which he shall have been convicted to the several penalties prescribed by the said Code, which such Court is competent to inflict; such penalties, when consisting of imprisonment, to commence the one after the expiration of the other. It shall not be necessary for the Court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which such Court is competent to inflict on conviction of a single offence, to send the offender for trial before a higher Court." Under the first clause, reading it according to its ordinary grammatical construction, when a prisoner has been convicted of several offences, a Criminal Court, competent to inflict the penalty of whipping, is competent to punish one of such offences with whipping, that being one of "the several penalties prescribed by the Code;" and other offences with other of "the several penalties prescribed by the Code;" such as imprisonment or the like. Then come the qualifications or provisos, the second of which we have to deal with: "Provided that, if the case be tried by a Magistrate, the punishment shall not, in the aggregate, exceed twice the amount of punishment which such Magistrate is, by his ordinary jurisdiction, competent to inflict." The limit of the power of imprisonment possessed by the Magistrate of the district is two years, and fine to the extent of Rs. 1,000. A Magistrate, before the passing of the Whipping Act, under s. 46, could have sentenced an offender, convicted at the same time of several offences, to an aggregate of punishment amounting to four years' imprisonment, and fines amounting to Rs. 2,000. Since the passing of the Whipping Act, the Magistrate has the power to inflict whipping in lieu of imprisonment for certain offences. If s. 46 does not apply to punishment under the Whipping Act, the only question as to such sentence would be whether it is a legal punishment for the offence for which it is to be inflicted. The limitation under s. 46 of the Magistrate's power would not apply to a sentence of whipping. But if s. 46 does apply, as I think it does, the punishment in the present case is clearly warranted by it. The Magistrate of a district has power to inflict two years' imprisonment, with whipping in certain cases; or whipping in lieu of imprisonment in others. Twice that would be four years' imprisonment, with (or in lieu thereof) two whippings. One whipping and seven months' imprisonment is clearly within the limit of twice the amount of imprisonment which the Magistrate was competent to inflict.

I am therefore of opinion that the sentences upon the prisoner Gaur Chandra are not illegal. I do not discuss the question whether a Magistrate has power to inflict two whippings. That depends entirely on the construction of the Whipping Act. I confess I do not think it presents much difficulty.

LOCH, J.—I concur in the view taken by the Chief Justice that Act VI. of 1864 should be read as part of the Penal Code, though there be no express words to that effect in the Act. It appears, however, to me from the preamble to the Act, as well as from the wording of ss. 1, 2, 3, and 4, that this view is correct. Whipping was a punishment excluded from the list of punishments prescribed by the Penal Code. It has been added to that list by Act VI. of 1864. And this punishment is to be inflicted, as shown by ss. 2 and 3 of the Act, in lieu of, or in addition to, any punishment prescribed by the Penal Code. I would therefore read the Code as Mr. Justice Jackson did on a former occasion when this question was before the Court, *e. g.*, I would read the punishment

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prescribed for theft as follows : " Whoever commits theft shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or both," or with whipping in lieu of, or in addition to, other punishment as the case may be, and so on in other cases where the offence is made punishable with whipping under Act VI. of 1864. A party convicted of theft for the first time would be liable to be whipped in lieu of other punishment. If convicted of theft a second time, he would be liable to whipping, in addition to a sentence of imprisonment and fine. If, then, a person be tried at one time for two or more offences, one of which involves the punishment of whipping in lieu of, or in addition to, the punishment of imprisonment, what sufficient reason is there that he should not be sentenced in each case to the penalty prescribed for each offence? If a man have committed theft, and, in resisting a neighbour of the party robbed, he inflict grievous hurt, why should the offender not suffer for both offences? It is clear that he might be punished with imprisonment for the theft, and with imprisonment for the grievous hurt; and under the provisions of s. 46, Criminal Procedure Code, the period of imprisonment in one case would commence from the close of the period in the other; but why, if whipping have been added to the punishment prescribed by the Penal Code, should not the offender be punished with whipping in lieu of other punishment for the first offence, and with imprisonment for the second? Or if he have been convicted of theft more than once, why should he not be punished with whipping, in addition (s. 3, Act VI. of 1864 to any other punishment prescribed by the Code, and also to imprisonment for the other offence? And if the punishment in the first case be whipping, in addition to imprisonment, the imprisonment awarded in the second case would, under the provisions of s. 46 of the Criminal Procedure Code, commence on the expiration of the other. Reading, as I do, Act VI. of 1864 as part of the Penal Code, I do not confess that I see no sufficient reason for holding that, if a Magistrate proceeds under s. 46 of the Code of Criminal Procedure, he must confine his sentence strictly within its provisions.

BAYLEY, J.—I think the Magistrate's acts are not illegal. The Whipping Act does not preclude punishment for those offences to which it is applicable, such as theft here. And because a man is punished according to law with whipping for theft, I do not see why he should not be punished for assault and grievous hurt when he commits those distinct and separate offences as in this case. I see nothing in the law against this view.

KEMP, J.—I think that the view taken by the late Chief Justice, Sir Barnes Peacock, and by Mr. Justice Phear in *Nassir v. Chunder*,\* is correct.

MACPHERSON, J.—I remain of the opinion which I expressed at length in the case of *Nassir v. Chunder*,\* and I have no doubt in my own mind that the sentences passed on the prisoner, Gaur Chandra, are legal.

MITTER, J.—I am of opinion that the view taken by the Chief Justice and by Mr. Justice Macpherson is correct. The reasons in support of that view have been so fully gone into by those learned Judges that it would be mere waste of time on my part to repeat them.

PHEAR, J.—I regret very much that I cannot bring myself to agree with the majority of my colleagues in this case. I am unable to perceive error in

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\* Reference by the Sessions Judge of Mymensing under Circular Order (No. 17, dated 17th June 1863), March 12th, 1868.

the view taken by Sir Barnes Peacock and myself on the occasion which has been referred to. It still appears to me that a multiple punishment inflicted by one sentence is essentially different in its character and effect from the aggregate result of the punishments, which are its factors, supposed to be separated from each other by an interval of time. I take it that no Judge of sound discretion, if called upon to accumulate punishments for different offences, would award each punishment precisely in the same manner as he would if the corresponding offence were alone under his consideration. For instance, if a man was convicted at one time of three thefts, for each of which, if it stood single, one year's imprisonment might be an appropriate punishment, I suppose that the convicting officer would for a moment think that, therefore, the aggregate of three years was the right punishment for the three offences. The whole of s. 46 of the Criminal Procedure Code, and especially the proviso in the latter part of it, appear to me to show beyond question that the Legislature held this view, which I endeavour to express, namely, that a punishment effected by accumulation of penalties is not merely a set of separate punishment. Then also the words of the Whipping Act seem to me to make it as plain as can be that the Legislature, in giving Criminal Courts the power which they did not before possess of inflicting the punishment of whipping, intended, for reasons which may be easily conjectured, carefully to limit its application. I cannot see in the Act the smallest indication that the Legislature contemplated whipping, as by any possibility becoming, under the Act, an element in any punishment, except under the circumstances which are therein expressly mentioned. On the contrary, the language of the Act, coupled with the elaborately detailed form of its various provisions, leads me to think that the Legislature only meant that whipping should be associated with another punishment, in the particular cases, of which express mention is made. But if the Whipping Act does, in truth, apply not only to single sentences, but also to each constituent factor of an accumulated sentence, such as is the subject of s. 46 of the Criminal Procedure Code, whipping may be lawfully associated with other punishments, even in cases of minor offences not committed after previous conviction—a result which certainly seems to me diametrically opposed to the unmistakeable spirit of the Act itself. Thus, if a boy were convicted of stealing two mangoes belonging to one owner, he could not be both whipped and also imprisoned; the whipping, if inflicted, must, by the words of the Act, be in lieu of any other punishment; but if it were proved that one mangoe belonged to one owner, and the second to another, the Magistrate might, on the principle now maintained, convict for two offences, and in this way both imprison and whip. I can't believe that the Legislature, against the very spirit of the Act, intended to leave a discretion of this sort to the judicial officer. Before the whipping Act was passed, he certainly had not uncontrolled discretion in the matter of accumulating such punishments as then existed. S. 46 expressly restricted him in this respect; and I think the consequence is that, since the passing of that section at any rate, he has had no other power of accumulating punishments than is given him either by that or by some subsequent enactment. In the case which has been cited, I gave at length my reasons for coming to the conclusion that the punishment of whipping was not included among the punishments which a judicial officer could accumulate in the event of simultaneous conviction for several offences. To the opinion which I then expressed, I still adhere, and therefore I need not now discuss this question again.

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## [APPELLATE CRIMINAL.]

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7 B. L. R. 179.

[16 W. R. 15.]

*Before Mr. Justice Kemp and Mr. Justice Glover.*

IN THE MATTER OF THE PETITION OF GHOLAB KHAN, MOOKHTEAR.

*Act XX. of 1865, ss. 15, 16—Mookhtear, Dismissal of—Professional Conduct—Reasonable Cause.*

The High Court has power, under s. 15, Act XX. of 1865, to suspend or dismiss a mookhtear from his office, when it sees "reasonable cause," although he might not have committed any act of "professional misconduct" under s. 16.\*

Mr. G. Gregory for the petitioner.—Under s. 14, a mookhtear can be removed when he is convicted of a criminal offence. The accused here was charged with a criminal offence, and he was properly tried, and was acquitted on the evidence. All the Courts in the country must accept that finding for all purposes.

S. 15 provides only for cases of fraudulent or grossly improper conduct in the discharge of his professional duty. The words, "or for any other reasonable cause," must refer to things *ejusdem generis*. The Sessions Judge on the trial condemned the evidence against the accused as suspicious, and here we have only a part of that evidence adduced on this inquiry.

GLOVER, J.—Gholab Khan was tried at the Midnapore Sessions on a charge of instigating a very serious dacoity; he was acquitted (the Judge differing from the assessors, who thought the accused guilty), on account of an insufficiency of evidence which induced the Judge to give him the benefit of a doubt. The Magistrate considered that, although acquitted at the Sessions, Gholab Khan was, under the circumstances, unfit to hold the position of mookhtear, and applied to the Judge, under s. 16 of Act XX. of 1865, to report the matter to the High Court. The Judge, Mr. Bainbridge (the same officer who held the Sessions trial), sent up the Magistrate's letter, with an endorsement to the effect that the mookhtear deserved to lose his sanad.

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\* *Act XX. of 1865, s. 15.*—"The High Court may also, after such enquiry as it may deem proper, suspend or dismiss any pleader or mookhtear enrolled as aforesaid, who shall be guilty of fraudulent or grossly improper conduct in the discharge of his professional duty or for any other reasonable cause."

S. 16.—"If any pleader or mookhtear practising in any Court subordinate to the High Court shall be charged in such subordinate Court with any such conduct as aforesaid, the Judge or Magistrate of the Court, as the case may be, shall send him a copy of the charge, and also a notice that, on a day to be therein appointed, such charge will be taken into consideration. Such copy and notice shall be served upon the pleader or mookhtear at least ten days before the day so appointed, and on such day, or on any subsequent day to which the enquiry may be adjourned, the Court shall receive all evidence properly tendered by or on behalf of the party bringing the charge, or by the pleader or mookhtear, and shall proceed to adjudicate on the charge. If the Judge or Magistrate shall find the charge established, and consider that the pleader or mookhtear should be suspended or dismissed in consequence, he shall record his finding and the grounds thereof, and shall report the same to the High Court, and the High Court shall proceed to acquit, suspend, or dismiss the pleader or mookhtear. Such report, when made by any officer other than the District Judge, shall be submitted to the High Court through the District Judge, who shall accompany the report with any remarks that he may think necessary, and an expression of his own opinion on the case. Such report, when made by a Magistrate subordinate to the Magistrate of the District, shall be submitted through the Magistrate of the District to the District Judge, and shall be accompanied by the remarks and opinion of the Magistrate of the District as aforesaid. The Judge or Magistrate may, pending the investigation and the orders of the High Court, suspend the pleader or mookhtear from practising in the Court."

This Court, after reading the proceedings, pointed out to the Judge that the requirements of the law had not been complied with; and the papers were returned with directions that a charge should be properly drawn up, and a copy of the same, with notice of the day fixed for considering it, should be sent to Gholab Khan. These directions have been carried out, and the Magistrate again recommends that Gholab Khan be dismissed from his office of mookhtear. The Officiating Judge, Mr. Cornell, has, however, declined to support the Magistrate's proposition, holding that the mookhtear has been sentenced to dismissal on account of an offence of which he has already been acquitted by a competent Court, and that, in any case, the misconduct, contemplated in s. 16 of the Pleader's Act, is professional misconduct, of which Gholab Khan is not even alleged to have been guilty.

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After hearing the counsel for the petitioner, I am disposed to think that the procedure under s. 16 of the Act does refer only to cases of professional misconduct; the words used, "any such misconduct as aforesaid," being connected with the words, "grossly improper conduct in the discharge of his professional duty," used in s. 15; and as the misconduct which the Magistrate considers proved against Gholab Khan is not alleged to be "professional" misconduct, I think that so far the Officiating Sessions Judge was right.

But I do not concur in the other part of his opinion. It seems to me that the words, "for any other reasonable cause," used in the last clause of s. 15, refer to cases of other than professional misconduct, and that, if such reasonable cause is shown, a mookhtear may be suspended or dismissed, notwithstanding that he has committed no act of professional misconduct; if it were not so, it is difficult to see with what intention the Legislature added the words above quoted to the section.

Now, in the dacoity case, Gholab Khan was acquitted against the opinions of the assessors; the Judge himself did not seem to have any moral doubt of his guilt; for, after detailing the reasons which induced him to think the evidence insufficient, he says: "At the same time I think the strongest suspicion attaches to him, and possibly, simply as a matter of justice, the assessors may be right." I was one of the Judges who heard the dacoity case in appeal to the High Court, and I thought at the time that the assessors were right, and that there was sufficient evidence to convict Gholab Khan. No doubt, he was acquitted, and cannot be harassed again on the same charge; but when the law says that a mookhtear may be dismissed by the High Court for any "reasonable cause," we may, I think, look, if necessary, behind a verdict of acquittal, and see if the circumstances under which that acquittal was come to do not, except as regards a fresh trial, practically annul any such declaration of Gholab Khan's innocence as a verdict of not guilty might ordinarily be supposed to give. We ought to treat his case, I think, as a matter of equity and good conscience, and ought not to be bound to consider him a blameless man, *quoad* s. 15, Act XX. of 1865, merely because he has been released under very peculiar circumstances from a criminal charge.

After carefully considering the evidence brought against Gholab Khan in the dacoity case, I cannot agree in the propriety of the verdict of acquittal. I think it proved that he did instigate the attack on the Rani's premises, and that is, I consider, a very sufficient and reasonable cause for his dismissal from the office of mookhtear.

I say the evidence "in the dacoity case," because, as I have before stated, I do not think that the question now raised comes under s. 16 of the Act at all,



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and the charge and notice appear to me to have been unnecessary. When I joined in the order directing the Magistrate to proceed under s. 16, I was under the impression that that section governed the matter. Further consideration has made me think differently.

It seems to me that, when a mookhtear is alleged to have committed some impropriety (short of an offence for which he could be prosecuted criminally, and, if convicted, dismissed from office under s. 14 of the Act) which does not come under the denomination of professional misconduct, the High Court may institute enquiries "*motu suo*," and if it thinks that "any reasonable cause, other than professional, has been established, may suspend or dismiss the mookhtear without the necessity of either written charge or notice. Of course, it would take care that the mookhtear had every facility for knowing what he was charged with, and for making his answer; but no formal charge, as under s. 16, would appear to me to be necessary. In this case Gholab Khan has had every opportunity.

KEMP, J.—I have again read the evidence in the dacoity case against Gholab Khan. I concur with the assessors, and think that there is evidence which clearly establishes that Golab Khan took an active part in instigating the dacoity on the Rani's kutcherry. I am of opinion that Gholab Khan is not a proper person to practise as a mookhtear, and I concur with Mr. Justice Glover in directing that the name of Gholab Khan be struck off the roll of mookhteers.

*Petition dismissed.*

#### [EXTRAORDINARY ORIGINAL CRIMINAL.]

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[15 W. R. 69.]

*Before Mr. Justice Phear, Mr. Justice Macpherson, and Mr. Justice Mookerjee.*

#### THE QUEEN v. AMEER KHAN AND OTHERS.

*Letters Patent, 1865, cl. 29—Transfer of Criminal Case from Mofussil Court—Jurisdiction—Power of single Judge sitting on Original Side—24 and 25 Vict., c. 104, s. 15.*

On an application made for the transfer of a case from the Sessions Court at Patna for trial by the High Court at Calcutta, on the grounds, mainly, that all but one of the charges against the prisoners were for offences committed in Calcutta; that the selection of Patna as the place of trial was calculated to prejudice the prisoners; that the police at Patna were getting up the case against the prisoners by improper and illegal means; that by those means was created such a feeling of dread and insecurity among witnesses and others in Patna as would prevent a fair trial from taking place there; that some of the witnesses for the defence, although willing to give evidence in Calcutta, refused to go to Patna to give evidence; and that many difficult points of law were likely to arise at the trial; but these allegations were denied by the affidavits filed in opposition to the application. *Held* (Macpherson, J., *daubing*) the High Court had power under cl. 29 of the Letters Patent to transfer the case for trial by itself. The Court, however, refused the application on the ground that a sufficient case had not been made out for the exercise of the power of the Court.

*Per PHEAR, J.*—A single Judge, sitting on the original side of the Court, has power to entertain an application for the removal of a criminal case from a Court in the mofussil to the High Court in the exercise of its extraordinary original criminal jurisdiction.

THE prisoners were charged with the offence of waging war, attempting to wage war, and abetting the waging of war against the Queen. The preliminary investigation had taken place before the Officiating Joint-Magistrate of Patna, by whom they were committed to take their trial before the Sessions Judge of Patna. The present proceedings arose out of an application made by Mr. Ingram on behalf of two of the prisoners, Ameer Khan and Hashmadad Khan, that their cases might be removed from Patna, and be tried by the High Court, Calcutta, in the exercise of its extraordinary original criminal jurisdiction under cl. 29 of the Letters Patent of 1865.\*

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Mr. Ingram (Mr. Evans with him) based his application on the following grounds:—

1. That the charges drawn up by the Magistrate were so vague and unsatisfactory that it was impossible for the prisoners to meet them.
2. That the evidence consisted principally of the testimony of convicted parties or accomplices, and that many nice points would arise in the case as to the admission or rejection of evidence which would require the decision of an experienced Judge.
3. That many important questions of constitutional law would be raised, which a Civilian Judge, who in his legal training was not required to be informed on such subjects, would find difficult to solve.
4. That Ameer Khan and Hashmadad Khan were, by reason of their residence in Calcutta up to the time of their arrest, entitled to be tried in Calcutta by jury, whereas the only Court for the trial of offences of this kind at Patna was the Judge and assessors.
5. That it was necessary to produce certain documents for the defence which could only be obtained by the orders of the High Court.
6. That the absence of any trained interpreters at Patna, and the ruling of the Magistrate that the employment of an interpreter was a matter of grace and not of right, made it very doubtful whether competent interpreters would be allowed the prisoners in the Sessions Court.
7. That all but one of the charges in the indictment were for offences committed in Calcutta.
8. That forty-nine witnesses for the defence were resident in Calcutta, and that it would be impossible for the greater number of the witnesses to attend at Patna.
9. That the conduct of the police respecting this case had caused such terror that many of the prisoners' witnesses have refused to attend at Patna, though willing to give evidence in the High Court.

He referred, in support of the application, to the case of *The Queen v. Nabadwip Chandra Goswami*,† as showing that the High Court has the power to transfer a criminal case to itself from the mofussil, and to *Doucett v. Wise*,‡ as showing that the application for the transfer of a civil suit should be made on

\* *Letters Patent, 1865, cl. 29.*—"And we do further ordain that the said High Court shall have power to direct the transfer of any criminal case or appeal from any Court to any other Court of equal or superior jurisdiction, and also to direct the preliminary investigation or trial of any criminal case by any officer or Court otherwise competent to investigate or try it, though such case belongs in ordinary course to the jurisdiction of some other officer or Court."

† 1 B. L. R. O. Cr. 15 (see p. 24 of this book).

‡ 1 I. J. N. S. 94, 227.

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the Original Side of the High Court, and therefore by analogy should this application; and in support of his grounds he relied on several affidavits, which also stated that Ameer Khan and Hashmadad Khan had been, down to the time of their arrest in July 1869, residing in Calcutta; that Ameer Khan had been arrested without any warrant or proper authority; that, on 10th January 1871, he had been discharged and told to leave the jail, but on his doing so he had been immediately re-arrested on a warrant of the Magistrate of Patna on the present charges; that Hashmadad Khan had been arrested, on 14th July 1869, without any warrant or proper authority, and taken out of the local limits of the jurisdiction of the High Court, Calcutta; that Mr. O'Kinealy, who had been appointed by Government to conduct the prosecution, was not a barrister, advocate, vakeel, or pleader in any Court in India; that many witnesses who could give evidence negating that for the prosecution refused to do so at Patna from fear of the Government officials, and the police were taking bribes from some persons for excusing them from giving evidence, and compelling other persons to give evidence, against the prisoners by bribes and by imprisoning them until they consented to do so, and by threats that if they did not give such evidence, or if they gave evidence on behalf of the prisoners, they would be arrested and charged with being Wahabees, whereby the police had caused many persons to abscond to Calcutta from fear, and had deterred others from giving evidence on behalf of the prisoners, or from holding communication with the prisoners or their counsel and legal advisers; that upwards of one hundred persons who had been induced by these means to give evidence against the prisoners were confined in the house and compound of Mr. Reilly at Patna under the charge of the police; and that the conduct of the police and other officials at Patna had produced such an influence on the minds of the native inhabitants of Patna that it was impossible that a fair trial could take place there.

PHEAR, J. (after taking time to consider, on 21st April, made the following order):—You have, I think, made out a *prima facie* case in support of your application, at any rate so far as Ameer Khan is concerned—that is, such a case as would render it incumbent on the Court to issue a rule *nisi* if there were any one against whom the rule could go. As I understand the matter however, so far as the proceedings have yet gone, no one has appeared in the character of prosecutor with such sanction of or authority from Government, express or implied, as would make him the person whom I could rightly call upon to show cause, on behalf of the Crown, why the case should not be transferred to this Court for trial, and I need hardly say that there exists no officer who permanently represents the Crown for such a purpose as this. Nevertheless, it is eminently apparent that this is a case in which not only is the abstraction termed the Crown, as in all other criminal cases, the nominal prosecutor, but the Government is itself the active promoter of the proceedings. It is therefore abundantly clear, I think, that I ought not to take the step of removing the case, without affording the Government an opportunity of being heard against your application, if I can in any reasonably practicable mode do so. Now, in this Court the Advocate-General is always recognized in a special manner as the counsel and adviser of the Government in respect to both civil and criminal matters, and I believe that comparatively lately a gentleman has been appointed Solicitor to the Government with functions such as to constitute him in some sense Crown prosecutor within the local limits of the original criminal jurisdiction of the High Court. Having regard to these circumstances, I think it will be an effective and convenient method of giving the Government an opportunity of appearing in this matter, that I should adjourn the further hearing of it until Monday next,

and direct notice of the application and the adjournment to be given at once both to the Advocate-General and to the Government Solicitor.

Notice of the application and adjournment was accordingly given. On April 22nd the Senior Government Pleader, on the appellate side of the Court, moved on the petition of the Government of Bengal, stating that Mr. Justice Phear was acting without jurisdiction in entertaining the application to transfer the case from Patna, and that such application should be heard by the particular Bench appointed under a rule of 12th December 1870 to dispose of cases from the district of Patna.\* The application was heard by Norman, J. (Officiating Chief Justice), and Loch, J., but they refused to make any order in the matter.

On 24th April the *Advocate-General* appeared before Mr. Justice Phear on the notice which had been given of the application to transfer the case, and said he would, with the leave of the Court, make some observations with regard to the jurisdiction of which a Judge sitting on the original side of the Court had to entertain such an application. He referred to the application made on the appellate side before Norman and Loch, JJ., and the judgment thereon, and contended that a Judge so sitting had no such jurisdiction. [PHEAR, J.—I threw out a doubt when the application was first made to me as to whether this was the right side of the Court on which to make it. I had no doubt, however, of my power to entertain the application. If you now say I have not the power, I will hear you on that point.] The application should be made to the appellate side of the Court. Such applications have not been made on the original side. In *The Queen v. Nabadwip Chandra Goswami*,† the application was apparently made on the appellate side of the Court; So in the case of *Pogose*

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\* *Before Mr. Justice Norman, Offg. Chief Justice, and Mr. Justice Loch.*

*The 22nd April 1871.*

IN THE MATTER OF THE PETITION OF THE GOVERNMENT OF BENGAL.  
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Baboo Annada Prasad Banerjee, the Senior Government Pleader, moved the High Court upon the following petition:—

"That it appears from the newspapers that application has been made to a single Judge of a the High Court on its original side to transfer a criminal case pending in the mofussil, and the Judge has assumed jurisdiction, and directed notice to be given to the Advocate-General and to the Government Solicitor to show cause why the case should not be removed from the Sessions Court at Patna to the High Court in its extraordinary criminal jurisdiction.

"That your petitioner begs to submit that the order passed by the single Judge on the original side is without jurisdiction, inasmuch as the Chief Justice has not determined under ss. 13 and 14 of the Charter Act of 1861 by whom such applications in general, and this application in particular, are to be heard; and, further, inasmuch as a particular Bench has been appointed under Resolution of 12th December 1870 to hear criminal motions from the Patna district, that your petitioner therefore prays that Your Lordships be pleased to pass such order as may seem to Your Lordships meet and proper under the circumstances of the case."

The judgment of the High Court was delivered by

NORMAN, J.—It appears to me quite plain that we have no power of interference at present. The application on behalf of Ameer Khan is now pending before Mr. Justice Phear, and has not been disposed of in any way. It may very well be that, with reference to the 13th section of the 24 & 25 Vict., c. 104, to a rule of this Court passed on the 28th May 1870, and the order for the distribution of business made on the 12th December 1870, a motion under the provisions of the 20th clause of the Charter to transfer a case pending before the Court of Sessions at Patna to any other Court should have been properly made before the 4th Bench of this Court on its appellate side, which hears motions in criminal matters relating to cases pending within the Patna district. But it seems to us that this matter will be properly considered by Mr. Justice Phear when it comes before him.

† 1 B. L. R. O. Cr. 15 (see p. 24 of this book).

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v. *Pogose*.<sup>\*</sup> On the ground of convenience it is better that the Court in its original jurisdiction should not interfere with criminal matters in the mofussil. S. 13 of 24 & 25 Vict., c. 104, gives power to the Court to make rules for the exercise of the jurisdiction vested in the Court, and s. 14 provides that the "Chief Justice shall decide what Judge shall sit alone, and what Judges of the Court shall constitute the several Division Benches." Under this power, districts have been fixed, and Division Benches appointed to hear cases from particular districts. See Rules for the Routine of Business, dated 26th January 1870,† and 12th December 1870.‡ [PHEAR, J.—In civil cases is not the application to remove the suit made on the original side of the Court?] Different considerations apply in criminal cases.

PHEAR, J.—Assuming that this Court has the power, under the 29th clause of the Letters Patent, to transfer a case from a Criminal Court in the mofussil to be tried before itself, I think this Bench is competent to entertain and adjudicate upon the application which Mr. Ingram has made. By virtue of the 13th section of the Charter Act, the Judges who sit alone, and the Division Courts, which are composed of two or more Judges under duly made arrangements of the Court, separately, in my opinion, exercise the jurisdiction of the whole Court; in other words, a single Judge so sitting, and a Division Bench so constituted, is, for the purposes of the work brought before it, the High Court itself. I apprehend that the object of the sub-division which is authorized by s. 13 of the Charter Act is simply the more expeditious and effective despatch of the judicial business. And in furtherance of this object, the judicial work of the Court is apportioned not very precisely, by rule, among the different Benches, and no doubt the number of Judges who are to form each Bench is settled with due reference to the nature of the work which falls to the Bench under that rule. This being so, it is undoubtedly clear, as I threw out when Mr. Ingram first made his application, that no Bench ought to take work which does not fall within its allotted province. But I think the judicial validity of acts done by each Bench *bond fide* cannot depend upon whether or not the particular matter dealt with lies, with logical strictness, within the limits assigned to the Bench by rule of apportionment. For if it were otherwise, it would always be open to a party bound by a decree of the High Court to question whether the Judge or Judges who passed it, although sitting as a regularly constituted Bench, were really possessed of the powers of the Court—a result never contemplated, I should say, by the Legislature when it gave the power of distributing work under s. 13 of the Charter Act. I suppose that it is incontestable that the Judge or Judges who, in the ordinary course of business, sit alone in this place on the original side of the Court, as it is termed, do so sit for the despatch of business, under a rule of Court; and it is for the despatch of all judicial business, both civil and criminal, which rises out of, or is connected with, the local jurisdiction of the Court over the town of Calcutta, except that part of course which is appellate in its nature, and excepting also the trials by jury at the Criminal Sessions. Almost all applications in criminal matters, such as for writs of *certiorari*, whether to issue into the town or into the mofussil, for writs of *habeas corpus ad testificandum*, and so on, are made to the Judge who is sitting here for the discharge of the ordinary business on this side of the Court, and when made are heard and determined by him. There are also, I need hardly say, other special and important

\* Unreported.

† 4 B. L. R., High Court Cir., 8.

‡ 6 B. L. R., High Court Cir., 10.

portions of the jurisdiction of the High Court which it is not necessary that I should now proceed to specify, and which are delegated by the High Court to the Judge who is sitting here for the disposal of the ordinary business of the Court. In truth, I imagine, it would be no easy task to include within any precisely defined line all that portion of work which ordinarily or by custom is taken up or disposed of by the Judge sitting here in the ordinary course. And, therefore, I think it would be a mischievous error to throw doubt on the power of any Bench sitting on this side of the Court for the disposal of ordinary business to take cognizance of and dispose of any particular matter, because it lay on the confines of the somewhat undefined area of ordinary practice. I cannot say that I have the smallest doubt of my authority and power, sitting here in the discharge of the ordinary business of the Court, to entertain and adjudicate on the application which Mr. Ingram has made.

Whether it is convenient or entirely regular that I should do so, is altogether another question; and, at first, I doubted whether it would not be better that the application should be preferred to a Bench of the Court sitting on the other side. But, on consideration, I think this is not so, and that the practice, so far as there is any practice to guide me, is in favour rather of the application being made here than there. The object of Mr. Ingram's application is to procure the removal of a criminal case into the High Court for trial. If the application, by whatever Bench, on whichever side, it be heard and determined, should ultimately be granted, the cause will come on, as a matter of course, to this side to be tried. It seems to me *a priori* right that the application should be made to this side, where the case will have to be tried. There is no distinction between the Judges on one side of the Court and on the other, and indeed I believe that it is a fact that, if this application were made to a Bench on the other side of the Court, it would, according to the course of business, come on to be heard by a Bench of which the senior Judge is a barrister, and, so far as the personal experience goes, which I think the learned Advocate-General referred to, is more familiar with the work and practice on this side than with any of the elements which, he says, are required to be taken into consideration in matters arising out of a different state of things in the mofussil. So that, in truth, I think the Crown can hardly say that there are any substantial reasons why this application should be dealt with by a Bench sitting on that side of the Court, rather than by a Judge sitting on this side. It appears to me, moreover, that the considerations upon which the propriety or otherwise of removing the case to this side of the Court depends may be presumed to be more likely to be better arrived at and dealt with on this side, where the case will have to be tried, than on the other; so that in my view this application in its nature falls properly to the business on this side.

It is distinguishable from an application to remove a criminal case from one Mofussil Court to another Mofussil Court, just in the same way as an application to remove a civil suit for trial to this Court is distinguishable from an application to remove the same suit to another Mofussil Court for trial; and that distinction has been held a sufficient reason on the other side of the Court why a Bench on that side should not entertain such application. It seems to me that the reason is precisely the same in one instance as in the other. When the words of cl. 29 of the Letters Patent are construed so as to authorize the removal of a criminal case from a Mofussil Court into this Court, they become exactly parallel with the words of cl. 13, which authorizes the Court to remove a civil suit into this Court. If, in one case, the side of the Court into which the cause is to be removed is the proper side to judge of the propriety

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of the application to remove it, it seems to me it must be so in the other—*Doucett v. Wise*;\* and the course of practice which rests on that case determines the matter beyond question as regards civil suits. It seems to me that I am only following the practice so laid down by saying that this application belongs properly to the business on this side of the Court.

A feeling of hesitation has passed through my mind as to whether or not the Judge to whom on this side of the Court is assigned the duty of presiding at the Criminal Sessions is not the Judge who ought to take such an application as this, in preference to the Judge who merely sits here for the despatch of ordinary business. But I think now that that hesitation is not well-grounded; at any rate, that it ought not to induce me to decline to hear this application, because no Judge has yet been appointed to take the next Criminal Sessions, and the particular appointment of the Chief Justice under which I took the criminal work of the last Sessions assigns to me the disposal of all criminal matters until another appointment is made.

I think, therefore, that there is no good reason why I should stop the hearing at the present stage, and I have given my reasons at some length, because I think the matter of some considerable importance.

A rule *nisi* was then granted, calling on Mr. O'Kinealy, who had been appointed and authorised by the Government to conduct the prosecution in this case, to show cause why the case should not be transferred from the Court of the Sessions Judge of Patna to this Court, in its extraordinary original criminal jurisdiction; and on the application of the Advocate-General, who said he proposed arguing the question as to the power of the Court to transfer the case, as well as to oppose the application on the merits, an adjournment was granted to allow time for the prosecution to put in affidavits in opposition to those in support of the application.

On 29th April a further petition was presented on behalf of Government, by the Government Pleader, to Norman, J., Officiating Chief Justice, Macpherson, J., and Mookerjee, J., praying that the proceedings in the application before Phear, J., should be stayed, and the question of law be tried before the full Court, under the powers given to the Court by s. 15 of the Charter Act 24 & 25 Vict., c. 104.† But the Court held that Mr. Justice Phear as a Judge of the High Court making an order in the original criminal jurisdiction was not a Court subject to their control under s. 15.

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\* 1 I. J., N. S., 94, 227.

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† Before Mr. Justice Norman, Offg. Chief Justice, Mr. Justice Macpherson, and Mr. Justice Mookerjee.

The 29th April 1871.

IN THE MATTER OF THE PETITION OF THE GOVERNMENT OF BENGAL.  
THE QUEEN v. AMEER KHAN AND OTHERS.

THIS was a petition to the High Court on behalf of the Government of Bengal as follows :—

“An application was made to the Chief Justice and Mr. Justice Loch, on Saturday last, representing that Mr. Justice Phear had assumed jurisdiction on an application for the transfer of a criminal case from Patna to Calcutta, and that such an application could only be heard by a Bench of the Court appointed under ss. 13 and 14 of 24 & 25 Vict., c. 104, under which the High Court is constituted.

“The Chief Justice and Mr. Justice Loch said that the matter was not in a stage in which they could interfere, although it might well be that, under the rules of the Court already made, such an application should properly be heard by the 4th Bench of the Court, as appointed to hear

On the 4th May, in reference to the hearing of the argument upon the rule, the following remarks were made by

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PHEAR, J.—When the Advocate-General on the last occasion applied for the postponement of the rule, he stated that he intended to urge very strongly against the rule that the Court had not power to transfer from a Mofussil Court to itself a criminal case for trial. The point thus raised is manifestly one of the gravest importance, and such as ought not, I think, to be determined by the decision of a single Judge; and yet it seems to be more than doubtful, to say the least of it, whether under the terms of the Charter there would, in this matter, be an appeal as of right from the decision of a single Judge to the Court. Under these circumstances, I felt very anxious to be relieved of some portion of the responsibility which would attach to me in determining this question alone, and therefore I requested the Chief Justice to give me the assistance of other Judges sitting with me on the occasion when the rule should come on to be argued, if it could be afforded me without inconvenience to the general business of the Court. Also in this case the Government, in its capacity of prosecutor, for reasons which are not patent to me—fortunately there is no need that I should enquire into them—and in a manner which I venture to say was certainly irregular, has endeavoured, with considerable pertinacity, to set up the authority of one Division Bench of this Court against, and to the exclusion of, that of

motions in criminal matters relating to cases pending in the Patna district, and the Court added that this matter would properly be considered by Mr. Justice Phear.

"This opinion was mentioned to Mr. Justice Phear, and the Advocate-General was heard in opposition to the hearing of the application by the learned Judge; but the Judge decided the other way, and delivered judgment, the gist of which seems to be that the rules of Court apportioning the business cannot take away the inherent powers of every Judge to exercise the full powers of the Court, but are mere indications of the most convenient course, and that in the present instance the most convenient course was that the application should be heard by himself sitting where he was. He accordingly directed notice to be served on Mr. O'Kinealy, who has hitherto conducted the case on the part of Government, to show cause why the case should not be transferred from the Sessions Judge of Patna to the High Court for trial in its extraordinary original criminal jurisdiction.

"As it may be doubtful if an appeal will lie from Mr. Justice Phear's decision after a final order on the application has been passed, the Government wish to make it clear that it has neglected no means which the law may afford of obtaining a hearing before a Bench properly and conveniently constituted. It is submitted that many powers for and in excess of those of the late Supreme Court, and some in excess of those of the late Sudder Court, for controlling the administration of justice in the country generally, were given to the High Court, as being a Court combining the elements which formed the late Sudder and Supreme Courts; and the contention of the Government is that it was never intended to authorize the assumption of a single Judge sitting in the original jurisdiction to exercise those powers uncontrolled by, or it may be contrary to, the opinions of the Court at large. It should be submitted that, as a matter of fact, the Judges who sit on the original jurisdiction, in practice, belong to one only of the elements of which the combined Court is composed, and that the exercise of the power assumed by Mr. Justice Phear is contrary to the whole spirit and intention of the Acts and Charters by which the Court is constituted.

"On these grounds the Government trust that the Court will take the question into consideration, both with reference to the matter pending before Mr. Justice Phear, and in order to guide the Judge of Patna, before whom the case is appointed to come on immediately, and in whose Court a host of witnesses are cited to appear, and pass such orders as may appear to be proper under the circumstances of the case."

Baboo Annada Prasad Banerjee and Jagadanand Mookerjee appeared in support of the petition.

NORMAN, J.—I am of opinion that the Court cannot interfere with Mr. Justice Phear's decision in the case of Ameer Khan, unless that decision can be called in question in a formal and regular way. We have been asked to interpose our authority, which it is suggested that this Court possesses under s. 15 of the 24 & 25 Vict., c. 104; but Mr. Justice Phear, as a Judge of the High Court, making an order in the original criminal jurisdiction of that Court, is not a Court subject to our control under s. 15.

MACPHERSON, J.—I am of the same opinion.

MOOKERJEE, J.—I am of the same opinion.



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another Bench. I am quite sure that there is no Judge of the Court who may be sitting on this Bench to-day and on another Bench to-morrow—that there is no Judge who would wish in the particular Bench where he may happen to be sitting—to travel beyond the routine of work which properly belongs to that Bench; and I think it would be a deplorable thing in this case, supposing that the High Court has the power to make an order transferring this case to itself for trial, that the order, whichever way directed, should be made in such a way as to leave it open to question afterwards, either by the prosecutor or the prisoners, whether it was passed by the right Judges. Now, no one has, I believe, suggested that it would not be within the province of the Division Bench which takes civil and criminal business from the district of Patna to dispose properly of this application; and accordingly I, when I learned the course which the prosecutor was taking in this case, thought it right to signify my readiness to direct that the rule should be returned to that particular Bench, if it would entertain it, instead of before myself alone. The Chief Justice has met both these points of difficulty by requesting the two Judges who at present constitute that particular Division Bench to sit with me on the hearing of this rule on Monday next, at the same time appointing me to be a member of that Bench. Accordingly, I desire to say that the rule will be heard on Monday next by the fourth Division Bench sitting here in this place, and constituted of Mr. Justice Macpherson, Mr. Justice Mookerjee, and myself.

On May 8th the rule was argued.

The *Advocate-General* and The *Standing Counsel* (Offg.) appeared to show cause against the rule.

Mr. *Ingram* and Mr. *Evans* appeared in support of it.

The rule as drawn up contained only the names of the prisoners Ameer Khan and Hashmadad Khan, and the argument on the rule was confined to those two cases.

The affidavits on behalf of the prosecution denied the allegations of attempting to procure evidence by bribes or threats, or that any illegal means or measures had been used or taken to procure evidence. The charges against the police and Government officials were totally denied, and were characterized as being false and malicious statements got up for the purpose of weakening the effect of the evidence for the prosecution. It was also denied that any means had been taken to prevent the prisoners or their witnesses from having full and free communication with their legal advisers. Mr. Reilly stated that it was not true that about one hundred persons selected as witnesses for the prosecution had been confined in his house and compound under the charge of the police; he stated that some of the witnesses for the prosecution were not residents of Patna, and were allowed to live rent-free in his house at Patna, and the only surveillance the police exercised over them was to avoid their being tampered with by persons who were trying to induce them not to give evidence against the prisoners.

The *Advocate-General*.—This Court has no power to transfer a criminal case which has been sent up to a Sessions Judge in the mofussil, and hear and determine the case before itself. Neither the Supreme Court nor the Sudder Dewanny possessed such power; the latter was merely a Court of Appeal, and as such had no power to hear the case itself. But the words of cl. 29 of the Letters Patent are very similar to, and identical in meaning with, those of s. 35 of the Criminal Procedure Code. The position of cl. 29, with reference to the other

clauses, shows that there was no intention of creating by it any extraordinary original criminal jurisdiction. It comes under the heading Criminal Jurisdiction, and follows those sections which provide for the exercise of appellate and provincial jurisdiction. Cl. 24 provides for the extraordinary original criminal jurisdiction. The words of cl. 29 are not apt words to express the intention to give such a new and special jurisdiction as removing a criminal case from the mofussil. If such had been the intention of the Legislature, express words would have been made use of. The High Court in the exercise of its ordinary original jurisdiction is not a Court of equal or superior jurisdiction as meant by cl. 29. Its constitution and mode of procedure are entirely different from those of a Court in the mofussil, and it has a distinct jurisdiction allotted to it. Where the Legislature did intend to confer the power on the High Court of removing a case from the mofussil, it was done in express words, which left no doubt what power they were intended to give. See cl. 13, which gives power to the High Court to transfer civil cases to itself. The absence of any such words in cl. 29 shows that the Legislature intended to confer no such power with respect to criminal cases. If any clause gives the High Court such power, it would be cl. 24, but that provides for a totally different procedure from the present. There some original proceedings are to be taken by the Advocate-General. Such proceedings have not been taken in this case; on the contrary, the prisoners have been committed to take their trial before the Sessions Judge of Patna; yet cl. 24 is the only one giving extraordinary original criminal jurisdiction. [PHEAR, J.—Cl. 29 does give the High Court extraordinary original criminal jurisdiction over Courts in the mofussil;—so far it is adverse to you.] It does not give power to transfer cases to itself. No provision is made as to the procedure by which a case is to be tried if it were removed, which shows that the Legislature never intended to give power to remove cases; for when it gives power to exercise the jurisdiction otherwise than in the ordinary places, the procedure to be followed is specified—see cl. 31. That procedure would be now by Act XIII. of 1865. But by that Act the only cases to be tried in the High Court are for offences committed in the local jurisdiction, and offences by European British subjects, who may be tried as if they had committed offences in the jurisdiction. The procedure, therefore, if a case were transferred, would be under the Criminal Procedure Code—see cl. 38, Letters Patent. It could not be tried before a jury. It is said that this point has been decided against my contention in the case of *The Queen v. Nabadwip Chandra Goswami*;<sup>\*</sup> but that case came before the Court on a totally different state of facts. The offence there had been committed in Calcutta. The question as to the power of the High Court to transfer cases to itself under cl. 29 arose incidentally, and was not fully argued. It was not necessary for the determination of the case. There had been no order of the High Court directing the transfer of the case from Serampore. The Magistrate committed it without any order from the High Court; therefore that case by no means determines the question.

Mr. *Ingram* in support of the rule.—Cl. 29, if its terms be literally construed, gives power to the High Court to remove this case. Cl. 29 gives larger powers than s. 35 of the Criminal Procedure Code. S. 35 authorizes the Sudder Court to transfer a case “from a Criminal Court subordinate to its authority to any other such Criminal Court of equal or superior jurisdiction.” In cl. 29 the words are merely “from any Court to any other Court of equal or superior jurisdiction.” The words “subordinate to its authority” are

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omitted. But even under s. 35 the Court possessed power to transfer such a case as this. The latter part of the section gives power to the Sudder Court to order "that any offence may be enquired into and determined in any district other than that in which it was committed." Calcutta would come within the terms of that section as a district, if those terms are taken in connection with the interpretation of "Magistrate" and "District" given in ss. 15 and 18 respectively. The object of cl. 29 of the Letters Patent was to remove all doubt on the subject of the power of the High Court. Cl. 24 confers the power to exercise extraordinary original criminal jurisdiction; cl. 29 gives power to remove cases in the exercise of that power. The latter part of cl. 24 in addition provides for the trial of certain cases the proceedings in which may be initiated by the Advocate-General.

The Supreme Court had a limited power of jurisdiction in criminal cases in the mofussil. See 53 George III., c. 155, ss. 100, 103, 105, and 111. But the High Court has full powers for the exercise of that jurisdiction. If the High Court has not such power, the latter words of cl. 24, "or by any Magistrate or other officer specially empowered," &c., would give a Magistrate a power which was not possessed by the High Court. [The *Advocate-General*.—A Magistrate specially empowered only, not any Magistrate. PHEAR, J.—"Specially empowered" applies to both "Magistrate" and "any other officer."] The Court has always considered itself to possess the power, which we ask it to exercise in this case. In *The Queen v. Rajkiso Mitter*,\* and *Pogose v. Pogose*,\* rules were granted to show cause why those cases should not be removed to the High Court. Then there is the case of *The Queen v. Nabadwip Chandra Goswami*,† in which the question distinctly arose, and was decided by Peacock, C.J., and Norman and Markby, JJ.‡ If this Court

\* Unreported.

† 1 B. L. R. O. Cr. 15 (see p. 24 of this book).

‡ Only two judgments are reported—*vis.*, that of Peacock, C.J., and Markby, J. Norman, J., is reported as having concurred. Macpherson, J., stated that, understanding from Norman, J., that he had delivered a separate judgment, he had caused search to be made, when the following was found:

NORMAN, J.—On the first question discussed, I entirely concur with the Chief Justice. I am glad that the decision has been based on no technical point, but on the broad ground laid down by him.

Every technical objection which the law allows the prisoner has been made in his favour, and it appears to me that these objections are entirely unfounded. I desire to guard myself against being supposed to allow that the prisoner does not get the full benefit of every exception. I agree with the first proposition of Mr. Newmarch that, in order to a valid conviction under Act XIII. of 1865, there must be a valid charge—that is, a charge by a Justice of the Peace, or a Magistrate having jurisdiction to prefer that charge. I also go with another proposition of Mr. Newmarch's that, in this particular case, supposing that Mr. Ryland acted as a Magistrate, and not as a Justice of the Peace, it was essential that he should have been empowered by the High Court, under s. 29 of the Letters Patent, in order to give him, a Mofussil Magistrate, power to hold the preliminary investigation at Serampore of a charge against the prisoner, who had been arrested in Calcutta for a crime alleged to have been committed in Calcutta.

I am not prepared to say that the rules laid down in *Knowlden v. The Queen* (a) is sufficient to decide the case now before us. The marginal note of that case is as follows:—"By the 22 & 23 Vict., c. 17, s. 1, no bill of indictment for certain specified offences shall be presented or found by the grand jury, unless some one of certain conditions have been performed. Held that it was not necessary that the performance of any of these conditions should be averred on the face of the indictment, or proved before the petty jury." On the argument, the cases of *Hollis v. Marshall* (b) and *The King v. Fraser* (c) were cited for the defendant. Mr. Justice Blackburn pointed out that the grand jury had a general jurisdiction [though the Statute had imposed certain restrictions on the general jurisdiction which they already had] to find the bill. And it is that fact which distinguishes *Knowlden v. The Queen* (a) from those above mentioned.

(a) 33 L. J. M. C. 219.

(b) 2 H. & N. 735.

(c) 1 Moo. Cr. C. 407.

is a Court of "equal jurisdiction," it has power to transfer this case to itself; and if it is one of "superior jurisdiction," it has such power. It is submitted it is a Court of superior jurisdiction. The inconvenience which would result if it were to be held that the Court had not this power must be looked to. When part of an offence is committed in Calcutta, and part elsewhere, it seems only reasonable to suppose that power exists to have the trial for the whole offence to take place in Calcutta. See the instance given by Peacock, C.J., in *The Queen v. Nabadwip Chandra Goswami*.\* Why should the Court have a greater power with regard to civil cases than criminal?

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Mr. *Evans* on the same side.—The Supreme Court had power to bring up proceedings from the Courts of the Justices of the Peace by *certiorari*. It had the same power as the Court of Queen's Bench, where it had power at all—Archbold's Criminal Practice, p. 88, and cases there cited. The Supreme

In that case the indictment was presented by an authority—*vis.*, the grand jury,—which had general jurisdiction. In the present case, if the facts are as supposed by Mr. Newmarch, the charge was preferred by an officer not having jurisdiction, unless specially empowered by the order of the High Court under the 29th section of the Charter, and therefore it would have been necessary, if the matter were put in issue, to show that the Magistrate had such special powers, because without such evidence it would appear that the charge was preferred by an officer not having jurisdiction.

Apart from Act XIII. of 1865, if the prisoner desired to take the objection that the Magistrate had not been so empowered, I think he could not have done so on his trial, under the plea of not guilty. The objection does not show that no offence had been committed of which this Court had jurisdiction, and therefore the case is not like that of *The Kinloch's (a)*. The offence was committed, and the prisoner arrested, within the jurisdiction of this Court, and to such a case the observation of Lord Ellenborough, in *The King v. Johnson*, (*b*) applies—*vis.*, the presumption is, that "nothing shall be intended to be out of the jurisdiction of a superior Court of general jurisdiction, which is not alleged and shown to be so." *The King v. Johnson (b)* shows that a plea to the jurisdiction would have been bad, because it would not, and could not, have shown any other tribunal before which the prisoner ought properly to have been tried.

It is said that the Crown was bound to prove, or was at least liable to be called on to prove, that an order had been made directing the transfer of the case for the preliminary investigation. The 3rd section of Act XIII., 1865, provides that "any Justice of the Peace or Magistrate who shall commit to custody or hold to bail any person for trial before the High Court, for an offence committed within the local limits of its ordinary original civil jurisdiction, shall, together with all examinations, &c., deliver to the Clerk of the Crown a written instrument of charge, signed by him, stating for what offence such person is committed for trial." The 4th section empowers the Clerk of the Crown to consider, and, if necessary, to amend the charge, and directs that the charge, with any such amendment, is to be recorded. The 6th section enacts that, "upon charges so recorded as aforesaid, persons committed to custody or held to bail shall be deemed to have been brought before the High Court in due course of law, shall be arraigned at suit of the Crown, and the verdict recorded thereon." The effect of this 6th section is that, if a person is committed for trial before the High Court for an offence committed, or which was by law so dealt with as if it had been committed, within the local limits by any Magistrate, the charge is to be deemed to have been brought before the High Court in due course of law. It follows that if, in a particular case, any special order of the High Court is necessary to empower the Magistrate to hold the investigation, it must be presumed, for the purposes of the trial, that such preliminary order was duly made. The duty of the Court, in dealing with a charge so recorded, is clearly prescribed in the 6th section. The prisoner is to be arraigned, and the verdict recorded upon the charge. It does not follow that the prisoner has no remedy if there were no such order. No doubt, if a charge by a Magistrate, not having any jurisdiction, is sent up, the prisoner can question it; but that apparently must be by motion to quash the charge, before the trial, or, by error in fact, after the verdict. I think the Crown was not bound to give evidence of the order, and that the learned Judge was not bound to receive the evidence. The prisoner was arraigned, and the verdict given as directed by the 6th section, and the learned Judge was right in accepting and recording the verdict as the case stood.

\* 1 B. L. R., O. Cr., 15 (see p. 24 of this book).

(a) Foster's Cr. C. 17-23.

(b) 6 East 601.

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Court had not universal power, for there were Courts with which it had nothing to do, as the Sudder Dewanny and the Courts under it; but where it had judicial power at all, that power was a sovereign power. When the Courts were amalgamated, such power was not taken away or diminished. It is only reasonable to suppose that the High Court has the powers which were possessed by the Supreme and Sudder Courts, and among them the power to transfer cases by some process analogous to the writ of *certiorari*. Such power, it is submitted, is given by cl. 29. There is nothing adverse to this to be inferred from the position of cl. 29; the clause must be placed somewhere, and no principle of arrangement seems to be violated by its present position: besides, viewing it as a clause intended to give general powers of transfer in criminal cases, it comes naturally at the end of the various clauses providing for the exercise of original criminal, extraordinary original criminal, and appellate criminal jurisdiction. There is nothing in the terms of the clause against this construction, and when compared with s. 35 of the Code of Criminal Procedure, it appears that by cl. 29 the Legislature intended to give enlarged powers. By *The Queen v. Nabadwip Chandra Goswami*,\* it has been decided that the Court has the power. If the argument of the other side is correct with regard to that decision, a Magistrate in the mofussil would have power to hold a preliminary investigation in respect of an offence committed within the local limits of the criminal jurisdiction of the High Court, while the High Court would be unable to transfer a case from the Court of a Magistrate in the mofussil to the Court sitting within the limits of the local jurisdiction. The High Court possesses power to transfer civil cases—why should it not have the same power with respect to criminal cases? A greater power is given with respect to criminal cases by cl. 24 than with respect to civil cases by cl. 13. The latter clause gives no power to institute in the High Court a civil suit originally cognizable by a Mofussil Court; but the former gives such a power as regards criminal cases. As to the procedure when the case has been transferred, it is submitted that cl. 23 would regulate it, by which the Court has power, “in the exercise of its ordinary original criminal jurisdiction, to try all

As to arrest of judgment, I think that there was not any ground for moving in arrest of judgment, because the matter alleged to be error does not appear on the face of the record. No injury has been sustained by the prisoner. We are not bound to go into facts, because, as the 6th section raises *prima facie* presumption of the regularity of the charge, it was for the prisoner to rebut it, and show that the charge was not rightly instituted, and he has not done so. But if we do go into the facts, there is sufficient proof by evidence under the hand of the Registrar, an officer of the Court, that an order was made, directing that the preliminary enquiry should take place before the Magistrate of Serampore.

It has been urged that cl. 29 of the Letters Patent does not give to the High Court power to give such a direction as to the preliminary investigation. The first branch of that clause refers to the transfer of criminal cases and appeals; the second branch empowers the Court to give directions as to holding preliminary investigation. (His Lordship read the clause in question.) I know of no conceivable reason why the words “any officer or Court” should have the restricted sense contended for by Mr. Newmarch. His contention even as to the first branch, it seems to me, entirely failed. The result is that, in my judgment, whether Mr. Ryland was a Justice of the Peace or not, there is no reason for alleging that he was not an officer competent to prefer the charge, and on that ground I think the conviction wholly unassailable.

Upon the point, whether we can take judicial notice that Mr. Ryland is a Justice of the Peace for Bengal, Behar, and Orissa, our records show that he is so. He is an officer of the Court, subject to it, and constantly committing prisoners for trial to the Court. Before we receive such charges, are we to enquire and take evidence whether he has received a commission or not? His commission is now in Court, under the seal of the Court, and the signature of the Chief Justice.

It seems to me plain that we cannot but recognize our own records and acts, and our own Subordinate Magistrates. Mr. Ryland professed to act as a Magistrate. I think, in so doing, he acted rightly, and I do not rest my judgment on the ground that he was also a Justice of the Peace for Bengal, Behar, and Orissa.

\* 1 B. L. R. O. Cr. 15 (see p. 24 of this book).

persons brought before it in due course of law." [PHEAR, J.—There is a difference in your favour in the terms of cl. 38 in the Letters Patent of 1862 and cl. 38 of the Letters Patent of 1865. Under the Letters Patent of 1862, such a case as the present, if transferred to the High Court, would have had to be tried by the Criminal Procedure Code. But by the Letters Patent of 1865 the procedure in such a case as this would be "regulated by the procedure and practice which was in use in the said High Court immediately before the publication of these presents."] It is submitted that the power to transfer clearly exists. It is not unreasonable to suppose that the High Court, having power to transfer cases from one inferior Court to another, has power also to transfer them to itself, the highest Court.

The Court reserved its decision upon this point.

The *Advocate-General* then showed cause against the rule on the merits. He went into the affidavits which had been filed on behalf of the prisoners, and read those in reply of Mr. Wilkins, Superintendent of Police, Bhagulpore; Ishriprasad, a Deputy Magistrate on special duty at Patna; Mr. Reily, Superintendent of Police in Bengal; Ahmed Ali, Sub-Inspector of Police at Bhagulpore; Alizuma Khan, Inspector of Police at Patna; Nabakrishna Ghose, Inspector of Police; Tarini Charan Mitter, Deputy Magistrate of Hooghly; and Mr. Chauntrell, Government Solicitor, filed on behalf of the Crown. He referred to the case of *Rex v. Briscoe* (1) as an authority that it was immaterial where the conspiracy was alleged to be, and that the indictment could be laid against the prisoners at any place in which overt acts had been committed; and contended that this was not a proper case for the exercise of the power of the Court to transfer cases, if it should be held that they possessed that power.

Mr. *Ingram*, in support of the rule, went through the affidavits on both sides at considerable length, and contended that the case was a proper one to be transferred and tried in the High Court on the grounds urged in support of the original application.

He cited the following cases to show the practice of the English Courts in granting writs of *certiorari*, and in what cases and for what reasons cases were transferred: *Rex v. Cowle* (2) *Rex v. Lewis* (3); *Rex v. Wartnaby* (4); *Reg. v. Josephs* (5); *Reg. v. Heywood* (6); 2 Bute's Crown Practice, pp. 48, 49, 51, 54, 55, and 64, and cases there cited; *The Queen v. Palmer* (7); *Reg. v. Bell* (8); *The Queen v. Jeffs* (9). [The *Advocate-General* referred to *Rex v. Holden* (10), where, although the writ was granted, it was rendered nugatory.]

On 11th May the following judgments were delivered:—

PHEAR, J.—The two prisoners on whose behalf the present application to this Court is made are now awaiting their trial before the Sessions Court at Patna on various charges, which the Joint-Magistrate at Patna, after duly holding a preliminary investigation, has preferred against them; in other words, the cases of the prisoners are criminal cases pending for trial at the Sessions Court at Patna, and the object of the application is to obtain the transfer of the case from the Sessions Court to this Court for trial.

(1) 4 East 171.  
(2) 2 Burr. 862.  
(3) 4 Burr. 2456.  
(4) 2 A. & E. 435.  
(5) 8 Dowl. 128.

(6) 4 Jur. 413.  
(7) 5 E. & B. 1024.  
(8) 8 Cox, Cr. C., 287.  
(9) 9 Jur. 580.  
(10) 2 Nev. & Man. 167.

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The transfer is sought under the provisions of cl. 29 of the Letters Patent of this Court (*reads*).

The learned Advocate-General on behalf of the prosecution, in the first place, urges that this clause (29) does not confer on the Court the power to make such a transfer as this. The Advocate-General, as I understand his argument, urges that this Court, in its character of a Court exercising criminal jurisdiction over the town of Calcutta, is a distinct Court, *sui generis*, and is not so related to the Criminal Courts of the mofussil as to fall within the scope of the words of cl. 29, "any other Court of equal or superior jurisdiction." It appears to me that we cannot give effect to this argument without sanctioning a distinction of parts in the High Court which has no reality, and thus giving currency to an error which may become fertile in mischievous results. The High Court is endowed with extensive, I may say exalted, jurisdiction, embracing in its ambit various subjects or topics, and described in the Letters Patent under various heads. The Judges of whom the Court is composed are numerous, and the Legislature has empowered the Court by its own rules (I am now quoting s. 13 of the Charter Act) to "provide for the exercise, by one or more Judges, or by Division Courts constituted by two or more Judges of the said High Court, of the original and appellate jurisdiction vested in such Court in such manner as may appear to such Court to be convenient for the due administration of justice." The Court has availed itself of this power, and does exercise its power, as we know, by single Judges, and Division Courts consisting of two or more Judges. The rules of the Court by which this is done are perhaps little systematic, and certainly have not been framed with any view to the particular point upon which the present objection depends. It is not necessary for me now to discuss those rules, and I do not now propose in any way to review them. Nothing in them, however, as I understand them, gives favour to the present contention; for that would require that the effect of the rule should be to confer on each particular Bench of this Court a portion only of the jurisdiction of this Court. And it seems to me that there are only two ways in which this could be done—namely, either by deputing to each Bench a portion of jurisdiction by express words of limitation, or by assigning to it work locally or otherwise defined, and delegating to it only so much and such limited jurisdiction as may be needed for that work. Now, assuredly the rules bearing on this matter have never been understood as operating in either of these directions. It is within our daily experience that a Division Bench of the Court, whose work is defined by local limits, takes up and disposes of work which in the same way belongs to another Bench. And in many other modes work is being constantly done without question, which, I apprehend, would be without authority and legal efficacy if the view which has been contended for before us were correct. And see what the result would be. The High Court rarely sits as a whole. Only once in the whole course of my experience has it done so. The result would be that, instead of one High Court, we should have a group of Courts, each of imperfect and ill-defined limited jurisdiction. This, I think, would offer every sort of opportunity for uncertainty, whether or not any particular matter of litigation had been decided by competent authority. This would be a wretched state of things, and one not likely to have been intended, but rather, I should say, very foreign to the mind of the Legislature which amalgamated the Sudder and Supreme Courts. And I think there is nothing in the words of s. 13 of the Charter Act which would warrant such a limited deputation of jurisdiction to a Division Court in this fashion. I need not now say anything as to the distribution of work and as to the disposal by the Division Benches of the business which is actually brought before them,

but I come, without any sort of hesitation, to the conclusion that this Court, when engaged in administering criminal justice within the district of Calcutta under its ordinary criminal jurisdiction, is none other than the High Court itself. It is the High Court discharging one of its proper functions; it is not merely the High Court in some, to me not very conceivable, inferior capacity. If this be so, the application to remove this criminal case from the Sessions Court at Patna into this Court to be tried by virtue of its criminal jurisdiction seems to me to be an application made precisely within the words of cl. 29. As regards the Sessions Court at Patna, the High Court is unquestionably a Court of superior jurisdiction. Why, then, are we to say that we have not the power under that section to make the transfer which is sought?

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In the first place, the Advocate-General says that, supposing the words of cl. 29 are large enough to comprehend this Court, yet the situation of the section relatively to other sections is such that it cannot be reasonably supposed that those words were intended to have the fullest signification. I thought that there was considerable force in Mr. Evans's answer to this objection, and a closer survey of the Letters Patent makes that answer more forcible than it appeared at first sight, because I think it very apparent that the different clauses of the Letters Patent have been very inartistically framed and put together, and in truth that the Letters were drawn without any great completeness of purpose.

But I am not even prepared to take the view that the clause authorizing the transfer of a criminal case into this Court would be inaptly placed in the position which cl. 29 occupies. By the nature of the Advocate-General's argument, he admits that the clause is rightly placed for the purpose of giving power to this Court to transfer cases from one local District Court to another District Court. If that be so, I see nothing inapt in including in the same section a power to transfer to this Court. If the power to transfer to this Court is needed at all, it is needed for reasons, amongst others, which would render it right and proper to transfer cases from one local Court to another.

If, to take an instance, such reasons existed for the transfer from the district of the 24-Pergunnas into another district, why should the power to transfer it into this district for those reasons be absent? It seems to me to be quite unintelligible, for instance, to take the case given by the late Chief Justice in the case of *The Queen v. Nabadwip Chandra Goswami*,\* that this Court should have the power of transferring the trial of criminal cases from the Court of the 24-Pergunnas to any other district of Bengal upon grounds of convenience, if convenience existed, and yet should not have the same power to remove the case into this Court across Circular Road, even though the reasons of convenience were tenfold stronger. It appears to me that there are large classes of cases in which the transfer of criminal trials to this Court might require to be made upon grounds exactly similar to those which would justify the transfer from one Mofussil Court to another. And, if so, it does not seem strange that the power to transfer a case into this Court should be included in the same clause as that which gives the power to transfer cases from one Court into another. But then it was urged that cl. 13 of the Letters Patent does give express power to remove a civil case from a Mofussil Civil Court to this Court for trial, in words altogether beyond any possible misapprehension. If, therefore, the framers of the Letters Patent intended this Court to possess the like power of

\* 1. B. L. R. O. Cr. 15 (see p. 24 of this book).



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removing a criminal case, why did not they say so with equal precision and expressness?

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AMRER KHAN, this argument, it ought to be allowed to cut down the natural operation of the 7 B. L. R. 240. words of cl. 29. The power which is given to us in cl. 29, whatever may be [15 W. R. 69.] its proper extent, is unquestionably remedial in its nature; and I am disposed to think that this Court, the highest Court in this Presidency, ought not to decline a remedial power which the words of its Letters Patent apparently give it, without the strongest possible grounds for thinking that these words were not intended to mean what they apparently do mean. But there is much in the Letters Patent, or perhaps I ought to say omitted from the Letters Patent, which leads me to think that any argument drawn from the existence of cl. 13 must be taken with very great qualification. Cl. 13 provides for but one portion of the civil jurisdiction as compared with the other portions of the criminal jurisdiction which is dealt with by cl. 29. Cl. 13 is confined only to removing civil suits for trial; cl. 29, in one comprehensive set of words, provides for the transfer of criminal cases from district to district, including, if the words are to be taken in their apparent sense, removal to this Court, and further gives powers to this Court to direct preliminary investigations—in other words, the institution of criminal suits—in any district. The sections, therefore, do not, in my opinion, admit of being closely compared. And, further, that which is left out of cl. 13, and does not appear anywhere else in the Letters Patent, is nevertheless taken to be a power belonging to this Court, and to lie within its jurisdiction—I mean the power to transfer civil cases from one District Court to another. This Court obtains that power under the general representation which it, so to speak, makes to the Sudder Court, and the power was given to the Sudder Court by the Civil Procedure Code; so that cl. 13 and the Letters Patent are very defective if it were intended that all our powers should be found in the Letters Patent—defective, that is, as regards civil matters in an important particular which is supplied by cl. 29 with regard to criminal matters. Or else, that which is put into cl. 29 with regard to criminal matters is there of design. If the one is a defect due to inattention of the framers of the Letters Patent, the value and weight of the argument from cl. 13, which depends altogether upon a supposition of the completeness of the Letters Patent, is very materially qualified. And if that which is inserted in cl. 29 is put there intentionally, it is very important to observe that cl. 29 is a reproduction of s. 35 of the Criminal Procedure Code with a certain omission. So it stands thus, that the framers of the Letters Patent did not think it desirable to put into the Letters the enactment relating to the transfer of civil suits, thinking it sufficient where it stood in the Civil Procedure Code; but at the same time thought it proper to bring the corresponding enactment from the Criminal Procedure Code into the Letters Patent, making an alteration in it while they did so. And if that be the true version of what took place, the alteration is surely very significant. S. 35 says:—

“It shall be competent to the Sudder Court to order the transfer of any criminal case or appeal from a Criminal Court subordinate to its authority to any other such Criminal Court of equal or superior jurisdiction or to order that any offence shall be enquired into or determined in any district, or division of a district, other than that in which the offence shall have been committed, whenever it shall appear to such Sudder Court that such order will promote the ends of justice, or tend to the general convenience of the parties or witnesses.”

The clause, as it appears in the Letters Patent, does not contain the words "subordinate to its authority" in the first part, or the word "such" in the latter part. Had these words been contained, they would have excluded this Court from the category of superior Courts referred to in cl. 29, and therefore the reasonable inference from the omission of them is that this Court was not intended to be excluded.

It is, no doubt, singular that, if cl. 29 of the Letters Patent does confer the general power which I think it does, s. 24 should have been put into the Letters Patent, inasmuch as it appears to be little other than a particular instance of that general power. There are, however, provisions even in that section which, under a nice discrimination, might possibly distinguish the power there given, and prevent it from being strictly such a particular case as that to which I have referred. However this may be, having regard to the want of completeness of drafting which certainly is manifested in the Letters Patent, I do not think that even the presence of such a provision as that of cl. 24 should be allowed much weight in the argument which I have already dwelt upon at some considerable length.

And, lastly, we have the express opinions of the late Chief Justice, the present Officiating Chief Justice, and Mr. Justice Markby, in *The Queen v. Nabadwip Chandra Goswami*,\* all concurring in laying down that this Court does, under cl. 29, possess the jurisdiction which is now invoked by Mr. Ingram's client. I thought it necessary at this length to give the reasons which have led me to concur in the opinion of these three Judges, because the question whether or not this Court possesses the power is one, I apprehend, of the greatest importance to the administration of justice in Bengal.

I come now to the facts upon which this application is made. The principal grounds upon which the application is based seem to me to be shortly these, namely :—

1. That in substance all the numerous charges preferred against the prisoners are allegations of criminal acts and conduct committed and exhibited at Calcutta, not at Patna.
2. That the course of the prosecution, whether intentionally or not, has been unfair, and that the selection of Patna as its place is certainly calculated to prejudice the prisoners.
3. That the case against the prisoners has been, and is being, put together by an organized set of police agents who have had their quarters at Patna, and are using improper and illegal means to attain their object.
4. That the effect of the proceedings of this police agency is to create at Patna such a feeling of dread and insecurity among persons likely to be called upon to give testimony there in the matter, as will prevent a trial held in that place from being fair, impartial, and satisfactory.
5. That several of the material witnesses for the defence refuse to go to Patna to give evidence.
6. That difficult points of law are likely to arise at the trial.

These taken together did appear to me to afford very sufficient cause why the trial should be held in the superior Court at Calcutta, rather than the Sessions Court at Patna; and as the affidavits filed by the applicants were

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undoubtedly strong enough to make out these grounds *prima facie*, the rule was issued by this Court.

In answer to this rule the prosecutor has filed affidavits denying to a very great extent the statements of the applicants relative to the conduct of the prosecutor and behaviour of the police. I do not think it right that we should express anything in the shape of a judicial decision on the many issues of fact thus raised between the parties, or compare the relative truthfulness of the different deponents, on the one side and on the other, because we can hardly do this without the risk of giving rise unnecessarily to possible cause for prejudice at the ultimate trial. It seems to me sufficient now to say—to state very generally—that I have considered the affidavits on both sides with the gravest anxiety. I am very sensible of the weight which must of need be attached to the forcible arguments employed by Mr. Ingram, and I feel much the absence of former decisions upon the point, which might in so grave a matter as this afford a valuable guide to the proper decision of this Court. It appears to me that instances drawn from the practice of the Court of Queen's Bench in England with reference to the granting or withholding writs of *certiorari* to bring up an indictment from an inferior Court are not near enough—not nearly parallel enough—to this case, to afford us any real assistance in forming our judgment. In England all criminal trials, except trials for small offences under summary procedure, are effected by jury—by a jury which, I may say, is drawn somewhat promiscuously from a not very high class of the population. There is, therefore, some risk that the impartiality of the tribunal so constituted should be affected by existing causes of popular feeling or excitement bearing on the matter to be tried. And then the verdict of this body is final without appeal. Any risk of miscarriage of this kind, by such a tribunal, if it is to be prevented at all, can only be prevented by removal to a better or less prejudiced tribunal for trial. Hence a comparatively small cause may possibly be found inducing the Court of Queen's Bench to remove criminal cases in England which might not be sufficient to render a removal necessary or justifiable under a different kind of procedure.

In the present case the prisoners will be tried at Patna by a Judge assisted by assessors of intelligence and of respectable independent social position, and an appeal from the decision of the Sessions Court will lie to this Court, both upon fact and law. Bearing this in mind, I think the affidavits put in on behalf of the prosecution do appear so far to displace the case set up before us by the applicants, as to remove the grounds for supposing that they will not have a fair and impartial trial at Patna.

There remains, perhaps, on the face of these affidavits themselves, enough to indicate that there has been a long-continued and zealous activity on the part of the police in procuring witnesses in support of the prosecution, such as may not possibly be without an effect upon the character of the evidence upon which the Sessions Court will have to act. But although for this reason more than common care will be required for the proper trial of the case, I do not see in it sufficient cause to justify our coming to the conclusion that the Sessions Court at Patna is not competent to exercise the requisite care.

Finally, it appears to me that it is not likely that points of law will arise in the course of this trial such as the Sessions Court cannot satisfactorily deal with; and in saying this I bear in mind that, should the Sessions Court by any misfortune err in this matter, the error can be set right afterwards in this Court.

On the whole, then, I think that the applicants have failed to show to this Court that it is necessary to promote the ends of justice that the removal asked for should be ordered.

MACPHERSON, J.—The questions to be decided on this rule are, whether the High Court has power to order this case to be transferred to itself for trial; and whether, if this Court has the power, it ought to exercise it in this particular case.

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I confess I think that there is great force in the argument of the Advocate-General as to the power of transferring criminal cases to this Court from a Court in the mofussil: and it may be that, if the matter were *res integra*, I should have adopted the view for which he contends. I am, however, unable to discover anything which actually excludes that interpretation of cl. 29 of the Letters Patent, which gives this Court power to transfer cases to be tried by itself in the exercise of its original criminal jurisdiction. Indeed, I must admit that on a perfectly fair, reasonable, and unstrained reading of the words used, they do bear that interpretation.

This being so, I find that a Court consisting of three Judges (Peacock, C.J., and Norman and Markby, JJ.) have held expressly that the High Court has power to transfer a criminal case to itself. This was in the case of *The Queen v. Nabadwib Chandra Goswami*,\* decided in April 1868; and the decision was given after formal argument of the question, though the judgment of one at least of the learned Judges turned more especially upon another point.

Under these circumstances, I am not prepared to say that I differ from my learned colleagues, who now are clearly of opinion that cl. 29 does confer this power on the Court. At the same time, I must add that I think that the language of cl. 29 is ambiguous, and might fairly have been construed in the more restricted sense which the Advocate-General would put upon it, and which the position of cl. 29 in the Letters Patent, and the provisions of certain other sections of the Letters, would seem to indicate that the framers of the Letters Patent intended should be put upon it.

I concur in the opinion that sufficient grounds have not been made out to justify the High Court in transferring this case for trial before itself in Calcutta.

The cases referred to as showing the circumstances under which a criminal case may in England be brought up by *certiorari* for trial in a superior Court appear to me to have little or no applicability to the present matter. In England there is, I may say, practically no appeal in a criminal case from the decision of the Court which tries it—no remedy for a miscarriage of justice. From the decision of the Patna Court, if it tries this case, there is an appeal to the High Court on both facts and law. In my opinion, therefore, the mere possibility or probability that difficult questions, whether of law or of fact, will arise, is no reason for transferring a case under cl. 29. For, in the event of a miscarriage on the part of the Mofussil Court, sufficient remedy is provided in the right of appeal to this Court.

A very much stronger case must be made out to justify us in transferring a case to this Court than would in England justify the removal of a case by *certiorari*. For the effect of a transfer under cl. 29 is wholly different from the effect of a removal under a *certiorari*. In England a case brought up on *certio-*

\* 1 B. L. R. O. Cr. 15 (see p. 24 of this book).

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*rari* is tried in precisely the same manner before the superior Court as it would have been tried if it had not been removed. Here, a case transferred to this Court is tried under a procedure wholly different from that of the Mofussil Court from which it is transferred. While such a transfer in England involves change only of place of trial and Court, here it involves change of place of trial and Court, and also of procedure. I may add that the transfer of a criminal case to this Court may involve further very substantial changes in the personal *status* and privileges of the accused, and of all others who come from the mofussil into Calcutta for the purposes of the trial. To obtain the benefit of these changes is one of the avowed and principal objects of the present application.

S. 35 of the Criminal Procedure Code gives the High Court power to order the transfer of a criminal case from one Court in the mofussil to any other Mofussil Court of equal or superior jurisdiction, whenever it shall appear "that such order will promote the ends of justice, or tend to the general convenience of the parties or witnesses." Considering the great difference which exists between the effect of a transfer from one Mofussil Court to another, and the transfer from a Mofussil Court to the High Court, it appears to me that it is under s. 35 of the Criminal Procedure Code, and under that section alone, that this Court ought to order transfers except in very special cases. The excepted cases would comprise the class indicated by Sir Barnes Peacock in his judgment in *The Queen v. Nabadwip Chandra Goswami*,\*—i. e., cases in which the transfer is necessary in order to avoid the trial of what is substantially but one issue, more than once, in different Courts with different jurisdictions. They would also include cases in which it is clearly made out that there is a substantial doubt as to whether the accused can have a fair trial elsewhere than in Calcutta. I see no reason, on the materials before me, for entertaining any such doubt. I therefore think the rule should be discharged.

MOOKERJEE, J.—I concur with Mr. Justice Phear in holding that the High Court has the power to direct the transfer of any criminal case to itself and to try the same. It cannot be denied that the Letters Patent give the High Court much larger powers and more extensive jurisdiction than those possessed by either the late Sudder Court or the Supreme Court. Cl. 29 of the Letters Patent of 1865, I think, gives the power to the High Court to remove a criminal case from any Court to any other Court, including itself. The Sudder Court was only a Court of Appeal, and it appears to me, therefore, that the Legislature in 1861 never contemplated that the Court should try and determine criminal cases as a Court of original criminal jurisdiction. The language of s. 35, Act XXV. of 1861, is as follows:—

"It shall be competent to the Sudder Court to order the transfer of any criminal case or appeal from a Criminal Court subordinate to its authority to any other such Criminal Court of equal or superior jurisdiction, or to order that any offence shall be inquired into or determined in any district, or division of a district, other than that in which the offence shall have been committed."

The language used in cl. 29 of the Letters Patent of 1865 is quite different. It does not use the words "from a Criminal Court subordinate to the authority of the High Court," and also omits the word "such." On the contrary, the section says, "to any other Court of equal or superior jurisdiction." That the High Court is a Court of superior jurisdiction to that of a Sessions Judge cannot, I apprehend, be denied. I cannot see how it can therefore be

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\* 1 B. L. R. O. Cr. 15 (see p. 24 of this book).

contended that the High Court, which can transfer criminal cases from the Court of one Sessions Judge to that of another (which is a Court of equal jurisdiction), is not empowered by the terms of cl. 29 to remove the case to itself, which is undoubtedly a Court of superior jurisdiction to that of a mofussil Sessions Judge. I therefore entirely agree with the learned Judges who decided the case of *The Queen v. Nabadwip Chandra Goswami*,\* and hold that it is competent to this Court to direct the trial by the High Court of an offence triable by the Sessions Court at Patna. This decides the first objection raised by the Advocate-General as to the jurisdiction of this Court under the Letters Patent to remove a mofussil criminal case to itself. With reference to the second objection raised by the learned Advocate-General as to the expediency of removing this particular case from the Court of the Sessions Judge of Patna to the High Court, I agree with my learned colleagues that no sufficient case has been made out by the prisoners to induce a reasonable belief that the prisoners will not have a fair and impartial trial in the Court of the Sessions Judge. English cases have been cited to show that, where important questions of law arose, or where accounts of a complicated nature had to be tried, the Court of Queen's Bench issued writs of *certiorari*, and removed the trial from the inferior Court to itself. But in England there is no appeal in criminal cases, whereas in this country a regular appeal on facts and law is allowed by our procedure, and any mistake of law or fact committed by the Sessions Judge can be rectified by an appeal to this Court. If a strong case had been made out that there is a reasonable apprehension that the prisoners will not have a fair trial at Patna, I would not have hesitated to direct the removal of this case from the Sessions Court at Patna to this Court for trial.

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*Rule discharged.*

Attorney for the Government : Mr. *Chauntrell*, *Government Solicitor*.

Attorneys for the prisoners Ameer Khan and Hushmadad Khan : Messrs. *Carruthers and Dignam*.

### [APPELLATE CRIMINAL.]

*Before Mr. Justice Bayley and Mr. Justice Paul.*

THE QUEEN *v.* KALI CHANDRA SHAH AND MAHIMA RANJAN ROY CHOWDHARY. †

*Criminal Procedure Code (Act XXV. of 1861), s. 318—Evidence on Oath—Actual Possession.*

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[16 W. R. 13.]

In a proceeding under s. 318 of the Criminal Procedure Code, to determine the right of actual possession, it is necessary that evidence should be taken upon oath.

This case arose out of a dispute for a chur claimed on the one hand by the zemindars of Kakina, and on the other hand by the izardar holding under the zemindar of Purbhobhog of Cooch Behar. The dispute commenced in the cold season of 1869-70, since which time petitions were filed on either side, and the police had been directed to investigate these cases. The police sent in their report in B form as true cases, at the same time giving it as their opinion that the izardar, holding under the zemindar of Purbhobhog, was in possession.

\* 1 B. L. R. O. Cr. 15 (see p. 24 of this book).

† Reference under s. 434 of the Code of Criminal Procedure by the Officiating Magistrate of Rungpore.

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Upon this report, on the 6th January 1871, it appears that the Officiating Joint-Magistrate recorded a proceeding, giving reasons for apprehending a breach of the peace, and calling on the parties to produce any witnesses or other evidence regarding actual possession. Shortly after this proceeding, on the 10th January, one of the parties in this dispute, named Sheikh Burra Mahomed, presented a petition, complaining of the probability of a breach of the peace taking place, and setting out the grounds of his apprehension. He was thereupon at once examined on solemn affirmation, and in his evidence he repeated all the main facts stated in his petition..

The proceedings under s. 318 of the Criminal Procedure Code were actually taken after this statement had been taken on solemn affirmation.

On the 31st January 1871 the Officiating Joint-Magistrate held that the dispute could not be properly decided without a local investigation; and on the 18th February he visited the spot, made a local enquiry, and ordered that the izardar of Purbhobhog be considered to be in possession of the disputed chur until ousted by due course of law. Between the 31st January and 18th February, it appeared that nothing was done, nor does it appear that the Officiating Joint-Magistrate, on going to the spot, took the depositions of witnesses on oath. The zemindars of Kakina brought this order to the notice of the Magistrate for the purpose of having the proceedings sent up to the High Court, and the order under s. 318, Criminal Procedure Code, set aside.

The Magistrate, considering the order of the Officiating Joint-Magistrate to be illegal, sent up the records of the case to the High Court in a long letter of twelve paragraphs, proposing two grounds for the reference:—

I. "Before a case can be brought under s. 318 of the Criminal Procedure Code, is it necessary to adjudicate upon legal evidence?"

II. Having been so brought, are the statements of the parties, and mere local enquiry not on oath, sufficient data on which to decide who is in possession of the disputed land?"

The Magistrate, after reciting the facts of the case, and laying down the points of reference in paragraphs 7 to 9 of his letter, discussed the rulings bearing on the two points of reference, and pointed out certain differences of opinion between the several Divisional Benches, suggesting at the same time a reference to a Full Bench for a clear and authoritative ruling on these points.

He referred, upon the first point, to the cases of *Dewan Elahee Newoz Khan v. Suburunnissa*,\* *The Queen v. Abbas Ally Chowdhry*,† and *The Queen v. Ballabh Kant Bhuttacharjee*.‡

\* 5 W. R. Cr. 14.

† 6 B. L. R. 74 (see p. 239 of this book).

‡ Before Mr. Justice L. S. Jackson and Mr. Justice Markby.

April 6th, 1869.

Also reported  
in

11 W. R. 36.

#### THE QUEEN v. BALLABH KANT BHUTTACHARJEE AND OTHERS. (a)

Baboo Sreenath Das and Kissen Dayal Roy for the prisoners.

JACKSON, J.—This is an order under s. 318 of the Code of Criminal Procedure by the Magistrate of Rungpore, which has been laid before us by the Sessions Judge for revision, and against which we have also heard an argument on the part of one of the zemindars interested, the effect of the Magistrate's order being to keep the opposite party, the zemindar of Nekbukht, in possession of a quantity of chur land, excepting a certain part which the Magistrate described as being unculturable and sandy soil, and therefore not capable of being possessed in the usual way, and which, oddly enough, he goes on to say, must be considered as not forming part of the disputed

(a) Reference to the High Court, under s. 434 of the Code of Criminal Procedure, by the Sessions Judge of Rungpore.

Upon the second point, he referred to the cases of *The Queen v. Sonaollah\** and *Maharajah Gobind Nauth Rai v. Rajah Anund Nath Rai*.†

Baboo *Krishna Dayal Roy* appeared on behalf of the Kakina zemindar.

Baboo *Kashi Kant Sen* on behalf of the izardar under the zemindar of Purbhobhog.

Baboo *Krishna Dayal Roy* referred to the cases quoted by the Magistrate, and pointed out how they applied to the facts of this case. He urged that the first order of the Officiating Joint-Magistrate, calling on the parties to give evidence of actual possession, was based on a mere police-report, which was not evidence; and that there was nothing on the record to show that the final order of the Magistrate on the question of possession was based on any evidence whatever; and although the Officiating Joint-Magistrate recorded having personally visited the spot, yet he said nothing as to whether he had taken any evidence of parties on oath. On both these grounds, he urged the order of the Officiating Joint-Magistrate ought to be quashed.

Baboo *Kashi Kant Sen* drew the attention of the Court to the statement on solemn affirmation of one Sheikh Burra Mahomed, which was taken down by the Officiating Joint-Magistrate before proceeding under s. 318, and contended that it disclosed, if believed, grounds upon which a Court deciding a question of fact would be competent to base a finding as to the probability of a breach of the peace happening. This, he urged, disposed of the first point of reference. On the second, he observed that the Officiating Joint-Magistrate went personally to the spot, and, from enquiries made by him from the residents there, he was satisfied as to which party was in possession; and it could not be said that the Officiating Joint-Magistrate had come to his conclusion on the matter of possession at a mere guess; the mere omission to record the statements of the parties, whom he must have questioned, could not lead to the inference that the Officiating Joint-Magistrate had not examined witnesses. Upon the authority of *The Queen v. Ballabh Kant Bhutta-charjee*,‡ he contended that it was not absolutely necessary for the Officiating Joint-Magistrate to have examined any witnesses at all on the fact of possession.

PAUL, J.—In this reference two questions have been submitted for our consideration: First, before a case can be brought under s. 318 of the Criminal Procedure Code, is it necessary to adjudicate upon legal evidence? And, secondly, having been so brought, are the statements of the parties, and mere local enquiry, not on oath, sufficient data on which to decide who is in possession of the disputed lands?

land, but as being in the undisputed possession of the second party. The question before us, however, does not relate to this small portion of sandy chur, but to the larger area which has been found to be in possession of the opposite party.

The objections urged before us are, first, that the Magistrate's proceedings were not commenced in the way required by s. 318, and that consequently the orders were altogether bad on that account. Now, it seems to me that the Magistrate has recorded an amply sufficient proceeding as to the grounds upon which he was satisfied that such a dispute existed regarding these lands as was likely to occasion a breach of the peace, and therefore demanded his interference. It has been argued before us that, in order to his being satisfied on this subject, he ought to have summoned witnesses. This is not prescribed by the Code, nor has it been so held in any case before this Court, so far as I know. The Magistrate was satisfied by certain investigations

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[16 W. R. 13.]

\* 2 W. R. Cr. 44.

† 5 W. R. Cr. 79.

‡ See ante, p. 404.



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With reference to the first question, the Magistrate has considered the decisions under s. 318 of the Criminal Procedure Code to be apparently conflicting. We think the circumstances of this case do not admit of any reference to those decisions which are said to be conflicting, because we find that in this case a petition was presented by Sheikh Burra Mahomed on the 10th January 1870 that his evidence was then and there taken on solemn affirmation, and that he substantiated the principal matters contained in his statement.

This evidence plainly shows that a dispute existed concerning lands, &c., which was likely to create a breach of the peace; and the order that was made on that occasion was to the effect that, in order to prevent the breach of the peace, two inspectors should be deputed to the spot to keep the peace. All the subsequent proceedings are based upon this preliminary proceeding. The subsequent proceedings consist of petitions and other matters put in by the disputing parties, and they clearly confirm the view originally taken by the Magistrate upon the evidence of Sheikh Burra Mahomed as to the existence of a dispute concerning lands, &c., which was likely to create a breach of the peace. Under these circumstances, it appears that the Magistrate was reasonably and rightly satisfied, and that he acted fully within the provisions of s. 318. In this view of the case, a consideration of what is said to be a conflict between the various decisions is not, I think, called for, and I would suggest that, in making references to this Court, the Magistrates should be careful to glean the facts first, and see if any of the admitted facts, on being carefully weighed and considered, give rise to any questions which are mooted in the decisions said to be conflicting. In this case we consider that, if the Magistrate had applied his mind to the particular facts of the case, he would have had no difficulty whatever in putting the correct interpretation upon s. 318. It often happens that a confusion arises in the mind upon reading a number of decisions, without at the same time assiduously considering the particular facts upon which those decisions are come to.

With reference to the second question, it is quite clear that mere local enquiry and statements of parties not on oath are not sufficient data on which to decide what party is in possession of land. We do not find on the records of this case any evidence of witnesses examined on oath by the Magistrate; and we consider that any statements that they have made not upon oath cannot be regarded as evidence, and ought not to be relied upon as such. It is admitted on both sides that there is no evidence of parties on the record; that the state-

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conducted by the district police, and the report made by the police was clearly sufficient ground upon which to proceed.

The next objection is that the Magistrate has decided, not with reference to possession, but with reference to the title of the parties respectively; and also that the Magistrate has come to a decision entirely upon documentary evidence, and has not examined the witnesses whom the parties were ready to produce. Now, I think it very clear on the face of those proceedings that the Magistrate has quite misconceived the nature of the jurisdiction which he has to exercise under the 22nd chapter of the Code of Criminal Procedure. What the Magistrate has to do under that chapter, when he finds that occasion exists, is to make a speedy and summary enquiry into the fact of possession of the disputed land, and to pass, with as little delay as possible, an order declaring the party whom he finds to be in such possession entitled to retain it until ousted by due course of law. I observe that the Magistrate commenced these proceedings in the month of August 1868, and after receiving papers and holding investigations of various kinds, and adjourning the enquiry from time to time, he finally passed an order in January 1869. It is also clear that, in passing his order, he has taken into his consideration various circumstances which were really beyond the scope of the proper enquiry, and has not confined himself to the simple issue before him. But it is also, I think, quite clear that what he has done has been done on the invitation of the parties themselves. It is the parties themselves who have placed before him the materials on which he has based his judgment, and any miscarriage of his, therefore, is chiefly their own fault.

ments were not taken on oath; and that the local enquiry was not conducted on oath. Under such circumstances, the question involved in this reference is too elementary to require discussion, and it has taken me by surprise that an enquiry made on the spot, either in the presence or absence of the parties, and some statements elicited from persons not under the sanction of an oath, should be considered as any legal evidence on which to direct a party to be kept in possession to the exclusion of another. When we consider that an award under s. 318 gives a man a strong hold upon land, from which he cannot be dispossessed until the opposite party can prove a superior title, it cannot but be maintained that the proper proceeding must be that the local enquiry or investigation, of whatever nature it may consist, should be upon evidence in the legal sense of the word. I do not myself much approve of the term "legal evidence," for all that Courts of Justice are concerned with is evidence in the legal sense of the term—that is, that which is taken on oath. Oral evidence is the statement of a witness on oath; and unless it be upon oath, it cannot be any evidence at all. Therefore the expression "legal evidence" seems to create some confusion, in that it supposes that there may be evidence which is not legal. The adjudication in any case must be upon evidence properly so called. The adjudication by the Magistrate on the second question having been made upon matter which was not properly in evidence is manifestly wrong, and his proceedings must therefore be quashed.

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BAYLEY, J.—On the first of the two questions referred by the Magistrate, I think there is no doubt that Sheikh Burra Mahomed's statement on solemn affirmation recorded by the Joint-Magistrate after the presentation of his petition on its back, and followed by an order endorsed under the affirmation upon the police to act, and for two constables to keep the peace, fully satisfied the Joint-Magistrate as to the likelihood of a breach of the peace, and this in such a manner as to make his proceedings in accordance with the provisions of s. 318. It follows, therefore, that a discussion of the several decisions referred to by the Magistrate is now unnecessary in this case and under the above circumstances.

As to the second question, the pleader is unable to show us any statement on oath or solemn affirmation of any witness whatever. In fact, it seems clear that the Joint-Magistrate went to the village in company with his mohurir, and asked the inhabitants their views of the rights and interests of the contending

I do not find that the Magistrate refused to examine witnesses when produced before him. The only thing shown to us is that, on one occasion, when witnesses were apparently in attendance, he directs that they may be discharged for that day, but that the case will be taken up the following Monday. It is not shown to us that the witnesses were again produced on that day, and that he refused to examine them; and although he certainly does say that he thought it unnecessary to go into oral evidence, thus leading the parties to produce oath against oath, and perhaps leading to a great deal of false swearing upon both sides, it does not appear that the course which he took was taken otherwise than with their consent. I am therefore not of opinion that there is any such miscarriage in these proceedings as obliges us to interfere; but my objection to interfering in this case is also based upon the impossibility of our substituting for the order of the Magistrate any order which would place the parties in a better position, or would be more to the advantage of the public than the order which now stands. These proceedings commenced some eight months ago. The dispute, if it then existed, is now probably at an end; and I am altogether unable to see what enquiries we could order, or what directions we could now give, which would improve the state of affairs. It is quite clear that, if either of the parties has been injuriously affected by these proceedings, he has had ample time to resort to the Civil Court to have the matter set right. We are not told that anything of the sort has been done. I think, therefore, that the objections preferred before us are rather in the nature of technical and formal objections to the order than really well-founded complaints of wrong done, and I consider that we ought not to interfere with the order of the Magistrate.

MARKBY, J.—I also think we ought not to interfere with this order.

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parties, but did not put their statements under the sanction of an oath or solemn affirmation. So these statements, under the law, are no evidence at all. The Joint-Magistrate no doubt makes some reference as to "oral evidence" in his judgment, but, as stated above, there is no such evidence in a legal sense on the record. I concur, therefore, in the order that the Joint-Magistrate's proceedings should be quashed as illegal on the second point referred.

*Magistrate's proceedings quashed.*

*Before Mr. Justice Bayley and Mr. Justice Mitter.*

1871.

June. 23.

7 B. L. R. 329.

[16 W. R. 17.]

IN THE MATTER OF THE PETITION OF BHADRESWARI CHOWDHURANI.\*

*Criminal Procedure Code (Act XXV. of 1861), s. 318—Evidence—Police Report—Breach of Peace.*

A Magistrate, before proceeding under s. 318 of the Criminal Procedure Code, must be satisfied by evidence that a dispute likely to induce a breach of the peace exists. A police-report is not evidence.

In this case there was originally a report made by the police, and sent to the Extra Assistant Commissioner of Gowalpara (vested with the powers of a Magistrate), that there was a likelihood of a breach of the peace being caused by the ryots of Gharla and Parbat Jowar, who were disputing as to the right of fishery in a certain bhil called Bhoispori, on the ground that it was the property of their respective zemindars. Simultaneously with this report, one Nilchand Manji, on behalf of the zemindar of Parbat Jowar, presented a petition, setting out his claim, but not praying for an adjudication under s. 318 of the Criminal Procedure Code. Upon this report the Extra Assistant Commissioner called upon Nilchand Manji, on behalf of the Parbat Jowar zemindar, and Gobardhan Manji, on behalf of the Gharla zemindar, to file written statements as to the actual possession of the fishery. The parties filed their statements, and the Magistrate thereupon personally went to the spot and took the depositions of witnesses on both sides on the fact of possession, and found in favour of the Gharla zemindar, and passed an order retaining him in possession.

The zemindar of Parbat Jowar applied to the Judicial Commissioner of Assam (vested with powers of a Sessions Judge) to send up the proceeding of the Extra Assistant Commissioner of Gowalpara to the High Court for revision under s. 434 of the Criminal Procedure Code, on the ground that the Court below had passed no decision on the point as to whether he was satisfied that there was a likelihood of a breach of the peace, which is requisite before steps can be taken under s. 318 of the Code, and that there was no evidence on the record on which a finding could be arrived at on this point. The Judicial Commissioner called for an explanation from the Extra Commissioner, at the same time directing him to take evidence (if there had been an omission to do so), and to record a proceeding as to whether he was satisfied or not of the likelihood of a breach of the peace. The Extra Assistant Commissioner took the evidence of eight witnesses, and recorded his opinion that he was satisfied that there was a likelihood of a breach of the peace happening; and the Judicial Com-

\* Criminal Motion Case, No. 48 of 1871.

missioner after this thought the necessity for a reference to the High Court no longer existed, and rejected the prayer of the Parbat Jowar zemindar.

Baboo *Mohini Mohan Roy*, on behalf of the Parbat Jowar zemindar, moved the High Court (Bayley and Mitter, JJ.) to call for the records of this case, and quash the order of the Magistrate, as there was no finding, nor evidence, that a breach of the peace was likely to take place.

A rule was granted, calling upon the other side to show cause why the order of the Extra Assistant Commissioner should not be set aside.

Mr. *Allan* (with him Baboo *Tarini Kant Bhuttacharjee*), for the Gharla zemindar, now showed cause. He contended that the report of the police was sufficient, if believed by the Magistrate, to warrant proceedings being taken under s. 318 of the Criminal Procedure Code. In support of this view, he quoted the case of *The Queen v. Ballabh Kant Bhuttacharjee*.\*

He further urged that, in this case, the Extra Assistant Commissioner did not act simply on the police-report, for there was a petition on the record, put in about the same time with the police-report, by the petitioner, complaining to the Magistrate of the conduct of the opposite party, and asking for an adjudication, which would be sufficient to move a Magistrate to take proceedings under s. 318. The Magistrate, he urged, is simply to be satisfied of the probability of a breach of the peace taking place, and that it was nowhere laid down that he could not be satisfied otherwise than on the sworn statement of parties.

BAYLEY, J.—We think this rule should be made absolute, and the order of the Extra Assistant Commissioner be set aside.

The contention between the parties was as to the right of fishery; and the legal question raised before us in this reference is, whether the Extra Assistant Commissioner had legal evidence to proceed upon under s. 318.

It is admitted that no depositions on oath were taken, and it is not alleged that the Magistrate personally and with his own eyes saw any probability of a breach of the peace. All that was acted upon was the report of the police.

In a recent case, decided by Mr. Justice Paul and myself, on the 17th of this month, *The Queen v. Kali Chandra Shah*,† we stated on a similar question that “mere local enquiry and statements of parties not on oath are not sufficient data on which to decide what party is in possession of land;” and further on, that “any statements made not on oath cannot be regarded as evidence, and ought not to be relied upon as such.” The only exception to this rule—if exception it can properly be called—is when a Magistrate on the spot, and with his own eyes, see parties armed for a conflict, or otherwise in such a position as would create a breach of the peace.

A decision of Mr. Justice L. S. Jackson and Mr. Justice Markby, in *The Queen v. Ballabh Kant Bhuttacharjee*,\* has been quoted to us as holding that, in some cases, the mere information of the police may be accepted. There might have been peculiar facts in that case which are not in this. The majority of decisions are the other way, so we follow them and the ordinary rule of law—*viz.*, that statements not upon oath are not ordinarily legal evidence.

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\* See *ante*, p. 324 note (see p. 404 of this book).

† See *ante*, p. 322 (see p. 403 of this book).

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It has, however, been pressed on us that the complainant himself, Nilchand Manji, had requested by a petition that the Magistrate should proceed under s. 318; but on referring to the petition and the endorsement upon it, it is quite clear that all that the complainant has requested was with a view to the satisfaction of his own particular claim, and did not specifically ask for an enquiry and trial under s. 318.

In this view, we think that the orders of the Extra Assistant Commissioner, dated the 26th May 1870, and 24th November 1870, must be set aside, and this rule made absolute.

7 B. L. R. 329.

[16 W. R. 17.]

MITTER, J.—I am of the same opinion. The report of the police is no evidence whatever, and the Extra Assistant Commissioner ought not therefore to have accepted that report as sufficient to institute proceedings under s. 318.

*Rule absolute.*

*Before Mr. Justice Ainslie and Mr. Justice Paul.*

1871.

July 24.

THE QUEEN v. RAMKRISHNA DAS AND ANOTHER.\*

*Penal Code (Act XLV. of 1860), s. 161—Public Servant—Illegal Gratification.*

7 B. L. R. 446.

[16 W. R. 27.]

A peon of the Collector's Court, who received no fixed pay from the Government, but was remunerated by fees whenever employed to serve any process, and was placed on the register of supernumerary peons, had been ordered by the Magistrate to do duty on a particular day at the office of the Special Sub-Registrar, where he was detected receiving an eight-anna piece from a person, and was prosecuted for receiving an illegal gratification as a public servant.

*Held*, that the peon was a public servant under the definition in the 9th clause of s. 21 of the Penal Code, and the trial of the charge against him must be proceeded with.

ONE Ram Charan Sing, a Collectorate peon, was, on the 21st June 1871, deputed to keep order in the Special Sub-Registrar's office. On that day, the Special Sub-Registrar saw him receive something from Ramkrishna Das, and, getting up immediately, he caught hold of Ram Charan, and found that what he had just received was an eight-anna piece. The Sub-Registrar prosecuted Ram Charan for receiving, and Ramkrishna Das for giving, an illegal gratification. The case was made over for trial to the Deputy Magistrate.

The Deputy Magistrate discharged the prisoners. He was of opinion that, as Ram Charan was not a peon on the regular establishment in receipt of a fixed pay, but a supernumerary, being remunerated by fees on each occasion that he was required to serve any process, and that as on the day of this occurrence he had no process to serve, and was therefore in receipt of no pay, he could not be regarded as a public servant.

The Officiating Magistrate, however, being of opinion that Ram Charan was, on the 21st June, a public servant, sent up the case to the High Court under s. 434 of the Criminal Procedure Code. The Magistrate said that, as the peon was appointed under the Board's rules, and in accordance with s. 6 of Act V. of 1863, B.C., as an occasional or supernumerary peon, and was registered and had a badge, he was a public servant under the 9th description mentioned in s. 21 of the Penal Code, although he was remunerated for his labour by fees instead of a fixed salary.

No one appeared to support or oppose the reference made by the Magistrate.

\* Reference, under s. 434 of the Code of Criminal Procedure, by the Officiating Magistrate of Backergunge.

AINSLIE, J.—We are of opinion that the view taken by the Magistrate is correct. S. 21, cl. 9, includes among public servants “every officer in the service or pay of Government, or remunerated by fees or commission for the performance of any public duty.” The Deputy Magistrate reads this as if the word “and” were substituted for the first “or”—that is, as if the clause stood—“every officer in the service of Government or remunerated by fees or commission;” but the words of the law are more extensive. Explanation 2 appended to the said section disposes of the objection that the employment of the accused was in contravention of a rule of the Board of Revenue. As said in the commentary on the Penal Code by Messrs. Morgan and Macpherson, “According to the second explanation, the person who, in fact, discharges the duties of the office which bring him under some one of the descriptions of public servant, is, for all the purposes of the Penal Code, rightfully a public servant, whatever legal defect there may be in his right to hold the office.” The accused person was, wrongly perhaps, appointed to discharge the duties which should have been entrusted to a paid servant of the Government; but if he (to use the words of the commentary above quoted), “being to all appearance a public servant” (which unquestionably he was), accepted a bribe, or was obstructed in the execution of his duty, the penal provisions of the Code are applicable, and he will be punished in the one case, and protected in the other, notwithstanding that there may be legal defects in his right to the office.” The order for the discharge of Ram Charan Sing and Ranakrishna Das must therefore be set aside, and the trial of the charges against them must be proceeded with.

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7 B. L. R. 446.

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*Before Mr. Justice E. Jackson and Mr. Justice Miller.*

*The 6th July 1869.*

THE QUEEN *v.* ALA BUKSH AND OTHERS.

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July 16.

7 B. L. R. 482.

[12 W. R. 24.]

The facts of the case are fully stated in the judgment of the Court, which was delivered by

JACKSON, J.—These four cases relate to four different tanneries situated in the town of Chuttuck, which the Magistrate has ordered to be removed from the places where they are at present, on the ground that they are injurious to the health and comfort of the community.

The Magistrate took proceedings under s. 308 of Act XXV. of 1861. The proceedings appear to have been founded on a report of the Civil Surgeon of the district, who carefully examined each separate tannery, and made a report upon it. He distinctly states that in his opinion the godowns in question, which he says are situated in a thickly populated part of the town, are offensive to those who live near them, and also to those who have occasion to pass them, and that they must be the cause of illness and disease.

The Magistrate, acting upon these reports, served notices upon the several defendants to remove their trade, or to appear and show cause why the removal should not be enforced.

In accordance with the provisions of s. 313, those persons to whom the order of the Magistrate issued appeared and showed cause against it, and they attempted to satisfy the Magistrate that the order was not reasonable and proper. The Magistrate accordingly went himself to the spot, and was satisfied that these tanneries should be removed, and therefore confirmed his order.

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The application before us is on the point that the proceedings of the Magistrate are not legal, inasmuch as he did not record evidence. But it appears to us that if the defendants had asked him to have any witnesses examined, and had brought these witnesses before him, and applied to him to have them examined, the Magistrate would have been bound to examine them. But it does not appear that anything of this kind was done in the present case.

The parties on whom the order was served had the option of applying to the Magistrate for a jury to try whether such an order was reasonable and proper. The Magistrate in such cases is bound to be guided by the opinion of the majority of the jury. If the defendants were satisfied that their neighbours were in no way inconvenienced by the hide godowns and tanneries, they could easily have asked for a jury, and could have obtained a verdict.

But they did not take this step, but attempted between themselves to satisfy the Magistrate, and they failed to do so.

Under these circumstances, looking to the report of the Civil Surgeon, we think that we ought not to interfere. There is nothing illegal in the order passed by the Magistrate, and we therefore reject the applications of the petitioners.

Although there is nothing apparently illegal in the proceedings which would justify our interference, still the proceedings of the Magistrate should have laid down more fully the grounds on which he acted, and also what he saw in each godown, and which in his opinion rendered its removal necessary; and, in deciding on the objections of the parties, he ought to have recorded in each case the grounds of his rejection of such objections. The summary way in which he has dealt with the matter, no doubt, leads the parties to believe that they have not had justice done to them.

*Before Mr. Justice Norman, Offg. Chief Justice, and Mr. Justice Loch.*

1871.

June 13.

7 B. L. R. 499.

[16 W. R. 6.]

THE MUNICIPAL COMMISSIONERS OF THE SUBURBS OF CALCUTTA  
(PROSECUTORS) v. MAHOMED ALI AND ANOTHER (DEFENDANTS).\*

*Criminal Procedure Code (Act XXV. of 1861), ss. 308, 310, 311, 313—  
Slaughter-house—Nuisance.*

The condition and the conduct of an old-established slaughter-house is proved to be, in fact, an offensive nuisance, and dangerous to the health of neighbours; but the evidence did not show it was in a worse condition than at any time since its establishment; the occupiers, when summoned, refused to ask for a jury under s. 310, Criminal Procedure Code. *Held*, the Magistrate was justified in suppressing the 'trade or occupation' under s. 308. No length of enjoyment can legalize a public nuisance.

THIS was a reference by the Judge of the 24-Pergunnas under s. 434 of the Criminal Procedure Code. The letter was in the following terms:—

"It appears that the Magistrate of the district, having visited the slaughter-house on the 14th May, came to the conclusion that 'the occupation of slaughtering cattle and sheep carried on in the slaughter-house at Narkuldanga is injurious to the health and comfort of the community, and that it should therefore be suppressed'; and he proceeded under s. 308 of the Criminal Procedure Code. The depositions recorded by Mr. Barton, the Joint-Magistrate

\* Reference under s. 434 of the Code of Criminal Procedure, by the Sessions Judge of the 24-Pergunnas.

to whom the case was referred, show that some persons who inspected the place observed, and that some persons who live in the vicinity have experienced, those evils which are inseparable from slaughter-houses. They show also that the place is not sufficiently supplied with fresh water, and that the drainage of the locality has not been properly provided for. But they do not show that the slaughter-house in question is in a worse condition now than at any time since its establishment; on the contrary, it seems that some improvement has been effected in the arrangements during the last few years.

"It was urged before the Joint-Magistrate that s. 308 is not applicable to the case, because the slaughter-house was established in 1844 with the sanction of the Magistrate, which sanction was given after full enquiry and careful consideration; and because it has since been maintained with the express sanction of the law and of the municipality, which now constitutes itself the complainant in the matter. But Mr. Barton did not understand the argument, and rejected it on the ground that the past history of the slaughter-house did not exempt it from the operation of the law. Mr. Barton did not distinguish between the trade and the manner in which it is conducted. It cannot properly, I think, be said that a trade is injurious which has been established and maintained by authority, and is expressly sanctioned by law; and it is, as it seems to me, especially absurd in the municipality to set up such an allegation, since they have erected a slaughter-house, and are very anxious to establish the business. But one slaughter-house may be well-conducted, and another ill-conducted; and it may be a very proper subject for magisterial enquiry and interference if a slaughter-house is used without due care for cleanliness. Now, there are special laws which empower the municipality to enforce cleanliness; but instead of putting into effect these provisions, which invest them with ample power for the purpose of avoiding what is injurious to the health and comfort of the community, they have adopted the expedient of treating the business as a public nuisance; and in this respect I think that the action of the Magistrate was illegal, and that the proceedings ought to be quashed.

"From a copy of an order passed by me in a similar case in January 1870. I find that I expressed a similar opinion, and upheld the order of the Deputy Magistrate refusing to treat this slaughter-house as a nuisance.

"There seems to be an undefined idea that an unlicensed slaughter-house may be a nuisance, although one carried on under a license cannot be so treated. But the license does not alter the trade, and a general law cannot be applied to a case for which special laws provide. The Magistrate treats the slaughter-house as a nuisance, because he has failed to enforce the Slaughter-house Act of 1865. It has been pointed out to me that in the case of *Elliottson v. Feetham*,\* to which the Joint-Magistrate refers, and other cases, it is laid down that a person coming to reside in the vicinity of an offensive trade cannot set up his own right to untainted air, if the owner of the trade has acquired a presumptive right to carry it on. See Gale on Easements, p. 291.

"It appears to me that a considerable animus has been shown by the witnesses. The Health Officer refers to the slaughter of diseased cattle as if it afforded a reason for suppressing the slaughter-house; and these witnesses, who confessedly live among gas-works, piggeries, and public latrines, do not hesitate to ascribe every noxious odour to the slaughter-house. This animus is referrible to the controversy which has been carried on for a considerable

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period, and to the popular feeling 'which has been excited by paragraphs in newspapers and otherwise; and, in submitting this case and others to the High Court, I think that it will not be irrelevant if I mention shortly the facts which have come under my cognizance in various cases officially brought before me.

"In 1865 the subject of the slaughter-houses attracted attention, and the Bengal Council passed Act VII. of that year 'for the better regulation and supervision' of them. It was proposed that a large and expensive slaughter-house should be built by the Calcutta Municipality for the use of the town and suburbs; and a private arrangement was made between the two municipalities that the one in Calcutta should build the house, and that the one in the suburbs should suppress all other slaughter-houses. The building was accordingly erected, and it is said to be very well adapted to the intended purpose; the Suburban Municipality therefore desire to fulfil their promise, but they have met with some resistance from those who have an important pecuniary interest in the old slaughter-houses, and the Calcutta Municipality being annoyed at the partial failure of the plan, pecuniarily and otherwise, have complained of breach of contract, and have urged the Commissioners in the suburbs to more strenuous efforts.

"The object which these Commissioners have in view is doubtless good. There cannot be a slaughter-house without offal, blood, &c., and a very fetid effluvia; but there is nothing really noxious in all this, if the place is properly cleansed after the slaughtering; and a masonry building with masonry drains, kept under proper supervision, affords the best means of securing this object. But the goodness of the object does not justify a man in adopting unjust means for its attainment. The Legislature, it may be assumed, never intended that the Municipal Commissioners should avail themselves of the legal power entrusted to them to injure individuals for the sake of the public. It was not intended that they should arbitrarily suppress all slaughter-houses in order to force the public to resort to the municipal slaughter-house; and they are not justified in refusing licenses to established slaughter-houses if they are properly conducted. But this is what they have endeavoured to do. As soon as the Act was passed, the owners of slaughter-houses were required to go to a considerable expense in paving and draining them, and immediately afterwards they were told that their licenses would not be renewed. The slaughter-houses are very valuable property; and to refuse the owners a license is to destroy the property. It is no cause for wonder that the owners have sought to evade the law when they found that the Municipal Commissioners would not listen to reason or justice; and it is not surprising that they do not improve the slaughter-houses during the continuance of the contest in which they are endeavouring to obtain a license or compensation for the loss of the profits which the municipality desires to appropriate. The owners are willing to give up their slaughter-houses for a fair compensation, but their proposals have been entirely rejected; and the Commissioners and Magistrates have sought to enforce compliance by criminal prosecutions which have hitherto failed. And now the Magistrate suddenly discovers that the slaughtering cattle is a public nuisance injurious to the health of the community, and desires the total suppression of it in seven days. I am also informed that this measure has been adopted while a committee appointed by Government is investigating the whole subject.

"I think that the proceedings now before me are illegal and unjust; but I have no power to interfere, and I submit the record to the High Court, with the recommendation that the order of the Joint-Magistrate, dated the 23rd

ultimo, directing that the slaughter-house be closed in seven days, should be quashed."

The further facts of this case and the arguments of counsel are sufficiently set out in the judgment.

The *Advocate-General* for the prosecution.

Mr. *Montrieu* and Baboo *Ashutosh Dhur* for the defendants.

NORMAN, J.—On the 15th of May, Mr. Graham, the Magistrate of the 24-Pergunnas, visited a slaughter-house in the possession of Mahomed Ali and Munshi Abbas Ali at Narkuldanga. He records that he found the place in a most filthy condition; that no arrangements appeared to exist for the removal of the offal and blood; that the stench was abominable, and the ground saturated with blood and filth; that he was of opinion that the occupation of slaughtering cattle and sheep carried on in the slaughter-house at Narkuldanga was injurious to the health and comfort of the community, and that it should therefore be suppressed. He therefore ordered Mahomed Ali and Munshi Abbas Ali, within seven days from the receipt of his order, to suppress the occupation, or within that time to show cause why the said order should not be enforced.

On the 23rd of May the defendants having been duly summoned, Mahomed Ali and Munshi Abbas Ali by their pleaders appeared to show cause why the slaughter-house should not be suppressed.

Dr. Tonnerre, being examined as a witness, deposed that, on entering the premises, he found a place about 20 feet square made of masonry, with a hole in the middle, in which a *gumla* was sunk. On the masonry and inside the *gumla* was a large quantity of coagulated blood and dung mixed together. Several sheep and goats were lying on the ground with their throats cut. Near these were butchers skinning other sheep and goats. Going a little eastwards, he came to a shed, the road to which he describes as a mere compost of mud, offal, blood, and cowdung. He entered the shed, and found it full of freshly slaughtered cattle. The floor of the shed was of broken concrete, full of holes. On both sides of the concrete was mud. Two-thirds of the breadth of the shed was concrete, and the remaining one-third mud, consisting of offal and blood. Down the middle of the shed was a drain. In the drain was a quantity of stagnant blood. Parallel to the shed was a *cutcha* drain, which received the sewage of the village south of the shambles, and the blood and offal out of the *gumla* above-mentioned. The drain was exceedingly filthy, and there were large quantities of night-soil in it. In the shed twenty-eight carcasses of cows were suspended. The greater part of these cows were thoroughly diseased. North of the first shed was another shed about the same size. In it about thirty-six carcasses of cattle were suspended, more or less diseased. The floor was tiled, but in bad repair. On the margin of the shed on each side and under was a mass of mud, offal, and blood. The sewage-drain above-mentioned runs parallel to this shed. Dr. Tonnerre says the smell arising from the whole premises, the sheds, and the drain, was the most offensive and sickening smell he ever experienced. Between the canal and the sheds there is a large pond about four yards from the sheds. The drainage of the premises falls into this pond. The water of the pond was simply filthy sewage, emitting a most sickening and offensive smell. On the north-west of the pond is a place where blood, offal, and cow-dung are thrown. The slaughter-house is surrounded on all sides by human habitations. Dr. Tonnerre says: "I consider the slaughter-house a most dangerous nuisance to the neighbourhood, and liable to spread disease. I consider

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the slaughter-house to have a tendency to spread small-pox and cholera among people who live in its vicinity." Dr. Tonnerre on cross-examination said he had known the slaughter-house for upwards of ten years ; he visited it ten years ago. It was in a worse state then than it is now.

Mr. Hallan, a veterinary surgeon, the President of the Cattle Plague Commission, described the state of the slaughter-house and the accumulation of filth and offal. He speaks of the sickening stench, and says it is likely to affect human life and health. He saw the livers and lungs of diseased animals which had been slaughtered, and says that the consumption of the meat of these animals would be dangerous to human life ; that the place could not be used as a slaughter-house without being injurious to the health of the neighbourhood, as there were no means to keep the premises in a clean state. There was no supply of clean water on the premises, and no attempt at proper drainage.

Mr. James Blackburn, the engineer of the Gas Company, said that he and others were frequently annoyed by most disgusting smells from the slaughter-house ; that he had suffered in health, but could not swear that the smells from the slaughter-house were the cause of it. The effect produced by the smell is a sickening sensation, which is worst in passing the place, but he had frequently felt it in his own house, which is 400 yards to the south of the slaughter-house.

Jonathan Rist, an engine-driver, who lives about 500 yards from the slaughter-house, speaks of the sickening smell which had compelled him to leave his food. He speaks of having often felt the sickening smell in the train when coming home.

Sheikh Hadu, a sirdar of coolies, who lives close to the slaughter-house, says that his children and wife are often made ill by the stink which comes from the slaughter-house. He himself is sometimes made ill. His son and brother died of cholera. Many of his neighbours are made ill. They cannot eat ; they vomit. On cross-examination, he said that he was one of 500 or 600 persons who lived near who complained of the nuisance about a year ago ; but the Deputy Magistrate at Sealdah, Kumar Harendra Krishna, dismissed the case. Kedarnath Ghose, a contractor, lives about three hundred yards from the shambles. He says an awful stink comes from the slaughter-house after 4 o'clock. "Sometimes myself and family are sick from it. We get vomiting sickness, headaches, and fever. There is a great deal of sickness among the people who live near it. Many are leaving the place altogether." On cross-examination, he said he also complained of the nuisance last year, with all the inhabitants, Hindu and Mahomedan, of the place.

Miran Khan, a khansama, gave similar evidence.

The Joint-Magistrate, Mr. Barton, says : "The evidence of Drs. Tonnerre and Hallan, of Mr. Blackburn and the others, who speak of the present state of the slaughter-house, is clear and decisive. It shows beyond a doubt that the nuisance is a public one, and of a most dangerous character, highly injurious to the health and comfort of the community." He adds : "I visited the place last Saturday, and the abominations of it exceeded every thing I had seen in all my life." The Joint-Magistrate found the slaughter-house at Narkuldanga to be injurious to the health and comfort of the community.

The defendants declined to apply for an order that a jury should be appointed to try whether the order was reasonable and proper.

The Joint-Magistrate then ordered that the slaughter-house should be closed on or before the 27th of May.

The Judge of the 24-Pergunnas, being of opinion that the Magistrate's order was contrary to law, has referred the proceedings to this Court under the provisions of s. 434 of the Criminal Procedure Code.

Mr. Montrion and Baboo Ashutosh Dhur contended that the order was illegal, and should be quashed.

They contended that this slaughter-house had been established in 1844, with the sanction of Mr. Mytton, the Magistrate of the 24-Pergunnas. It seems that this order was passed after a careful enquiry whether the business of a slaughter-house could be carried on at the place in question without inconvenience to any one, and that the Magistrate, after personal inspection, was satisfied with the arrangements then made. They referred to Act XXI. of 1857, and contended that s. 45, which provided that no place which was not used as a slaughter-house at the time of the passing of that Act should be so used without a license from the Magistrate, must be treated as having impliedly sanctioned the continued use of then existing slaughter-houses. They contended that a slaughter-house is not in itself a public nuisance, and they contended that the Municipal Commissioners, under s. 3 of Act VII. of 1865 of the Bengal Council, ought to have compelled the defendants to remedy the defects in the slaughter-house by paving it, draining it, and causing a proper supply of water to be provided; that the Commissioners ought to have proceeded under that Act, and they could not treat the trade itself as a nuisance, merely because it had been carried on without due precautions to avoid creating annoyance; that the carrying on of a trade which had been legalized and sanctioned by public authority, and carried on in the same place for so many years, could not be treated as a nuisance in a neighbourhood where other offensive matters, such as public tannies, pigsties, and bone-heaps, which the evidence shows to have existed in the neighbourhood of the slaughter-house in question, had long been borne with; and on this point they referred to Russell on Crimes, Volume I., p. 319, 3rd edition.

The Advocate-General appeared in support of the order of the Magistrate.

On reading through the evidence, we think that there can be no question that the Joint-Magistrate was abundantly justified in finding that the trade, as carried on in the slaughter-house in question, was most injurious to the health and comfort of the community. It was no answer whatever to say that the business was one which, if proper precautions had been taken by the defendants, might have been carried on without danger to the public health. The permission by Mr. Mytton shows no more than that, with reference to the state of the locality at the time, when such license was granted, and the arrangements then made, the business could then have been carried on without causing any nuisance to the persons residing in the vicinity. As observed by Lord Tenterden, in a case somewhat similar to the present, *Rex v. Cross*,\* the license would not entitle the defendant to continue the business one hour after it became a public nuisance to the neighbourhood. Although the Commissioners had taken no steps under Act VII. of 1865 against the defendants, the defendants had ample warning to set their house in order by the prosecution instituted against them by many hundreds of their neighbours in the course of last year.

We now come to the point adverted to by the Judge in sending up the case, *viz.*, that the evidence did not show that the slaughter-house is now in a worse condition than at any time since its establishment; but, on the contrary, that some

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improvement has been effected during the last few years, and that a person coming to reside in the vicinity of an offensive trade cannot set up his own right to untainted air if the owner of the trade has acquired a prescriptive right to carry it on. The notion of the existence of a species of right to corrupt the air of a particular locality by the exercise of a noxious trade, provided that, at the commencement of the nuisance, no person was in a position to be injured by it, has been exploded. It seems convenient that we should refer to two recent decisions on the subject of trades carried on so as to create serious nuisances. In *The St. Helen's Smelting Company v. Tipping*\* in the House of Lords extensive operations for the smelting of copper were carried on in the neighbourhood of the plaintiff's property. The vapours exhaling from the works did great injury to the trees and shrubs on the plaintiff's estate. It was shown that the whole neighbourhood where the copper-smelting works were carried on was more or less devoted to manufacturing purposes, and it was argued that, inasmuch as the copper-smelting was carried on in a fit place, it might be carried on with impunity. The Judge at *Nisi Prius* had told the jury that, if a man, by the erection of a lime-kiln or copper-works, or any works of that description, sends over his neighbour's land that which is noxious and hurtful to an extent which sensibly diminishes the value of the property or the comfort of existence on the property, it is an actionable injury. The House of Lords considered this direction substantially right. The Lord Chancellor pointed out the distinction between cases where the thing alleged to be a nuisance is productive of mere personal discomfort, and those where the nuisance produces material injury to property. He pointed out that, in the latter case, the submission required from persons living in society to that amount of personal discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours would not apply to circumstances the immediate result of which is a sensible injury to the value of property. It was argued that sensible discomfort for carrying on a necessary trade in a suitable locality is not an actionable injury. Lord Westbury pointed out that the law, as laid down on that subject, unquestionably does not carry with it the consequence that a trade might be carried on so as to cause injury and destruction to neighbouring property. The case is stronger where the nuisance is one not merely injurious to property, but dangerous to health. In *The Stockport Water-works Company v. Potter*† the nuisance consisted in the discharge into a brook of dye-stuff containing arsenic, the effect of which was that, in the reservoir of the Stockport Water-works, eleven miles below the defendant's works, arsenic was found in the proportion of nearly five grains to one pound weight of mud. It was contended that the defendant's trade was carried on in a proper place and in a proper manner. The Chief Baron, in the course of the argument, observed that his impression was that, if a person carries on a noxious trade in a particular place to which the exigencies of society cause a town to extend, the assent of the growing population to the nuisance must not be presumed. Baron Martin, in giving judgment, observed: "The defendants carried on the trade for their own profit, and the public are benefited by the carrying on of all trades; but what answer is that to persons whose water for drinking is affected by arsenic poured into it by persons carrying on such a trade." As to the claim of a prescriptive right alluded to by the learned Judge, we may observe that no prescriptive right to maintain the slaughter-house in its present condition was set up before the Joint-Magistrate, nor could any such right have been effectually asserted: *first*, because it appears on the evidence that the slaughter-house has existed in its present po-

\* 35 L. J. Q. B. 67.

† 7 H. & N. 160.

sition only for about six, or at most ten years; *secondly*, there is no evidence that, even during the whole of that time, the place was used in the same manner, and the stench emitted to the same extent, as at present; *thirdly*, in our opinion, it is clear that no length of enjoyment can legalize a public nuisance\* involving actual danger to the health of the community.

The Judge is wrong in supposing that it was incumbent on the prosecution to show that the slaughter-house was in a worse condition than formerly. The prosecution proved that the slaughter-house was in such a condition as to make it a nuisance dangerous to health, and if there was or could be any justification for its maintenance in such a condition, it was for the defendants to show that by way of answer.

We are of opinion that the order of the Joint-Magistrate was a legal and proper order.

*Conviction upheld.*

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*Before Mr. Justice Kemp and Mr. Justice Glover.*

THE QUEEN v. GIRISH CHANDRA GHOSE AND OTHERS.†

*Criminal Procedure—Act XXV. of 1861, ss. 66, 194, 249—Act VIII. of 1869, s. 36.*

A Magistrate of a district, before whom a complaint had been made, without complying with the provisions of s. 66, Act XXV. of 1861,‡ sent the petition to be disposed of by a Deputy Magistrate; and when the Deputy Magistrate had proceeded to some extent with the case, the Magistrate took it up, and tried it himself.

*Held*, that non-compliance with the provisions of s. 66 of Act XXV. of 1861 made the subsequent proceedings void.

*Held* also, that the Magistrate, having once sent the case to the Deputy Magistrate for trial, had no power to try the case himself, without formally recording a proceeding under s. 36 of Act VIII. of 1869.§

ONE Golab Raur charged the prisoners in this case before the Magistrate of Howrah with having extorted from her a sum of Rs. 100, by putting her in fear of an arrest under a warrant which they said had issued against her, and by threatening to have her brought up before the police as a suspicious character and for having stolen property in her possession, and with having violently

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August 7.  
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\* See *Weld v. Hornby*, 7 East 199; *Rex v. Cross*, 3 Camp. 224, per Norman, J.

† Miscellaneous Criminal Case, No. 94 of 1871.

‡ Act XXV. of 1861, s. 66.—“When, in order to the issuing of a summons or a warrant against any person for any offence, a complaint is made before the Magistrate of the district, or a Magistrate who is authorized to receive such complaint without reference from the Magistrate of the district, such Magistrate shall examine the complainant. The examination shall be reduced into writing, and shall be signed by the complainant and also by the Magistrate.”

§ Act VIII. of 1869, s. 36.—“The Magistrate of the district, or a Magistrate in charge of a division of a district, may respectively withdraw any criminal case from any Court subordinate to him, and may enquire into or try the case himself, or refer it for enquiry or trial to any other such Court competent to enquire into or try the same.”

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carried away another sum of Rs. 100 from her while she was counting out the first sum of Rs. 100. On the back of the petition containing this charge, the Magistrate simply wrote an order, sending the complaint to Baboo Dwarka Nath Banerjee, Deputy Magistrate, to be disposed of according to law. The Deputy Magistrate took down the statement of the complainant in writing, and, entertaining doubts as to the truth of the case, requested the Magistrate to direct a police-enquiry into the matter, keeping the case on his file. The Magistrate accordingly ordered the police to make an enquiry, and report on it. The police-report was against the truth of the complaint. The District Superintendent, while transmitting the report to the Magistrate, recorded his opinion that, having himself sent for the complainant, and examined her and her witnesses, he believed that, if a judicial investigation were held, the case would be proved. On receiving this report, the Magistrate summoned the accused, and proceeded to try the case himself, without recording any reason for withdrawing the trial of the case from the Deputy Magistrate to himself. One of the prisoners, Roshan Ali, appeared at a subsequent stage of the case, after the witnesses for the prosecution had been examined in the presence of the other prisoners. The Magistrate then recalled the witnesses, and asked them to identify Roshan Ali; and after that was done, the prisoner was allowed to cross-examine them.

The Magistrate, after taking evidence on both sides, convicted all the prisoners—Roshan Ali of theft and extortion, Tamizuddin of extortion, Dingo Sirang and Alahabax of aiding and abetting extortion, and Girish Chandra of aiding and abetting the same as a public servant.

In appeal, the Sessions Judge of Hooghly upheld the conviction of the Magistrate, but modified the sentence passed on Roshan Ali, by reducing one sentence, on the ground that the two offences of which he was convicted were supported by the same evidence.

On an application under s. 404 of the Criminal Procedure Code, the High Court sent for the proceedings.

Baboo *Ambica Charan Bose* (with him Mr. *M. L. Sandel*) now appeared for the prisoners, and contended, *firstly*, that non-compliance with the provisions of s. 66 of the Criminal Procedure Code rendered the subsequent proceedings void, as they had, therefore, no legal initiation: the provisions of a penal law must be strictly construed. See *Dulali Bewa v. Bhuban Shaha*\* and *The Queen v. Mahim Chandra Chuckerbutty*.†

*Secondly*, that the Magistrate was guilty of an irregularity in trying the case himself after having transferred it for trial to a Deputy Magistrate under s. 67 of the Procedure Code without recording a proceeding under s. 36. See *Shanto Teorni v. Belilios*‡ and *In the Matter of Naba Kumar Banerjee*.§ *Thirdly*, he pointed out that the witnesses for the prosecution had not been examined *de novo* in the presence of Roshan Ali, and he contended that it was not sufficient to read over to the prisoner the examination already recorded, and only to allow him to cross-examine. See ss. 194 and 249 of the Procedure Code; this was a defect which could not be supplied. See *The Attorney-General of New*

\* 3 B. L. R. A. Cr. 53 (see p. 122 of this book).

† *Id.* 67 (see p. 131 of this book).

‡ *Id.* App. 151 (see p. 141 of this book).

§ 5 B. L. R. App. 45 (see p. 230 of this book).

*South Wales v. Bertrand*,\* *The Queen v. Bishonath Pal*,† *The Queen v. Abdool Setar*,‡ *The Queen v. Kalee Thakoor*,§ and *The Queen v. Mahima Chandra Chuckerbutty*.||

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No one appeared to support the conviction.

GLOVER, J.—We are very unwilling to interfere with the orders passed in the Courts below, because the investigation appears to have been very carefully and thoroughly made, and the evidence is full and satisfactory. There can, however, be no doubt that the Magistrate has, in more than one particular, contravened the provisions of the Code of Criminal Procedure, and we have no choice but to quash his proceedings as illegal.

In the first place, he did not record the complainant's statement before referring the case to the Deputy Magistrate, as he was bound to do under s. 66 of the Code. There is an order on the back of the petition making over the case, but no examination of the complainant "reduced into writing, and signed by the complainant and the Magistrate." In the cases of *Dulali Bewa v. Bhuban Shaha*¶ and of *The Queen v. Mahim Chandra Chuckerbutty*,\*\* it has been decided that such a departure from the rules of procedure makes the acts of a Magistrate illegal.

The appellant further contends that the Magistrate, having once made over the case to the Deputy, could not try it himself, without formally recalling the case from the lower Court under s. 36. The point has been ruled in *Shanto Teorni v. Belilios*,†† and should, I think, be given in favour of the appellant in this case.

There are other questions of law raised : one that, as regards Roshan Ali, part at least of the evidence against him was not recorded in his presence ; another, that several witnesses whom the accused wished to call were not summoned. We do not see anything on the record that would substantiate the last objection ; and had it been a true one, it would have been made, we should suppose, to the Judge when the appeal was before him. The first is, however, at least partly correct, as the record itself shows. As, however, it appears that the conviction must be quashed on the two first objections taken, it will be unnecessary to further enquire as to the second.

The appellants must be discharged.

*Conviction quashed.*

*Before Mr. Justice Norman, Offg. Chief Justice, and Mr. Justice Ainslie.*  
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1869.

July 16.

7 B. L. R. 516.

*Criminal Procedure Code (Act XXV. of 1861), ss. 308, 310, 311, 313—Nuisance—Slaughter-house.*

When a Magistrate under s. 308, Criminal Procedure Code, has ordered the suppression of a trade or occupation as a nuisance, and injurious to the health of the community,

\* 36 L. J. P. C. 51.

† 3 B. L. R. A. Cr. 20 (see p. 102 of this book).

‡ 3 W. R. Cr. 36.

§ 5 W. R. Cr. 65.

|| 4 B. L. R. App. 77 (see p. 187 of this book).

¶ 3 B. L. R. A. Cr. 53 (see p. 122 of this book).

\*\* *Id.* 67 (see p. 131 of this book).

†† 3 B. L. R. App. 151 (see p. 141 of this book).

‡‡ Reference, under s. 434 of the Code of Criminal Procedure, by the Sessions Judge of the 24 Pargannas.



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the High Court will not interfere, unless they find either (i) that there was no reasonable evidence before the Magistrate of the trade being injurious to the health and comfort of the community, or (ii) that the cause shown was such as ought to have satisfied the Magistrate that his order for suppressing the trade was not reasonable and proper. The Court take the findings of fact by the Magistrate to be correct, unless they see that there is not on the record any evidence to warrant such findings.

THIS was a reference by the Judge of the 24-Pergunnas under s. 434 of the Criminal Procedure Code.

The letter was in the following terms :—

"I have the honour to submit, for the orders of the High Court, under s. 434 of the Criminal Procedure Code, the records of two cases, in which the Magistrate, proceeding under s. 308 of the Code, has ordered the suppression of the slaughter-house of Amanat Ali and Saadat Ali in one case, and of Hingan Bawa and Karim Buksh in the other case.

"2. These parties have appealed, and it appears to me that I ought not to reject the appeals, with reference to the order of the High Court of the 19th June last, in the case of Mahomed Ali and Abbas Ali,\* because the cases are somewhat different.

"3. In the case of Amanat Ali and Saadat Ali, it is urged that the medical evidence adduced by the Municipal Commissioners is rebutted by strong medical evidence, which shows that the proprietors have taken special care to carry on the trade in such a manner as to avoid what is injurious to the health and comfort of the community. The evidence for the prosecution shows that the real nuisance is to be ascribed to the adjoining premises, in which the occupant breeds maggots; and the only connection between the two is that the one procures offal from the other. It is said also that much of the stench is attributable to a collection of sweepings and refuse brought from the Fort, and deposited on the ground in the vicinity, over which the proprietors of the slaughter-house have no control. The Magistrate refused to summon the witnesses who would have proved these facts, and he relies on a petition, which is not evidence, and the subscribers of which would have been obliged to admit on examination that they live at a great distance from the slaughter-house, and on his own evidence, although he declined to submit himself to cross-examination. He told the appellants' pleader that no amount of evidence would alter his opinion; but, in truth, he was unable to judge impartially, for he was the prosecutor and the promoter of the several prosecutions against the slaughter-houses.

"4. In the case of Hingan Bawa and Karim Baksh, it is urged that the Magistrate refused to examine more than four witnesses for the defence, although 19 were in attendance, and the appellants prayed that he would examine some 250 of the persons residing in the neighbourhood.

"5. I have no power to interfere in these cases, and it appears to me unnecessary to say more than that, in my opinion, the order of the Magistrate ought to be revised.

"6. In submitting the former case to the High Court, I did not lay any stress on an alleged right by prescription, and did not intend to express any opinion that a trade which is a nuisance could not be stopped or removed by

\* *Ante*, p. 499 (see p. 412 of this book).

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proceedings taken in the proper Court. An occupation which is perfectly lawful and innoxious in itself may be so conducted as to become a nuisance to others, and the Courts may put a stop to it. But it appeared to me that the proper mode of procedure is to sue for damages, or for an injunction in the Civil Court, as in the cases to which the judgment of the High Court refers,\* and that the provisions of the Criminal Procedure Code regarding public nuisances are not applicable to slaughter-houses. If parties were damaged by the disposal of the sewage of the suburbs, the Magistrate would not close the sewers as a nuisance, but would make better arrangements. There are other laws specially enacted for the purpose of compelling persons to keep their premises clean; and the Municipal Commissioners, as it seemed to me, should put those laws in force. I am of opinion that these persons have a just grievance when they find that the Chairman of the Municipality, who is endeavouring to suppress a valuable trade, constituted himself the Judge in the trial of the case which he has promoted."

The Magistrate on the 14th June issued an order under s. 308 of the Criminal Procedure Code on Amanat Ali and Saadat Ali, the owners and lessees of the slaughter-house at Kurya, to suppress the trade carried on there, as being injurious to the health of the community, within four days, or to appear on the 19th instant, and show cause why the order should not be obeyed.

On the 19th June the accused appeared, and were heard by their vakeel. Nine witnesses were produced and examined for the prosecution (on the 19th), and twelve witnesses (on the 20th) for the defence.

With regard to the maggot-breeding referred to in the Judge's letter as (in his opinion) the efficient and immediate cause of the nuisance complained of, a witness for the defence, Chotta Maira, deposed as follows:—

I am a mether-jemadar, on Rs. 10 a month, in the service of the King of Oudh (Wajed Ali Shah). I know Amanat Ali. My maggot business is close to his rill-khana. It is the east side of the nulla, which is close to the slaughter-house. There are several bamboo clumps there. I have three bigas six katas of land there. I rent it from Hakim Karamat Hossein. I have bred maggots there for six or seven years. They are bred from cow-dung and other dung and blood. I have no connexion with Amanat Ali. The sweepings are deposited near the slaughter-house—dung and all kinds of filth. I have been summoned and fined for leaving this place in a filthy state three or four times. I got a summons eight days ago (identifies the summons he received from the jemadar). The stench from this does not reach the slaughter-house. I have never smelt any stench in the slaughter-house. It is always clean. I drink the water of the tanks near the slaughter-house. No Hindus live near the slaughter-house. My house is about twelve bigas from the slaughter-house.

*Cross-examined*—I have not brought my lease. Karamat is a hakim; he is not here. I get the dung and blood from the slaughter-house of Amanat Ali. The dung in the stomachs of the slaughtered animals is the bed for my maggots. I get this kind as much as I want from the slaughter-house. My servants bring it from the slaughter-house. I have five for all my work here, and pay them. They get Rs. 6 each. I get about Rs. 125 for three or four months.

\* *Ante*, pp. 508, 509 (see pp. 417, 418 of this book).

† The other depositions are not given, because the Court held that they could not weigh or compare the evidence: they treated it as an ordinary civil special appeal.—REPORTER.

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I am a servant also; Rs. 10 monthly. There is no bad odour from this collection of dung, neither is there any in the slaughter-house. There is a bad stench from the sweepings from the Fort when the rain falls. I have known Amanat Ali for eleven or twelve years. I have taken dung from his slaughter-house for a year. I have no friendship with Amanat Ali. I pay nothing for the dung, and Amanat Ali pays me nothing for taking it away. It is brought in baskets.

On the 21st June the Magistrate gave judgment as follows :—

The parties convicted, and whose trade is suppressed, petitioned the Sessions Judge to call for the record, and to refer the proceedings under s. 434, Criminal Procedure Code.

On the 14th instant an order was issued by me, under s. 308 of the Criminal Procedure Code, on Amanat Ali and Saadat Ali, the owners and lessees of the slaughter-house at Kurya, to suppress the trade carried on there, as being injurious to the health of the community, within four days, or to appear on the 19th instant, and show cause why this order should not be obeyed. Accordingly they appeared on that day, and evidence was gone into both in support of and against the order. Dr. Tonnerre, Health Officer to the Justices of Calcutta, was examined at considerable length. His evidence is to the effect that the sheds used for slaughtering the cattle, and the surrounding premises, were in a very filthy state; that the flooring and drain in the shed were defective, and allowed blood and other animal-matter to percolate and decompose there; the nearest water obtainable for the purpose of cleansing the sheds was that of a tank which received the sewage of two places where hide-pickling was carried on, and which appeared to be saturated with animal-matter. In the neighbourhood he found a bamboo-grove, which was filled with the contents of the stomachs and guts of animals, and in the village close by was an accumulation of filth from the slaughter-house, that a hundred carts could not have carried away, near the masonry reservoir intended to receive the drainage from the slaughter-house. He saw, in a place worn by rain-water, coagulated blood, offal, and dung, which in due course would be carried into the public drain close by. He positively asserted that the stench arising from the slaughter-house was injurious to the health of the community; that the stench arising from the bamboo-grove was specially insufferable; that the drain in the neighbourhood of the slaughter-house was unapproachable in the dry weather. He states that, without proper water-supply and proper drainage, no slaughter-house can be carried on so as not to be a nuisance; that here no such supply of water and proper drainage can be said to exist. He further deposed to diseased, and even dead, cattle being taken to this slaughter-house to be made use of. On several occasions ryots in the neighbourhood had complained to him of their being made ill, and of their not being able to sleep from the stench. Dr. Hallan, President of the Cattle Plague Commission, gave evidence of a similar description. He examined the meat of some of the animals recently slaughtered there, and found it diseased. He considered the noxious gases arising from the slaughter-house, the reservoir, and the quagmire in the bamboo-grove, must be injurious to the health of the community. Dr. S. M. Shircore, Civil Surgeon of the 24-Pergunnas, gave similar evidence. He did not give so bad an account of the tank in the neighbourhood as Dr. Tonnerre, but did not appear to have examined it equally minutely. He states that the neighbourhood is thickly populated, and that the slaughter-house as carried on is productive of unhealthiness. No means appeared to exist for fluxing the slaughter-house, and such a slaughter-house could not be properly carried on without a proper supply of water. Some Hindu-

witnesses, resident in the neighbourhood, deposed to the inconvenience experienced by them in consequence of the bad smells arising from this slaughter-house. One Mahomedan witness, a tailor, went so far as to say that he had left the spot in consequence of the nuisance; he himself having been made ill, and one of his children having died. William Carew, a police-inspector, who had been at the slaughter-house on twelve different days between the 25th of May and the 10th of June, deposed to seeing maggots there, crawling up from under the tiles and between the tiles, and from the earth and side. Charles Barnard, another police-inspector, deposed to seeing the stomachs and entrails of the slaughtered animals being carried away to the bamboo-grove before-mentioned.

The owners of the slaughter-house have produced two medical witnesses, who have both given certificates to the effect that the slaughter-house was clean and inoffensive. The first of these, Dr. Tamiz Khan, Lecturer on Medicine, Vernacular Classes, Medical College, visited the place on the last occasion on the 19th instant, at the request of the owner. He found the place perfectly sweet and clean, and he considers that the slaughter-house possesses all the requirements of such a place. He observed a bad stench from a place near the slaughter-house, where he was informed the sweepings of the Fort stable and kitchen refuse were thrown, but this was the only bad odour about the place. He did not see what became of the offal, but was informed it was taken away in carts. Dr. George, of 37, Park Street, visited the place on the morning of the 18th (Sunday), and found it perfectly clean and dry—nothing could be cleaner. He found the flooring and drains in good order. He found no offensive smell from the deposit to the east of the sheds (Fort-sweepings). He did not consider this slaughter-house would be injurious to the health of the neighbourhood. He should not consider the drainage here provided sufficient, if the drainage in the neighbourhood were similar to that in Calcutta town (this being in the suburbs). He also said if blood were allowed to remain, and offal to be about the place, it would be decidedly injurious to health. Abdul Wasid, who described himself as a native doctor, said that he was a servant of Amanat Ali and Saadat Ali; that he was employed to prevent diseased cattle from being admitted to the slaughter-house, and to superintend its cleansing. He also said that all the blood and offal were carried away in carts to a distance of two or two-and-a-half coss. This statement on cross-examination appeared to be untrue. Chotta Moira, who described himself as a jemadar (mehter) in the service of the King of Oudh, was called to prove that the bamboo-grove mentioned above was in his possession, and that he bred maggots there. He denied any connection with Amanat Ali, and deposed to having received summonses, and to having been fined three or four times (by the Suburban Commissioners) for having this grove in a filthy state, but he admitted that he obtained his dung and offal from the slaughter-house of Amanat Ali without payment, and that he had once held this slaughter-house on lease for a year. Certain witnesses in the neighbourhood deposed that they suffered no inconvenience from the slaughter-house, and a petition was filed, bearing the signatures of over three hundred residents, in which it was stated that they were employed in and about the slaughter-house, and suffered no inconvenience from it. I should mention that a petition was also put in by certain residents, bearing forty-one signatures, stating that the slaughter-house was a nuisance. In the petition filed in favour of the slaughter-house, most of the signatures appeared to have been written by one hand, and it was stated in evidence that the document had been written and circulated by Sham Sher Ali, the mooktear employed on behalf of the owner. Other witnesses—a large number—were present, but I did not examine

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them, as Baboo Ashutosh Dhur, the pleader on behalf of the owner, concurred with me that, from the nature of their evidence and their position, it would be waste of time to record it. The important point to consider is the evidence given by the medical gentlemen examined. I consider that the evidence of Drs. Tonnerre, Hallan, and Shircore, is sufficient to show that the place is a nuisance that should not be allowed to continue. On the other hand, Dr. Tamiz Khan has said that the place was perfectly sweet and clean, and that the only bad odour came from the Fort-sweepings mentioned above. But Dr. Tonnerre and Dr. George both state that they observed no offensive odour proceeding from these sweepings. Dr. George, however, has also stated that the place could not be cleaner. It would appear from the evidence of Mr. Inspector Barnard that special efforts were made to clean the place for the visit of this gentleman, and it is probable that it was unusually clean when he visited it. He, however, states that he considered the drainage only comparatively sufficient, and he does not seem to have inspected the surrounding premises. I do not consider that the evidence rebuts that of the three gentlemen first examined, which proves that there are no proper means and appliances for the proper carrying on of this slaughter-house. The pleader for the proprietor argues that there is nothing to show that this slaughter-house, properly conducted, would be a nuisance; that the bamboo-grove has no connection with it; that a great deal of the bad stench mentioned comes from the Fort-sweepings deposited in the neighbourhood. It is clear, however, that there is a close connection between the slaughter-house and the place used for breeding maggots, for the existence of the latter depends on the former. I may add that I myself visited this place once on a dry day when no slaughtering had been going on, and the stench arising from the masonry floor was excessive, such as would, I suppose, be produced by the decomposition of blood and other matter that had percolated between the tiles. On the second occasion the day was wet, and I did not experience so much stench in the sheds, but the place was very filthy, and appeared to me to answer the description given by Drs. Tonnerre, Shircore, and Hallan, rather than that given by Drs. George and Tamiz Khan. I am of opinion that it has been shown that the slaughter-house of Kurya, in its present state, is a nuisance, and injurious to the health of the community, and that it should be suppressed, and I therefore order as follows:—

*Order.*—That the occupation of slaughtering cattle, sheep, and goats in the slaughter-house at Kurya, which is in the possession and under the control of Amanat Ali and Saadat Ali, be discontinued, and that the slaughter-house be closed on or before the 25th June.

Mr. *Montriau* for the defendants.

The *Advocate-General* (*contra*).

Mr. *Montriau*.—The Court in the Narkuldanga case\* held that the Judge's letter operates as a mere reference; that its opinions or arguments are not to be regarded as of weight or importance *a priori*; I therefore proceed at once to the conviction itself. (The Court assented to this as the proper course.)

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\* This case is given at p. 499 *ante* (see p. 412 of this book). An effort was there made, on the opening of the argument, to treat the letter of reference as a judicial opinion, which (almost, if not quite) dispensed with argument against the conviction in the first instance. The Court, however, repudiated this view, and called upon counsel to impeach the conviction, which was to be held good *prima facie*.—REPORTER.

The proofs and the mischief complained of are of a very different character to those upon which the Narkuldanga slaughterers were condemned, the ground for interference admittedly less obvious, the accused by no means so clearly in fault.

The Magistrate has suppressed the trade of the Kurya slaughter-grounds under s. 308, Criminal Procedure Code. It is contended that his order is neither within the intent nor the words of the law. An exceptionally penal and summary power is conferred: if the Magistrate use that power capriciously, incautiously, mischievously, his order is illegal, and in abuse, not in lawful exercise, of the extraordinary jurisdiction created by the 308th section. The remedy in such case, and the sole remedy, is under the 434th section. So far this dangerous power is guarded and qualified.

The illegality, here, consists in (1) entire absence of proof of injury to the health or comfort of the community; (2) if there be *prima facie* evidence of some injury, it is coupled with, or rather consists of, proof that, not the trade suppressed, but another and a distinct trade or occupation, caused such injury; (3) the *prima facie* proof is materially qualified, if not rebutted and wholly met (so as to be deprived of all force and significance) by counterproof; (4) giving the utmost significance and weight to the evidence for the prosecution, the nature and character of the injury was such, that it clearly did not, for its cure or remedy, require suppression of the trade. The injury, so far as it could legally be cause of complaint, was a mere accident, not an incident, of the trade. The evil complained of should either have been left to be dealt with by a local municipal law specially applicable to the evil complained of, or some modified order, for removal or otherwise, should have been made, under s. 308, *i. e.*, suppressing the evil and nuisance, but not stopping an ancient and lawful trade, the exercise of which did not necessarily cause the evil. The jurisdiction is anomalous, and, it is believed, without English precedent; but useful principles and landmarks for guidance may be gathered from the several elaborate decisions and arguments arising out of actions for nuisance, and on occasion of applications, both public and private, to the Court of Chancery for injunction to stay mischiefs coming under the head of Nuisance. The Magistrate's order is an injunction; and in order to warrant or to support it, in order to justify under this section a judicial condemnation and suppression of a common-law right, a case, and a strong case, it is submitted, must be made. It is a difficult discretion, a conclusion of judgment from proofs, a judicial necessity. The Magistrate initiates a proceeding on his own view, or upon being otherwise satisfied; and his initiatory order or summons is analogous to the information *ex relatione* of the Attorney-General. In *Attorney-General v. Gee*\* (perhaps the latest reported case bearing on the subject), Vice-Chancellor Malins observes: "I quite agree with the law as stated by Mr. Pearson, who referred me to the passages in the *Attorney-General v. Sheffield Gas Consumers Company*,† in which the Court of Appeal, the Lords Justices, and Lord Cranworth in particular, laid down the rule that, when it is an information, the Attorney-General cannot obtain the interference of the Court, unless upon a case which he establishes, so far as he is concerned in it, as distinctly as an individual has to establish his case. The Attorney-General having failed to prove that there is that extent of annoyance and nuisance from this river which is complained of, I cannot, because it is an information, give relief any more than I could if it was a case of private injury." It is submitted, this extraordinary discretion given

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\* 10 L. R. Eq. 131; see 138.

† 3 De Gex, M. & G. 304.

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to a subordinate criminal tribunal must be exercised with at least the same caution, must be bounded and held within, at any rate, the same limits as are acknowledged and adopted by the Court of Chancery, when asked to stay a public mischief. The subject in India is entitled to equal protection with the subject in England, and our Mofussil Magistrates can scarcely claim, under this exceptional summary jurisdiction, larger remedial powers than the English Chancellor. It may, indeed, well be contended that much greater caution, that a more restricted and more carefully limited discretion (one confined to cases of the most pressing and inevitable necessity), is contemplated by s. 308; but, for the present instance, it is not needed to carry the argument so far. Is, then, the case here made one upon which injunction could be had in equity?

Nine witnesses are called, *viz.*, three medical officers, to give their opinions upon inspection; two police-officers, for the same purpose; and four residents, to speak to their experience of the alleged injury. This, indeed, is wonderfully meagre in aggregate number. But the injury to be proved is really not one of opinion, not one for experts to speak to: it is a purely empirical matter, to be proved by undoubted, unsuspecting, and ample testimony of those who have felt and suffered. Were the question the propriety of establishing or starting a possibly noxious trade, then, in the interest of the community, opinions of chemists and of medical experts would indeed be of value—perhaps the best reliable evidence of the proposed trade being or not being noxious. But here we have a long-established trade; generations of neighbours have successively lived and died on the spot; the place is thickly inhabited; the Health Officer says, he was, on his visit, surrounded by fifty ryots. Even were the inhabitants intimidated, or any way influenced to keep back (which does not appear, nor is suggested), sufficient fact of the progress of disease and death might, nevertheless, have been collected.

We hear of two petitions numerously signed by those who desired interference with the slaughter-houses, as well as of a counter-petition, and the promoter of one of the former (Grish Chandra Ghose) is named, but not called. In truth, there must be upwards of a hundred persons available to give their experiences of such an injury as is alleged and inferred (certainly not proved) to have existed.

One of the four residents who are called has had forty-two years' experience of the evil; another, forty-five years; another, fifty-five years. They each come to support the prosecution; they say all they can; but, in the aggregate or separately, they entirely fail to prove a case such as, looking at recorded cases, would have entitled the Attorney-General to interposition of the Court of Chancery. The evil is neither defined or certain, or satisfactorily shown, even on their own depositions; the annoyance and alleged injury is not clearly or probably (as a fact, or in any way) traced to the trade which has been suppressed. How, then, does the medical testimony supplement or supply the deficiency of proof in fact?

The Health Officer's expressions and opinions very much exceed those of his co-investigators. The cattle-inspector, whose special office it is to detect diseased cattle, angered by what he says he saw, *viz.*, unhealthy carcasses in this slaughter-house (a matter wholly beside the present enquiry), looks upon it with no favourable or lenient eye; and yet how much milder are his terms of criticism! The District Civil Surgeon, one the least likely to be biassed (having no special duty in connection with cattle-slaughtering, not affected by municipal interests or municipal speculations), scarcely furnishes any certificate

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of condemnation. When walking over the slaughtering premises, he experiences an "offensive stench," and he considers that slaughtering cannot be carried on without being a nuisance. Undoubtedly it is so; and so it is with many useful and necessary trades. It is to be remarked that the case for the prosecution admits and shows that there had been, of late, an improvement, and effort at increased cleanliness.

The distinct trade carried on in the bamboo inclosure is, no doubt, condemned, so far as mere opinion and bad odour can condemn it.

The injury alleged and charged is an injury to persons, to personal health and comfort, arising from the exercise of a lawful trade; and the distinction is to be borne in mind, which is so forcibly explained by the Lord Chancellor in the House of Lord's appeal, *The St Helen's Smelting Company v. Tipping* : \* "With regard to any thing that discomposes or injuriously affects the senses or the nerves, whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large." It is truly, as observed by Lord Cranworth in the same case, "always a question of compound facts." "Everything," also there said Lord Wensleydale, "must be looked at from a reasonable point of view." Here we have anciently-established, continual exercise of the trade, in the same place and in the same manner (substantially, but now conducted with more caution and less offensively); a neighbourhood in reality uncomplaining, for no noticeable evidence, none indeed to speak of at all, is given of positive injury or detriment to the lives and comfort of the residents; and, lastly, there is an effective and notoriously enforced local law (these very owners have been summoned under it simultaneously with the proceedings now under revision), whereby a trust, with ample powers, is created, for the distinct object of supervising and keeping in order the particular trade. That this last consideration is not irrelevant or immaterial, clearly appears from the *Attorney-General v. Gee*,† where we find the Vice-Chancellor observing : "It further appears, upon the evidence before me, that at that time there was a Bill before Parliament, which had passed through all its stages, and only waited the Royal assent; and I am of opinion that that Bill has afforded a remedy for all these evils by Act of Parliament. It has fixed upon its own remedies, and pointed out what they shall be if there is a disobedience to its enactments." The mere expectation of a specific remedy was there held to be an objection, if not a bar, to applying the general law of nuisance. Much more righteously and strictly should the existence of our Municipal Act preclude application of an unconstitutional and deposite nuisance procedure; one to be resorted to and justifiable only in cases of imminent danger of direct necessity. [AINSLIE, J.—Is this slaughter-house licensed; or has the license been suspended? how is that?] A license was granted until about twelve months since; it was for a term; it has not been renewed; but the withdrawal had nothing to do with the conduct of the trade; it was because of the newly-opened slaughter-establishment of the Justices' own. Here is

\* 35 L. J. Q. B. 67; S. C., 11 H. L. C. 642.

† 10 L. R. Eq. 131; see 136.



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the notice. [The *Advocate-General* objected that the matter of the license and its withdrawal was not before the Court on this argument. NORMAN, J., acquiesced.] The argument and views of Lord Chief Baron Pollock in *Bamford v. Turnley*\* are of not the less weight in illustration of a principle, because he was dissentient upon the mode of putting the question of nuisance to a jury. "The compromises that belong to social life, and upon which the peace and comfort of it mainly depend, furnish an indefinite number of examples where some apparent natural right is invaded, or some enjoyment abridged, to provide for the more general convenience or necessities of the whole community;" and "that may be a nuisance in Grosvenor Square" (we may here substitute Chowringhee) "which would be none in Smithfield Market" (or say in Kurya)—and in a previous passage the learned Judge observes: "I do not think that the nuisance for which an action will lie is capable of any legal definition which will be applicable to all cases and useful in deciding them. The question so entirely depends on surrounding circumstances. "Whenever" (I read from the judgment of the majority, *vis.*, four of the Judges in that case), "taking all the circumstances into consideration, including the nature and extent of the plaintiff's enjoyment before the acts complained of, the annoyance is sufficiently great to amount to a nuisance according to the ordinary rule of law, an action will lie." The plaintiff here is the Suburban Municipality as trustees for the public. We do not contend for any prescriptive right of nuisance, but we altogether deny that our trade is, under the circumstances (much less has it been proved to be), a nuisance at all. Nuisance or not, is a comparative or relative question; the very case for the prosecution negatives nuisances; at any rate, much falls short of the conditions of nuisance in the conduct of an anciently-established trade. Then there is no identity or common ownership, or other connection than customer and buyer, or one of independent contract and arrangement, between the owner of the maggot-breeding place, *vis.*, the bamboo-grove, and the slaughter grounds. The nuisance of the one (if it exists) has no relation or communion with any possible nuisance from the other; indeed, the grove is rather a safety-valve and relief to the slaughtering-place, as doubtless it is of other such establishments whence it may draw supplies.

If there be an evil to be abated as a nuisance, the injunction should be addressed to that evil, as in the injunction issued by Vice-Chancellor James in *Attorney-General v. Leeds Corporation*.†

The owner of the slaughter-house might have been enjoined not to slaughter unless or until certain defined precautions were taken.

The spirit and purport and terms of the law clearly admit of, indeed suggest, such modification, rather than the harsh and ruinous course here adopted. In proof or in general character of the thing which in each case is a nuisance, there is no difference between a criminal prosecution and an action or other civil proceeding.‡

The *Advocate-General*, in support of the order, relied upon the facts found by the Magistrate, and contended that, as this was not an appeal, it was not open to the Court to weigh or to estimate the evidence. An appeal on the facts was not allowed by the Criminal Procedure Act; only an error in law could be taken into consideration. Here it could not be said that the Magistrate had no

\* 3 B. & S. 62; see 77, 79, 80.

† 5 L. R. Ch. App. 589, note.

‡ See *arguendo* in *Stockport Works Co. v. Potter*, 7 H. & N. 160.—REPORTER.

evidence before him, and that therefore his order was illegal. If there was some evidence, the High Court could not interfere with the order or balance evidence. There was consistent and sufficient testimony that the trade, as carried on, was an annoyance and a dangerous nuisance, and that fact must be accepted on the Magistrate's finding. No ground of law had been laid or urged as an objection to the order which the Magistrate, in the lawful exercise of his discretion, had passed. (The *Advocate-General* was here stopped by the Court.)

Mr. *Montrion*, in reply, contended that the question of legality, and of the necessity of the High Court's interference, bore no analogy to an appeal in a cause or from a trial: it was, whether the Magistrate had, legally and justifiably, exercised his extraordinary power, using a judicial discretion. If he had not so exercised it, the order was a mere blunder, an act of arbitrary despotism, unsanctioned by any law, and most fitting to be stayed by the wholesome supervision of the High Court.

NORMAN, J. (after shortly stating the facts and the arguments of counsel, proceeded)—It is necessary that we should, in the first instance, consider the power under which the Magistrate acted, in order to determine what is the function of this Court upon the question which is brought before it by the reference of the Sessions Judge.

The 308th section of the Criminal Procedure Code enacts that, "whenever the Magistrate of a district considers that any trade or occupation, by reason of its being injurious to the health or comfort of the community, should be suppressed or removed to a different place, he may issue an order to the person carrying on such trade or occupation, calling on him, within a time to be fixed in the order, to suppress or remove such trade or occupation, or to appear before himself or some other officer, and show cause why such order should not be enforced."

S. 310 "provides that the person to whom such order is issued shall be bound, within the time specified in the order, to obey the same, or to appear before the Magistrate before whom he was required by the order to show cause, or he may apply to such Magistrate for an order for a jury to be appointed to try whether the order is reasonable and proper."

We cannot say much for the constitution of the jury, which under s. 310 is to consist of five members, and to decide by a majority, the foreman and two of the members of which are to be nominated by the Magistrate, and the other members by the applicant. It is difficult to see why this jury should not be taken by ballot from the jurymen in the ordinary list. The fact that such is not the law may account for the defendants not having applied to the Magistrate to have the question whether the order was reasonable and proper referred to a jury.

By s. 311, "if the person to whom the order mentioned in s. 308 is issued does not obey such order, or show cause against the same as in the Act provided, or apply for a jury, &c., he shall be liable to the penalty prescribed by s. 188 of the Indian Penal Code."

By s. 313, "if the person to whom the order of the Magistrate is addressed appears and shows cause against it, so as to satisfy the Magistrate that it was not reasonable and proper, no further proceedings shall be taken in the case."

To impeach the order of the Magistrate, Mr. *Montrion* has, therefore, now to establish, either that there was no reasonable evidence to show that the trade

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was injurious to the health and comfort of the community, or that the cause shown was such as ought to have satisfied the Magistrate that his order for suppressing the trade was not reasonable and proper.

We may observe that we are not sitting as a Court of Appeal from the decision of the Magistrate on points of fact, and, therefore, we must take the findings of fact by the Magistrate to be correct, unless we see that there is not on the record any evidence to warrant such findings.

Dr. Tonnerre proved (reads the evidence as set out in the judgment of the Magistrate).

Dr. Hallan gave similar evidence. He considered that the noxious gases arising from the slaughter-house, the reservoir, and the bamboo-grove, must be injurious to the health of the community.

Dr. Shircore gave similar evidence. He proved that the neighbourhood is thickly populated; and that the slaughter-house, as carried on, is productive of unhealthiness.

Several native witnesses, Tarini Charan Dutt, Tarini Charan Ghatak, and Khudu Ostagur, proved that the health of themselves and their families had been affected by the stench from the slaughter-house.

Witnesses were called for the defence. Dr. Tamiz Khan and Dr. George proved that they visited the shambles, and found that, at the time of their visit, there was not any stench arising from the shambles likely to be injurious to health. But they admitted that, if the place were not kept as clean as when they saw it, it would be injurious to health.

There was evidence before the Magistrate that special efforts had been made to clean up the premises and prepare them for the visits of the medical witnesses called for the defendants.

The defendants attempted to prove that the lessee caused the blood and offal to be carted off daily to Dhappa; but the Magistrate, apparently for very good reasons, disbelieved the evidence.

Mr. Hogg, who was called as a witness for the defence, proved that Saadat Ali, the lessee, had voluntarily taken him to the bamboo-grove, and told him that all the filth from the slaughter-house was taken to that place and thrown there.

Dr. Tonnerre also observed a man carrying the stomach of an animal from the shambles, and another man carrying a large basket, about two feet or two feet and-a-half broad, full of dung, to the bamboo-grove. What is the connection of the mehter who breeds maggots in the bamboo-grove with the owner of the slaughter-house does not very clearly appear. He says he rents his land from Kramat Hossein, but did not produce his lease. He was himself at one time the lessee of the slaughter-house, and he says there is no bad smell either from the slaughter-house, or from the collection of dung and blood where the maggots are bred in the bamboo-grove.

The Magistrate is of opinion that there is a close connection between the slaughter-house and the place used for breeding maggots. The bamboo-grove seems, in fact, to have been used as a place of deposit for the filth and offal of the slaughter-house.

The Magistrate visited the slaughter-house on two occasions. He says that on the first occasion, which was a dry day, the stench from the masonry floor was excessive, such as would be produced by the decomposition of blood and other animal-matter that had percolated between the tiles. On the second occasion, the stench was not so bad, but the place was very filthy, and appeared to answer the description given by Drs. Tonnerre, Shircore, and Hallan, rather than that given by Dr. George and Dr. Tamiz Khan.

The evidence of the witnesses for the prosecution goes to show that this slaughter-house; constructed as it is, could not be carried on without creating a nuisance.

Looking at the whole evidence, we think it cannot be said that the cause shown ought to have satisfied the Magistrate that his order ought not to have been made.

We cannot say that in point of law he was not fairly justified in coming to the conclusion, upon the evidence before him, that the trade of slaughtering cattle, as carried on by the defendants at the Kurya slaughter-house, was injurious to the health of the community; nor can we say that his order, that such trade should be suppressed, was not a legal and proper order.

We therefore cannot interfere with the order.

*Conviction upheld.*

*Before Mr. Justice Ainslie and Mr. Justice Paul.*

THE QUEEN *v.* BHOLANATH MOORERJEE AND OTHERS,

PETITIONERS.\*

*Code of Criminal Procedure (Act XXV. of 1861), ss. 252, 253, and 254.*

*Per* AINSLIE, J.—In a trial under Chapter XIV. of the Criminal Procedure Code, the Magistrate is not bound, under s. 253, to summon any witness whom the accused may require. It is only discretionary with him to do so, and in the circumstances of the present case he exercised his discretion rightly in refusing to summon the witnesses asked for.

*Per* PAUL, J. (differing).—The right of an accused to have witnesses for his defence summoned during the pendency of the trial is an ordinary and natural right, and this right is not taken away, but affirmed, by s. 253; the Magistrate is bound to summon the witnesses, though it is discretionary with him to adjourn the trial. In the present case, treating it as a matter of discretion only, the Magistrate was wrong in refusing to summon the witnesses required.

THE accused, Bholanath Mookerjee, and certain other persons, were convicted by the Assistant Magistrate of Jessore, on the 20th January 1871, of the offence of rioting with deadly weapons under s. 149 of the Penal Code, and were sentenced to rigorous imprisonment for two years. Bholanath Mookerjee was also sentenced to pay a fine of fifty rupees, and in default to suffer rigorous imprisonment for a further period of six months. The prisoners appealed to the Sessions Judge of Jessore, but their appeal was rejected. This application was made on the part of the petitioners, who stated in their petition that the conviction and sentence were illegal, inasmuch as the Magistrate did not summon and examine witnesses for the defence named by the petitioners as required under

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s. 253 of the Code of Criminal Procedure. It appears that the case was taken up on the 21st of December for trial, and on that day the witnesses for the prosecution were examined. Some further evidence was taken on the 28th and 29th; and on the 31st the charges were drawn out under s. 250 of the Criminal Procedure Code, and the answers of the accused were taken down in writing. Certain witnesses were on the same day named by the accused in their answers, who were summoned to appear on the 12th January. On that day some of the witnesses were examined, and the case was then adjourned for the remaining witnesses for the defence or the returns to come in. Either on the 10th or on the 12th of January, the accused presented a petition, on which was endorsed the order: "File with nuthi, 12th January 1871." The petition answered the charges framed against the accused, and prayed that a local inquiry be made by the Magistrate in person on the spot where the riot took place, or that certain respectable persons named in the petition be summoned and examined as witnesses. The additional witnesses named by the petitioner were not examined, and no further notice seems to have been taken of their petition. The case was decided on the 20th January 1871.

Under these circumstances the present application was made on the ground stated above.

Mr. *Cowell*, for the petitioners, contended that the Magistrate ought to have sent for the witnesses, and given the accused the chance of having their evidence recorded. So long as the case was pending, they were willing to accept the risk of having the case decided before the witnesses made their appearance. Under s. 253, Code of Criminal Procedure,\* the Magistrate is bound to grant summonses to the witnesses; though he is not bound to adjourn the case. Here the application was made on the 10th or the 12th. The case was not decided till the 20th January 1871. There was ample time to summon the witnesses. The Magistrate's not doing so was very unfair to the prisoners, and deprived them of a fair trial. In the affidavit put in on behalf of the petitioners in support of their application, it was stated that the place where the petitioners resided was only six hours' journey from the Magistrate's house.

Even if it be left to the discretion of the Magistrate, it is such an improper exercise of that discretion that, in the interests of justice, this Court will set aside the conviction upon the ground that the Magistrate used his discretion, not according to reason, but in the most capricious manner. About eight or ten days elapsed between the petition and the decision of the case, and the witnesses lived at no great distance, yet the Magistrate refused to summon the witnesses; so, whether it is put as a matter of law or as a matter of discretion, the prisoners were clearly entitled to have the witnesses summoned.

AINSLIE, J.—This is an application, under s. 404 of the Code of Criminal Procedure, on the part of Bholanath Mookerjee and others, who were convicted and sentenced, by the Assistant Magistrate of Jessore, on the 20th January, under s. 150 of the Penal Code. The conviction and sentence were affirmed by the Sessions Judge. The ground of the application is that the Magistrate refused to summon certain witnesses for the defence named by the petitioners in a petition, dated 29th Pash, corresponding to the 10th January 1871. On referring to this petition, it appears that it was presented on the 12th January 1871.

\*S. 253, Code of Criminal Procedure, is as follows: "The Magistrate shall summon any witness and examine any evidence that may be offered on behalf of the accused person to answer or disprove the evidence against him, and may, for this purpose, at his discretion, adjourn the trial from time to time, as may be necessary."

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Witnesses for the prosecution were first examined on the 21st December, and further evidence was taken on the 28th and 29th idem. On the 31st charges against the accused were drawn out as required by s. 250 of the Criminal Procedure Code. On that same day the answer of each of the accused was taken down in writing, and in their respective answers they named witnesses for their defence. These witnesses were summoned to appear on the 12th January, and on that day twenty-two were examined. At the close of their examination, the following order was made: "Adjourned till to-morrow to enable remaining witnesses or returns to come in. Accused in *statu quo*. Heard witnesses discharged." At some time in the course of this day, the petition above alluded to was put in, as appears from the order endorsed: "Filed with nuthi, 12th January 1871." The body of the petition is an answer in writing to the charges preferred. It concludes with a prayer to the Magistrate to hold an enquiry in person on the spot where the disturbance occurred, or to send for certain persons named at the foot and described as persons of respectable character.

The question is whether the Magistrate was bound by the law to issue summonses to these persons. I am of opinion that he was not bound to do so.

There are three chapters of the Criminal Procedure Code which contain the rules for the investigation by Magistrates of charges of criminal offences. Offences are divided into three classes according to their gravity, and a particular chapter is devoted to each. Chapter XV. treats of cases triable by a Magistrate in which a summons on complaint shall ordinarily issue, and by s. 257 these are defined as trials of offences punishable with fine only, or with imprisonment for a period not exceeding six months. Chapter XIV. treats of cases triable by a Magistrate in which a warrant on complaint may issue, and s. 248 describes these as trials of offences triable by the Magistrate, and punishable with imprisonment for a period exceeding six months: and Chapter XII. treats of preliminary enquiry by the Magistrate in cases triable by the Court of Session.

In the first class of cases, those of the least gravity, the ordinary proceeding is to issue a summons to the accused person to attend at a certain time and place to answer the charge made against him (s. 257). S. 260 provides for compelling the accused to come in if he fails to attend on the summons. Then by s. 265 it is provided that, on the day fixed for the trial, on the appearance of both parties, the substance of the complaint shall be stated to the accused person, and he shall be asked if he has any cause to show why he should not be convicted. If the accused person do not admit the truth of the complaint, the Magistrate, under s. 266, shall proceed to hear the complainant and such witnesses as he may produce in support of his complaint, and also to hear the accused person and such witnesses as he shall produce in his defence. By a later section (269), it is lawful for the Magistrate, before or during the hearing of the complaint, to order an adjournment. The only provision in this chapter for summoning a witness at the request of the parties is that contained in s. 262, by which a Magistrate is bound to issue a summons to any person to appear and testify what he knows concerning the matter of the complaint, if it appears to the Magistrate "that such person is likely to give material evidence on behalf of the complainant or of the accused person, and that such person will not voluntarily attend at the time and place appointed for the hearing of the complaint." These words, "at the time appointed for the hearing of the complaint," show distinctly that the law does not contemplate the issue of a summons to a witness at the request of the parties as a matter of right, except when the application is made at a time preceding that at which under ss. 265 and 266 the trial is ordinarily

1871. commenced and completed, and that even this right is not absolute, but is to some extent limited by the opening words of s. 262—words of which no equivalent is to be found in Chapters XIV. and XII. No doubt, a Magistrate may, under ss. 269 and 263, adjourn the hearing, and may summon any witness whose evidence he may consider essential to the just decision of the case; but this is a discretionary proceeding, which he may adopt for his own satisfaction, and not one which the law compels him to follow on the application of either party. The case of *In the Matter of the Petition of Bhikha Roy*\* is in accordance with this construction. It is there said that s. 252 does not apply to proceedings under Chapter XV., but s. 266 does so; and that “the terms of s. 266, read with s. 262, apparently suppose that the defendant’s witnesses attend voluntarily and accompany the accused.” These words by themselves are not quite clear, as they do not specifically mention witnesses summoned to appear, but their intention is evident when the case is looked into. The question was whether a Magistrate ought not to have called upon the accused to produce witnesses in support of his defence, and the officer who made the reference relied upon s. 262. The answer was that under Chapter XV. a Magistrate does not call upon an accused person to produce his witnesses, but hears them if they are in attendance and are produced.

In respect of the last class of cases, those of the greatest gravity investigated under Chapter XII., there is a very distinct provision contained in s. 227. As soon as the charge, on which the accused person is to be tried, has been prepared, it is to be read to him, and a copy or translation, if required, is to be furnished to him. “The accused person shall be required at once to give in, orally or in writing, a list of witnesses whom he may wish to be summoned to give evidence on his trial before the Court of Session or Supreme Court. It shall be in the discretion of the Magistrate to allow the accused person to give in any further list of witnesses at a subsequent time.” The prisoner can demand a summons as of right in respect of any witness named in his first list (subject to payment of expenses in certain cases provided for in s. 228), but he cannot do so in respect of any witness in any subsequent list. This is expressly stated in s.

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\* *Before Mr. Justice Loch and Mr. Justice Glover.*

*The 9th September 1868.*

IN THE MATTER OF THE PETITION OF BHIKHA ROY.†

THE complainant, Dhotan Roy, lodged a complaint to the effect that, while he was engaged in reaping the crops of his holding in Mauza Ladhowna, the accused and others interfered, assaulted him, and carried away his crops.

The case was referred for decision by the Magistrate of the district to the Deputy Magistrate, Moulvi Wajhalla Khan, who summoned the accused persons. The petitioner, one of the persons accused, appeared.

The Deputy Magistrate, after examining the complainant and the accused, and taking the evidence of the complainant’s witnesses, sentenced the petitioner to pay a fine of Rs. 5 under s. 143 of the Indian Penal Code, or, in default of payment, to suffer five days’ rigorous imprisonment; Rs. 25, under s. 379 of the said Code, or, in default of payment, to suffer fifteen days’ rigorous imprisonment; and Rs. 20, under s. 352 of the aforesaid Code, or, in default of payment, to suffer ten days’ rigorous imprisonment.

The Judge of Bhaugulpore referred the case to the High Court, recommending that the conviction be quashed on the ground of the illegality in not calling upon the accused

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† Reference under s. 434 of the Code of Criminal Procedure, from the Sessions Judge of Bhaugulpore.

375 in the following terms: "The accused person shall be allowed to examine any witness not previously named by him if such witness be in attendance, but he shall not be entitled of right to have any other witness summoned than the witnesses named in the list delivered to the Magistrate by whom he was committed or held to bail for trial, except as provided in s. 246 of this Act—*i. e.*, when a charge has been amended or altered, and proceeding immediately is likely to prejudice the accused."

Thus, it appears that, in the lowest class of cases, an accused person has no right to a summons at all after the Magistrate has proceeded under s. 266 to hear him and such witnesses as he shall then produce in his defence; and that, in the highest class of cases, those that are beyond the jurisdiction of the Magistrate, and in which the form of proceeding by commitment to another Court of necessity entails an adjournment, the accused has no right to a summons except in respect of persons named by him in a list to be given at once on hearing the charge, or on hearing and being furnished with a copy or translation of the charge, as the case may be.

But it is contended that, in the intermediate class of cases triable by a Magistrate under Chapter XIV., the accused is entitled to a summons to a witness as of right, whenever and as often as he demands it, up to the moment when the trial closes by judgment and sentence. I find this chapter standing between the other two above referred to, and the provisions for the investigation of offences classified according to their heinousness, following each other in regular series, from those which apply to the gravest offence, such as murder punishable with death down to those which apply to the most trifling misdemeanour, such as misconduct in public by a drunken person punishable under s. 510 of the Penal Code with simple imprisonment for a term not exceeding 24 hours, or with fine not exceeding 10 rupees, or with both; and I think I am entitled, or I would rather say bound, to look to the form of the entire Code, and in any case of doubt to interpret one part by the others so as to apply a construction of the doubtful point not inconsistent with the express provisions on similar points contained in other portions of the Code. And, if I do so, I cannot but say that it is inconsistent that a man tried by a Magistrate for theft under s. 379 of the Indian Penal Code, and liable to be sentenced by such Magistrate to a term of imprisonment not exceeding two years, should have greater privileges, in respect of his defence, than a man sent to be tried by the Court of Session on a charge of murder, and liable to capital punishment. I see that a man charged with theft under s. 379 may be punished by a Magistrate with a term of imprisonment extending from one day to two years, or that he may be committed to the Sessions and sentenced by the Sessions Judge to

to produce his witnesses under s. 252, Code of Criminal Procedure. He also called the attention of the High Court to the order of the lower Court, which, on three separate charges, was framed so as not to exceed 50 rupees fine, or one month's imprisonment.

The judgment of the Court was delivered by

LOCH, J.—The case appears to be one which comes under the provisions of Chapter XV. of the Code of Criminal Procedure, in which a summons on complaint ordinarily issues. S. 252 does not apply to cases which fall under Chapter XV., but s. 266, which requires the Magistrate, should the accused deny the charge, to hear the complainant and his witnesses, and also to hear the accused person and such witnesses as he shall produce in his defence. The form of summons attached to the Code does not require a party charged to bring his witnesses with him; but the terms of s. 266, read with s. 262, apparently suppose that the defendant's witnesses attend voluntarily and accompany the accused. We do not think there is any cause for the interference of the Court.

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a term of three years' imprisonment. If the Magistrate thinks that a person accused of theft ought to receive greater punishment than he is competent to inflict, and sends him to the Sessions Court, he will be deprived of a right which he would have in a trial by the Magistrate for an offence of precisely the same character, only differing in degree, for which the Magistrate considers a sentence of six weeks' imprisonment ample, if the rule contended for is adopted. To my mind, it is simply impossible that this can have been the intention of the Legislature, and therefore, unless I find that I am strictly tied down by the words of the law to the construction contended for, I must hold it to be an unsound construction.

Now, it appears to me that there is nothing in the law which compels me to adopt this construction. The provisions of Chapter XIV. are as follows: By s. 250 it is provided that "when the evidence of the complainant and of the witnesses for the prosecution, and such examination of the accused person as the Magistrate shall consider necessary, have been taken, the Magistrate, if he find that no offence has been proved against the accused person, shall discharge him. If the Magistrate find that an offence is apparently proved against the accused person \* \* \* he shall prepare in writing a charge." By s. 251, it is enacted "that the charge shall be then read to the accused person, and he shall be asked whether he is guilty or has any defence to make." S. 252 runs as follows: "If the accused person have any defence to make to the charge, he shall be called upon to enter upon the same, and to produce his witnesses, if in attendance, and shall be allowed to recall and cross-examine the witnesses for the prosecution." Then comes s. 253, as follows: "The Magistrate shall summon any witnesses and examine any evidence that may be offered in behalf of the accused person to answer or disprove the evidence against him, and may, at his discretion, adjourn the trial from time to time, as may be necessary." As I read these provisions, they prescribe that, as soon as the charge is prepared, the accused shall be called upon to plead to it. If he plead not guilty, he shall be called upon to state anything that he may have to say in answer to the charge; and if his witnesses are in attendance, to bring them at once before the Court. If he shall have any witnesses to call who do not attend voluntarily, he shall be entitled to a summons, whether he apply for such summons at the time he is called on to make his defence or previously; and the Magistrate may, if necessary, adjourn the case for the production of the accused person's witnesses; and if the witnesses are then named for the first time, the adjournment under the first part of the 253rd section becomes imperative. The use of the words "shall and may" in s. 253 appears to me susceptible of a clear explanation. On looking to s. 252 it will be seen that it is assumed that the accused may possibly have his witnesses ready at the time he is called on to enter on his defence; they may either have come voluntarily or they may have been brought in by summons, but it may be that summonses to the witnesses have been duly issued, and that they have failed to attend, and have possibly become liable to be brought in under warrant under s. 191, or to be otherwise proceeded against under s. 189; but the proceedings under these sections are not matters of course, but dependent on the discretion of the Magistrate, to be exercised under the circumstances specified in those sections—in the case of *The Queen v. Abdoor Ruhman*\*—and therefore it is not said that the Magistrate shall, but that he may, adjourn the trial for the attendance of the witnesses; because in this case he will, at an earlier stage, have done what was obligatory, and will, at the time of taking the defence, have discretion as to taking further steps. I read the

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words "at his discretion" in s. 253 with the following section, s. 254; and so with ss. 189 and 191. I hold that the words "shall summon any witnesses that may be offered" are to be taken as used in reference to the time when the accused is put on his defence under s. 252, or to some time previous to this. It appears to me that the course of procedure, as laid down above, is strictly in accordance with the words of the law, and is the only reasonable construction they admit of. If it is said that the words "shall summon" in s. 253 have no reference to that particular time, but apply equally to witnesses offered at any subsequent time, I cannot reconcile them with the words "may at his discretion adjourn." I cannot conceive that the Legislature intended that a Magistrate should be bound to issue a summons, but that he should not be bound to give it a chance of being operative; that while his clerk was drawing up the summons, he, refusing an adjournment, might be passing sentence on the accused. But if it is said that I myself hold that the word "may" is to be taken under certain circumstances as if it were "shall," and that my argument is therefore inconsistent, my answer is that this 253rd section is to be read with the preceding and following sections, and is not to be detached from the context; and that, if we so read it, there is no doubt or ambiguity but that it is quite clear when the obligation ends, and when the discretion begins. The issue of summons in the first instance, if applied for, is obligatory, and therefore the discretionary power of adjourning or refusing adjournment does not come into play. Any adjournment, beyond the day fixed by the summons issued on the taking of the defence under s. 252, is discretionary; and, therefore, the issue of any further summons to witnesses not named at the time the defence is entered on is not obligatory.

In the course of argument another ground has been put forward, which is not taken in the petition on which this case was called up for revision. I do not consider myself in any way bound to admit this in the special case; but I proceed to notice it rather that it may not be supposed that I dissent from the argument than because it is material in this case. It has been said that, even if a Magistrate be not strictly bound by the law to issue summons after summons to every fresh batch of witnesses named by an accused person at any time up to final judgment and sentence, yet he would not be exercising a sound discretion in refusing to do so; that the discretion allowed to him by law is to be exercised reasonably, and not capriciously; and that such a refusal being unreasonable, we should be justified in interfering. I understand that it was distinctly admitted that such fresh summons must be returnable on the day to which the trial may, at the date of its issue, stand adjourned, and that it was not pretended that the Court would be in any way bound to defer the conclusion of the trial in consequence of its issue. The practice of the Civil Courts was referred to. There is a distinction between the mode of issuing processes in the Civil and Criminal Courts. The former are issued at the expense of the parties; the latter, except in the case noted in s. 228 of the Criminal Procedure Code, are not at their expense. I do not refer to this as being of any great importance; still I think that, under certain analogous circumstances to those stated in s. 228, it might be an element in a question whether a Magistrate had properly exercised his discretion. As a general rule, I quite concur in what has been said—namely, that an accused person should not be refused a subsequent summons to a witness to appear on the day to which the trial may stand adjourned applied for on the chance of his being able to derive benefit from it, he thereby acquiring no right to an adjournment. But in the present instance the petitioners can derive no advantage from his rule. Their defence was taken on the 31st December, and they then gave

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in lists of their witnesses. These witnesses were summoned for the 12th January, and on that day the Magistrate proceeded to hear those who had attended—twenty-two in number. He then adjourned the case to the next day to give time to other witnesses to appear, and for the receipt of returns to some of the processes which had not on the 12th come to hand. As a matter of fact, the other witnesses did not appear till the 18th, and were then examined, and judgment was delivered on the 19th, but at the time when the petition of 29th Pash (10th January) was put before the Magistrate, namely, on the 12th, the case stood adjourned only till the following day, if indeed the petition was not put in before the adjournment. The prayer of that petition was not merely to get a summons on the chance of being able to bring the witnesses named into Court before the case closed. The object was clearly to get an adjournment, and to have a fresh inquiry started either by the Magistrate proceeding to the scene of the offence or by his calling for and examining a number of persons described as respectable and independent persons. That it was so understood by the parties themselves, is quite clear from their not taking the point now raised in their appeal to the Judge, or their petition to this Court. I cannot say that the Magistrate was wrong in refusing to exercise his discretion by summoning the witnesses on the chance of their being able to come in without an adjournment when neither he nor the petitioners believed that he was asked to exercise such discretion. Looking to the terms of the petition and the state of the proceedings when it was presented, I have no doubt that what was asked for was a re-opening of the whole case, and that only. Therefore I think the ground now taken is not admissible, and that there was no error in law warranting our interference. I therefore dismiss this application.

PAUL, J.—In this case, Mr. Cowell, on behalf of the prisoners who have been convicted, applied for the interference of this Court in the matter of their conviction, on the ground that certain witnesses whom these prisoners desired to call, and for that purpose prayed that subpoenas should be issued, were not subpoenaed by the Magistrate who tried the case. The Magistrate, in fact, refused to issue subpoenas, maintaining that the prisoners could not claim to call those witnesses as a matter of right. The Magistrate considered that, at the stage of the case at which the application was made, it was purely a matter of discretion with him to issue subpoenas, and, for reasons recorded in his judgment, he declined to exercise his discretion.

The facts, so far as they are material to this application, are as follows:—

The case of the prosecution was closed on the 28th December last after having been adjourned once at least for the examination of witnesses other than those originally named by the prosecution. On the 31st of December the Magistrate determined to try the prisoners summarily, and accordingly, on that day, put them on their defence. On the same day, that is, on the 31st December, the several prisoners stated generally the nature of their defence, and named certain witnesses for whose attendance they demanded subpoenas. The subpoenas were duly granted, and the case seems to have been adjourned to the 12th of January. On the 12th January certain witnesses were examined, and in consequence of the absence of some witnesses who had been subpoenaed, the case was adjourned the following day. On the same day the prisoners put in an application, praying, amongst other things, to have some other witnesses called and examined, and in substance demanded that subpoenas should be issued in respect of those witnesses. It does not exactly appear whether this application was made before the adjournment, or after it. In the absence of anything to show that the application was made after the order for adjournment, I must assume

that the application was made while the case was judicially before the Magistrate, and before the adjournment was announced. For some reason, which does not appear on the record, the case was not taken up on the 13th, but on the 18th of January. Witnesses were examined on the 18th and 19th, and judgment was given on the 20th January, convicting the prisoners, the present applicants. I should also remark that it is stated in the affidavit which has been put in on behalf of the prisoners, and I see no reason to doubt the statement, that the witnesses, whose examination the prisoners demanded on the 12th of January, might have been served with subpoenas in a few hours, namely, six hours. I conclude from this statement that, had the subpoenas been granted and served, the witnesses so summoned to attend might fairly have been expected to be present either on the 13th of January or the following day.

The prisoners urge before us that, under the circumstances which have transpired, they were absolutely entitled to subpoenas for the witnesses named in the application of the 12th of January, and I think it is clear that they had a right to have those witnesses summoned to attend, the prisoners running the risk of those witnesses arriving before the trial was concluded. I think the prisoners were entitled to have this clear right enforced, unless there is something in the Criminal Procedure Code to show that such a right is absolutely taken away by express enactment. Before I proceed to examine the provisions of the Code of Criminal Procedure applicable to this case, I would observe that an application for subpoenas upon witnesses is quite a different thing from an application for an adjournment. The former may be granted without the latter being either applied for or granted. One may exist without the other, and it is by no means necessary that both should co-exist. I make these remarks because the whole argument which tends to show that the prisoners had no right to have the witnesses named on the 12th January subpoenaed, proceeds on the basis that the issue of fresh subpoenas involved the adjournment of the trial.

Now, turning to ss. 251, 252, and 253, I observe that s. 251 runs as follows: "The charge shall be read to the accused person, and he shall be asked whether he is guilty, or has any defence to make." S. 252 directs that, "if the accused person have any defence to make to the charge, he shall be called upon to enter on the same, and produce his witnesses, if in attendance, and shall be allowed to recall and cross-examine the witnesses for the prosecution." This section certainly assumes that, when the prisoner is put upon his trial, he must go on with his defence then and there. S. 253 enacts as follows: "The Magistrate shall summon any witnesses, and examine any evidence that may be offered in behalf of the accused person to answer or disprove the evidence against him, and may, for this purpose, at his discretion, adjourn the trial from time to time as may be necessary." The language of this section, "the Magistrate shall summon witnesses, and may, at his discretion, adjourn the trial," must be clearly kept in the view in dealing with the present case.

Now, I take it that the prisoner, in making his defence at an adjourned hearing, is entitled to the privileges to which he would have been clearly entitled if the trial had taken place as contemplated by s. 252 at the time of the prisoners being put on their defence, subject to this reservation, that the accused persons could not claim as a matter of right a further adjournment. It is obvious that when a prisoner is put upon his trial, and applies to have any witnesses subpoenaed, the Magistrate is, under s. 253, bound to summon those witnesses, though he is not obliged to adjourn the trial. It may well happen in a particular case where the trial is a protracted one, that the witnesses may

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arrive before the trial is concluded. As the accused person is entitled to have his witnesses summoned on the first day of the trial, I see no objection to his being entitled to have the same right enforced on the 2nd or any other day of his trial, provided he merely applies for subpoenas, and does not ask for an adjournment to enable his witnesses to arrive and be present in Court. I find no limitation in point of time stated in s. 253, nor do the words of that section give rise to a clear or necessary implication to that effect. On the contrary, the language of that section, by drawing a distinction between the Magistrate's duty in summoning witnesses which is declared to be imperative, and the power to grant an adjournment which is left discretionary, clearly indicates that the accused person is entitled as of right to have his witnesses subpoenaed. Discretion in such a matter must necessarily be out of place, for the Magistrate cannot be supposed to know beforehand the value or importance of the evidence to be given by a particular person. Now, in the present case, long before the trial was concluded, the Magistrate was of opinion that the discretion which was (as he thought) vested in him should not be exercised, on the general principle that trials might be protracted to any length if such an application as the prisoners made were entertained. I fail to see how the exercise of discretion (assuming the matter was discretionary) in a particular case can be regulated by such general reasoning. If any general principle is to be involved in determining or defining discretion, I apprehend the Legislature would have acted on such general principle, affirmed it by a positive enactment, and declared it to be a positive law, and thus displaced discretion in the sense in which the word is understood from its provisions. Discretion must in all cases be exercised with reference to the particular facts of a given case; the exercise of discretion must not be capricious, as it appears to me to have been in this case. The right of a prisoner to have witnesses subpoenaed during the pending of a trial, which I may designate an ordinary and natural right, is not only not taken away by the terms of s. 253, but affirmed, for the section declares that the Magistrate shall summon witnesses upon the application of the prisoner, and he may adjourn the trial. The language used in the section shows distinctly that the grant of subpoenas need not be accompanied by an adjournment. Were it otherwise, the Magistrate's discretionary power to adjourn the trial would render his imperative duty created by the section also discretionary, and in cases in which caprice is substituted for discretion altogether nugatory.

By ss. 227 and 375, which relate to prisoners put upon their trial before the Sessions Court, the prisoner is bound by the list of witnesses which he puts in at first, and he cannot call as a matter of right any witnesses other than those he has named in that list. That being the state of the law in a trial of greater gravity and importance, it is argued that we should assume that the spirit of the law of procedure is against allowing prisoners, in summary trials, being trials of less importance, to have witnesses called who were not originally named. I do not wish to enter into any lengthy discussion of this matter here, because it is obvious that all arguments drawn from analogy assume the existence of the same or similar circumstances; and further, where any positive law exists which applies to one class of cases, and does not by its terms embrace another and distinct class of cases, the only argument to be drawn is that the particular positive law was not intended to apply to the cases which are left out of its operation. If I were asked to assign a reason for the difference, I should say that abundant reasons exist and account for the difference in the law in the two classes of cases. It must be conceded that the interval of time which elapses between a commitment by a Magistrate, and a trial before the Sessions Judge, furnishes unscrupulous persons with the opportunity of concocting a fresh de-

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fence to be supported by false evidence through the medium of witnesses not previously named, and thus enables such persons, unless otherwise restrained, to take the prosecution by surprise. In Courts in which the power of cross-examination is rightly and ably exercised by a bar of trained and accomplished advocates, falsehood is readily exposed, and an invented tale is almost certain of detection; so that surprises rarely succeed, and truth generally triumphs over falsehood. It is, however, a matter of notoriety that the power of cross-examination is but feebly exerted in Mofussil Courts, and the art of eliciting the truth by searching and relevant questions is but imperfectly understood. The sifting of evidence is consequently far from exhaustive, and in fact oral evidence is tested and dealt with in a manner different to the treatment it receives in other Courts of original jurisdiction at the hands of advocates of higher legal attainments. These considerations may reasonably have induced the necessity of introducing into the mofussil, in trials held by a Court of Sessions, a law of procedure, which either prevents, or reduces, the chance of surprise on the prosecution, and which averts the possibility of a defence, previously wholly unknown to the prosecution, being stated, and of evidence of witnesses, not previously named, subject to a special restriction, being adduced. Owing to the undoubted and radical defects existing in the ordinary mofussil practice, precautionary measures recommend themselves to the Legislature on the ground of expediency, and I accordingly perceive sufficient reason for the introduction of a procedure in trials before a Sessions Judge which contains provisions for the statement of the defence before trial, and requires the witnesses to be named to the committing officer. The dangers to be averted, on which I have dwelt, can scarcely attend a summary trial, which, according to s. 252, should proceed without delay and *de die in diem* until its termination. Further, I consider that we should put a liberal construction upon the law of procedure in favour of an accused person whose mouth is closed, and whose liberty may, in any given case, be sworn away, by an unscrupulous and remorseless enemy, and that the cause of justice demands, unless otherwise clearly restricted in its requirements, that the fullest opportunity be given to an accused to lay his whole case before a Court which tries him.

To assign to s. 253 the meaning which the Magistrate attaches to it, is to proclaim not a liberal, but (as it appears to me) a harsh and unreasonable construction; and to allow a Magistrate to deal according to his individual discretion with applications on behalf of prisoners to have witnesses summoned without asking for more during the pendency of a summary trial proceeding *de die in diem*, seems to me to be fraught with danger to the liberty of the accused, and to be altogether inexpedient. Even when a case is closed, and a Magistrate is about to deliver his judgment, should a witness for the defence, whose attendance has been anxiously expected, arrive, and such witness be tendered for examination, I should consider it incumbent on that judicial officer to take his evidence; and I am unwilling to believe in the possibility of such evidence being rejected on the ground of discretion. In every case the object should be to arrive at the truth, to enquire fully for that purpose, and then to deal out justice between the parties.

On the whole, then, I am of opinion that Mr. Cowell's contention is well founded; that the prisoners were entitled to have subpoenas issued upon the witnesses named on the 12th January. I hold that, according to the true construction of s. 253, the Magistrate has erred in refusing to summon the witnesses named on the 12th January, and that the Magistrate, assuming he had the discretion he believes he had, has exercised that discretion unwisely and to the

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prejudice of the prisoners. I would therefore re-open the case, and order the Magistrate to allow the prisoners to complete their unfinished defence.

There is a special feature in the present case which I have not prominently noticed. It is this; the case for the prosecution as originally made was not complete, and had to be supplemented by fresh evidence which was adduced at an adjourned hearing held on or about the 28th December. It is not likely that the prisoners, when called upon to state their defence on the 31st December, should have been able to give the names of all persons whom they might be able to call to rebut the further case made by the prosecution, and it is highly probable that subsequent enquiry brought to light the names of the other witnesses mentioned on the 12th January as persons who were able on their oath to answer the supplemental case put forward by the prosecutor.

If the matter complained of lay in the discretion of the Magistrate, I can hardly conceive a more incorrect and mistaken exercise of such discretion, as is evidenced by his refusal to comply, under the circumstances of this case, with the demand of the prisoners, which forms the subject of this application.

I regret much that I differ from my learned colleague, whose experience of the working of the Criminal Procedure Code is so much greater than my own. Constituted as the High Court is, my views in criminal cases must absolutely give way to the opinion of the senior Judge, and the result is that the judgment of my colleague will prevail, and be the judgment of the Court. I have consequently the satisfaction of knowing that, if my judgment is erroneous, it will, by reason of its being inoperative, be wholly innocuous. The application is refused.

*Application refused.*

## APPENDIX.

*Before Mr. Justice Bayley and Mr. Justice Paul.*

KAPTAN v. G. M. SMITH.\*

1871.

June 7.

7 B. L. R.  
App. 25.

[16 W. R. 3.]

*Assault—Causing Hurt—Autre fois Acquit—Penal Code (Act XLV. of 1860), s. 352—Criminal Procedure Code (Act XXV. of 1861), s. 55.*

A person who is tried and discharged for the offence of assault under s. 352, Penal Code, cannot again, upon the same complaint, be tried for "causing hurt."

A COOLIE named Kaptan charged one Mr. Menzies Smith with having severely flogged him with a cane. The Deputy Commissioner of Lukimpore, who tried the case, considered the facts alleged in the complaint to amount to an assault; but the complainant failing to establish a *prima facie* case of assault, he discharged the accused. The Commissioner was of opinion that there was a failure of justice in this case, and directed the Deputy Commissioner to put Mr. Smith on his trial, upon the same complaint, for causing hurt. The Deputy Commissioner was of opinion that s. 55 of the Criminal Procedure Code barred the second trial. The matter was then brought to the notice of the Judicial Commissioner, who was a Sessions Judge. The Judicial Commissioner, agreeing with the view taken by the Commissioner, sent up the proceedings to the High Court.

The opinion of the High Court was delivered by

\* Reference, under s. 434 of the Code of Criminal Procedure, by the Officiating Judicial Commissioner of Assam.

BAYLEY, J.—Mr. Menzies Smith having been discharged on his trial for the offence of assault or use of criminal force under s. 352 of the Penal Code, which includes the offence of battery (see Morgan and Macpherson's Penal Code, page 308), cannot now be tried for "causing hurt." The criminal matter in respect of which Mr. Menzies Smith was tried was the flogging and beating of a coolie with a cane; of this he was acquitted. It is now intended to put Mr. Menzies Smith on his trial for the same criminal matter upon a charge of "causing hurt." It is quite clear that, under whatever denomination the offence is classed, it is the *one* offence of beating and flogging. A second trial for the same offence cannot be allowed to take place, regard being had to the provisions of s. 55 of the Code of Criminal Procedure.

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7 B. L. R.  
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In the case of *The Queen v. Dwarka Nath Dutt*,\* Sir Barnes Peacock, in his judgment, discusses fully the plea of *autre fois acquit*, and His Lordship makes the following observation: "When it is said that the offences must be the same, it is merely meant that they must be in reality the same." It appears to us that the actual offence of which Mr. Smith was acquitted is the same as that for which he has been again indicted under the term "hurt." Under these circumstances, the plea of *autre fois acquit* stands good, and the second trial should not take place.

Before Mr. Justice Norman, Offg. Chief Justice, and Mr. Justice Loch.

THE QUEEN v. DURGA DAS BHUTTACHARJEE.†

Surety—Recognizance.

1871.  
May 12.  
7 B. L. R.  
App. 37.

A surety who was bail for an accused person having failed to produce him on the day appointed, the Deputy Magistrate ordered that the bail-bond be forfeited, and a warrant be issued for the attachment and sale of the moveable property, *first*, of the accused, and, *secondly*, of the surety. No recognizance had been signed by the accused, and no notice had been given to the surety to show cause. On a reference by the Magistrate, the Deputy Magistrate's order was set aside as being illegal.

ONE Durga Das Bhuttacharjee was sent up by the police for trial under s. 448 of the Penal Code. It seems that the accused was sent up on bail, one surety in the sum of Rs. 100 having been required by the police and found. The surety was bound over to cause the accused to appear before the Joint-Magistrate on the 10th November 1870. The case was made over for trial to the Deputy Magistrate. The accused was not present on the 10th. On the 11th the Deputy Magistrate recorded a "proceeding," ordering that the bail-bond should be forfeited, and that "a warrant be issued for attachment and sale of the moveable property belonging to (1st) Durga Das Bhuttacharjee, and (2nd) to his surety, Jadab Chandra Sarnokar, to the extent of Rs. 20 each."

The Magistrate, who referred this case to the High Court, thought this order illegal. He said that the Deputy Magistrate ordered the money to be realized from the accused himself, being under the impression that the accused gave his own recognizance to appear. But, as a matter of fact, he did not give it; and therefore the money could not be demanded from him.

With reference to the order against the surety, the Magistrate remarked that it was the Deputy Magistrate's duty, under s. 220 of the Criminal Pro-

\* 7 W. R., Cr. Rul., 15.

† Reference, under s. 434 of the Code of Criminal Procedure, by the Officiating Magistrate of Nuddea.



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App. 37.

cedure Code, to give notice to the surety to pay, or to show cause why he should not pay, the penalty mentioned in the bond; but no notice was given to the surety. It seems that the Deputy Magistrate in his explanation said that he had given the surety a verbal notice. With reference to this, the Magistrate observed that a mere verbal and unrecorded order to show cause would not have been sufficient, even if it had actually been given.

The judgment of the Court was delivered by

NORMAN, J.—The order of the Deputy Magistrate is illegal, and must be quashed for the reasons mentioned in the Magistrate's letter.

There seem to be several other objections to it.

1871.

July 11.

7 B. L. R.

App. 55.

[16 W. R. 18.]

*Before Mr. Justice Bayley and Mr. Justice Paul.*

THE QUEEN *v.* KALI CHARAN MISSEER AND OTHERS.\*

*Investigation of Complaint—Theft—Defence—Dismissal.*

A Magistrate ought to hear evidence in support of a charge before dismissing the complaint. A bare assertion by an accused, charged with committing theft, of a proprietary right in the alleged stolen property, is no reason for a Magistrate to refuse to entertain the charge of theft.

In this case Rannu Singh complained against Kali Charan Misser and others that they had plundered his crops. The complainant said that he was a tenant of one Khoshali Ram; that he had grown the crops on obtaining a settlement from the zemindar's tehsildar; and that the land was previously held by Sham Lal, who had relinquished it. Kali Charan, on being examined, said that the land, of which the crops were said to have been carried away, was the jaghir of Sham Das Gosain, who had leased it to him, and that he had grown the crops. After recording the statement, the Joint-Magistrate ordered an enquiry by the police on the 4th May 1871.

The police submitted their report to the effect that the crops belonged to the complainant, and that they had not been grown by Kali Charan. The Joint-Magistrate, on the 10th May, without hearing any evidence in support of the complaint, on reference to the case of *The Queen v. Ram Charan Singh*,† dismissed the complaint, saying:—

"This strongly worded decision takes the case out of Court altogether. Where the accused claims to be acting on a right, however ill-founded the claim may be, he does not commit theft by asserting it."

The Sessions Judge of Bhaugulpore sent up the case to the High Court with the following remarks:—

"It appears to me that the order of the Joint-Magistrate, passed after recording the statement of the complainant only, is clearly erroneous.

"The defendant, by the complainant's account, alleges a right to the crops taken by him, and the Joint-Magistrate, on the strength of the precedent quoted by him, refuses to enquire further into the case. There can be no doubt that the meaning of the said precedent has been misunderstood by him."

The judgment of the Court was delivered by

\* Reference, under s. 434 of the Code of Criminal Procedure, by the Sessions Judge of Bhaugulpore.  
† 7 W. R., Cr. Rul., p. 57.

PAUL, J.—The High Court observe that the view taken by the Judge is clearly right, and the dismissal of the complaint on the grounds stated by the Joint-Magistrate must be set aside. The Joint-Magistrate must try the case according to the allegations of the parties, and form his own opinion on the case, unaided by any such local enquiry by a police-officer as he, in one stage of the case, directed. The police may make a map of the locality if that should be deemed necessary. If the Magistrate finds, on duly taking and considering the evidence to be adduced by the complainant, that he has made out his statements, which go to show that the accused has committed theft, he should call upon the accused for his defence. If the accused should prove that the allegations of the complainant are not to be relied on, and that the crop was his, of course he will be entitled to an acquittal. If the accused should fail in doing so, but should show that the ownership of the crops is a matter of *bond fide* dispute between himself and the complainant, he will be entitled to be released. The parties will then be left to settle their disputes in a civil suit, as the nature of the case will be altered from a criminal charge to an action for damages. A mere plea by the accused that the property, of the theft of which he is charged, is his own property, unsupported by proof, or by some circumstances which tend to indicate that there is some truth in the statement, is not sufficient to entitle him to be summarily discharged. If the accused fails to show that the alleged stolen property is his, but proves that he in good faith, believing the property belonging to the complainant to be his, took that property out of the complainant's possession, then, in such a case, the dishonest intention being absent, the person accused will not be guilty of theft. See illustration (p.) in s. 378 of the Penal Code; and also Morgan and Macpherson's work, page 339.

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v.  
KALI  
CHARAN  
MISSER,  
7 B. L. R.  
App. 55.  
[16 W. R. 18.]

*Before Mr. Justice E. Jackson and Mr. Justice Mookerjee.*

THE QUEEN v. HARGABIND PAL.\*

*Criminal Procedure Code (Act VIII. of 1869), s. 310—Award of Fury—  
Appointment of Jury.*

1871.  
July 21.  
7 B. L. R.  
App. 57.  
[16 W. R. 23.]

A Magistrate cannot receive and enforce the award of a jury under s. 310 of the Criminal Procedure Code, delivered long after the day fixed for the purpose.

A jury appointed under s. 310 is not properly constituted when only the foreman is appointed by the Magistrate, and the rest of the members by the parties.

ON the 27th February 1871 one Dinanath Chuckerbutty represented to the Magistrate that Hargabind Pal had dug a tank and heaped up some earth, whereby two roads were obstructed, and requested him to cause the same to be opened. On the same day the Magistrate ordered Hargabind to open the road or show cause.† Hargabind appeared and asked for a jury.

On the 2nd March the Magistrate appointed a jury‡ consisting of five, each party nominating two, and the Magistrate the foreman. The 7th April was fixed for the submission of their report, which was on the 6th extended to the 24th April. On the 24th Hargabind intimated to the Magistrate that two of the jury were not working, and expressed his dissatisfaction, upon which a report was called for from the jury.

\* Reference, under s. 434 of the Code of Criminal Procedure, by the Sessions Judge of Sylhet.

† See s. 308 of Act VIII. of 1869.

‡ See s. 310 of Act VIII. of 1869.

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App. 57.

A report, dated 23rd April, was, on the 5th May, submitted to the Magistrate, signed by the foreman and two of the jurors named by the complainant. On the 19th May the Magistrate ordered the award of the jury to be carried out.

On the same day that the Magistrate ordered the award to be carried out, Hargabind Pal, through his pleader, moved the Sessions Judge of the district, desiring him to send up the proceedings of the Magistrate to the High Court under s. 434, with a view to have the above order quashed for the following reasons:—

1st.—That two of the jurors not having acted, there was no jury.

2nd.—That the Magistrate, instead of nominating the foreman and two of the jurors, had only nominated a foreman. On this application, the Sessions Judge sent up the papers in the case to the High Court.

The opinion of the Court was expressed by

JACKSON, J.—We think that the jury was not legally constituted, as the Judge has pointed out, and that its award long after expiry of the time fixed for giving an award was invalid,\* and that it was subsequently the duty of the Magistrate to take up the case himself, enquire into it, and decide it. We set aside his orders upholding the award of the jury.

1871.

May 8.

7 B. L. R.

App. 62.

[15 W. R. 68.]

Before Mr. Justice Kemp and Mr. Justice Glover.

THE QUEEN v. GOSHTO LALL DUTT.†

*Confession—Attestation of the Magistrate—Code of Criminal Procedure*  
(Act XXV. of 1861), s. 205.

Under s. 205 of the Code of Criminal Procedure, it is not necessary for the Magistrate to state in the body of the examination that the statement comprised every question put to the accused, and every answer given by him, and that he had had liberty to add to or explain his answers. Attestation at the foot of the examination is sufficient, but in case of doubt oral evidence should be admitted to prove the regularity of the proceeding.

THE (Offg.) Magistrate of Hooghly stated this case, which he referred to the High Court under s. 404, Criminal Procedure Code, as follows:—

“The defendant, Goshto Lal Dutt, was, on the 28th day of February 1871, committed for trial before the Sessions Judge of Hooghly, by the Joint-Magistrate of Hooghly, on charges of forgery, &c.

“The evidence against the accused consisted of a full confession, recorded in open Court by the mohurir of the Court in the presence and hearing of the Joint-Magistrate, and other corroborative evidence.

“The confession in question is written in Form No. 3, Criminal, published by the High Court. The blanks in the printed form are duly filled in. The confession commences with a warning to the defendant that all which he may say will be liable to be used as evidence against him; it continues in the form of question and answer; at the foot of each page, as well as at the termination of the confession, the printed certificate required by s. 205 is filled in and legibly signed and dated. The evidence of the recording mohurir was at hand, in case the Sessions Judge should entertain any doubts in regard to the points of procedure which, though enjoined in s. 205, are not required to be mentioned in the certificate. The examination was attested in the manner that the law directs, viz., by the signature of the Magistrate.

\* See s. 310, Act VIII. of 1869.

† Reference to the High Court, under s. 404 of the Code of Criminal Procedure, by the Officiating Magistrate of Hooghly.

"The Sessions Court, however, refused to receive this confession in evidence, on the ground that the signature of the Magistrate, as enjoined in s. 205, is not a sufficient attestation, and that a categorical statement, to the effect that all the requirements of the law have been complied with, is proper. Moreover, the Sessions Court held that, not only is such a statement proper, but that its absence destroys the confession, and renders it void, and not such an examination as is contemplated in s. 366.

"The Sessions Court cites, in justification of this ruling, a decision of the High Court in the case of *The Queen v. Mussamat Niruni*. \*

"In consequence of the rejection of the examination, the accused person was acquitted by a majority of five out of a jury of seven; the minority being satisfied of the guilt of the accused on the other evidence brought forward.

"On the Sessions Court refusing to accept the examination as evidence, the vakeel for the prosecution was instructed to apply to the Sessions Court to take oral evidence to show that the formalities of the law had been complied with, but the Sessions Court rejected this application also."

Under these circumstances the Magistrate of Hooghly referred, for the opinion of the High Court, the following questions:—*First*, was the Judge right in not accepting the confession as it stood, on the ground that the attestation was irregular; *second*, was the Judge right in refusing to allow oral evidence to be put in to show that the proceedings had been regular?

The Magistrate referred to the following cases:—*Reg. v. Timmi*,† *Reg. v. Kalla Lakhmaji*,‡ *The Queen v. Jaja Poly*.§

GLOVER, J.—This case was sent for by the Court, on a reference made by the Officiating Magistrate of Hooghly.

I may premise that, in accordance with at least three rulings of this Court (*The Queen v. Chandrakant Chuckerbutty*,|| *The Queen v. Gora Chand Gopee*,¶ and *The Queen v. Gora Chand Ghose*,\*\* the last being a Full Bench case), a verdict of acquittal by a jury, although given in consequence of a misdirection on the part of the Sessions Judge, cannot be interfered with under s. 404, Code of Criminal Procedure.

I think it right, however, to express my opinion that the Judge did misdirect the jury in this case. He told them to "exclude from their minds anything they had heard relating to a confession or statement made before the Magistrate, because the statement, not being admissible in evidence, had not been placed before them." Now, s. 205 of the Code of Criminal Procedure describes how the examination of an accused person is to be taken, and how, after being taken, it is to be attested by the signature of the Magistrate, who is to certify under his own hand that it was taken "in his presence and in his hearing, and contains accurately the whole of the statement made by the accused person." There is nothing in the section that makes it necessary to state, in the body of the examination (as supposed by the Sessions Judge), that the statement comprised every question put to the accused, and every answer given by him, that

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\* 7 W. R. Cr. 49.

† 2 Bom. H. C. Rep. 131.

‡ Id. 419.

§ 11 W. R. Cr. 39.

|| 1 B. L. R. A. Cr. 8 (see p. 5 of this book).

¶ 5 W. R. Cr. 45.

\*\* 3 B. L. R. F. B. 1 (see p. 79 of this book).

1871. they were recorded in full, and read to him, and that he had had liberty to add to or explain his answers, &c., &c. The attestation at the foot of the examination, when duly recorded in the terms of the section, is sufficient proof that the accused had the proper opportunities given to him of testing whether what was recorded had been made conformable to what he declared to be the truth; and as in this case the Magistrate's attestation is in the exact words of the law, nothing else was, as it seems to me, required. The statement of the accused, as it stood on the record, was perfectly legal evidence, and ought to have been laid before the jury.

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The ruling in *The Queen v. Mussamat Niruni*,\* quoted by the Sessions Judge in support of his opinion, does not, I think, apply to this case at all. There, the statement of the accused was not attested by the Magistrate's signature, and there was consequently no guarantee that the provisions of s. 205, Code of Criminal Procedure, had been in any way complied with. The Judges in that case said: "We do not think it proper to admit as evidence against the accused an examination which appears to have been recorded with such utter disregard of the forms prescribed by law as that of Maniruddin in the present case." I was one of the Judges in question, and retain the opinion then expressed. A strict observance of the law, in all matters relating to confessions, is in the highest degree necessary; but in the present case all the provisions of s. 205 have been fully complied with.

With reference to the second point referred by the Officiating Magistrate, it seems to me that the Magistrate's attestation at the foot of the examination was sufficient *prima facie* evidence that every thing had been legally and properly done, and that neither threats nor promises had been used. If, however, the Sessions Judge had doubts on this point, he should have cleared them up by taking evidence as to the manner in which the accused's statement was recorded.

KEMP, J.—I entirely concur. There has, in my opinion, been a clear failure of justice in this case, owing to the Judge's misdirection to the jury. The provisions of s. 205 have been strictly complied with in this case, and the examination of the accused ought to have been admitted in evidence at the trial under s. 366. The attestation of the Magistrate, which is in the proper form, was sufficient *prima facie* evidence of such examination, and the Judge, if he doubted the genuineness of the Magistrate's signature, was bound to take evidence on that point. I think the Judge is wrong, and the Officiating Magistrate is perfectly right in his view of the law.

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*Before Mr. Justice Macpherson and Mr. Justice Glover.*

THE QUEEN v. MAHARAJ MISSER AND OTHERS (APPELLANTS).†

1871.  
Sep. 18. Penal Code (Act XLV. of 1860), s. 193—Charge under s. 193 of the Penal Code—  
Charge for giving False Evidence, Form of.

7 B. L. R.  
Ap. 66. [15 W. R. 47.] Six persons were charged in the same charge as follows: "That you, on or about the — day of June —, at Tajpur, committed the offence of voluntarily giving false evidence in the stage of a judicial proceeding, and that you have thereby committed an offence under s. 193 of the Penal Code."

\* 7 W. R. Cr. 49.

† Criminal Appeal, No. 569 of 1871.

*Held*, the charge was bad and defective: *first*, as it charged a number of persons jointly with giving false evidence; *second*, as it did not show what statement the accused persons made; *third*, as it did not mention the day and year when the offence was committed; *fourth*, as it did not indicate the Court or officer before whom the false evidence was given.

To support a charge of giving false evidence under s. 193, it must be shown that the accused intentionally made a particular statement false to his own knowledge.

Mr. R. E. Twidale and Baboo Chandra Madhab Ghose for the appellants.

The facts are sufficiently stated in the judgment of the Court, which was delivered by

MACPHERSON, J.—It is impossible that any of these convictions should be upheld. The ten appellants were all tried together charged with giving false evidence under s. 193 of the Penal Code. Six of them—*viz.*, Baijnath Misser, Imrath Misser, Kari Misser, Sarban Chowdhry, Brij Behari, and Lalla Dhanuk—were included in one charge: the remaining four were the subjects of the other.

The charge against the six is—

“That you, on or about the      day of June      , at Tajpur, committed the offence of voluntarily giving false evidence in a stage of a judicial proceeding; and that you have thereby committed an offence under s. 193 of the Penal Code,” &c.

Now, this charge is bad and defective in a variety of most substantial respects:

*Firstly*.—It is wholly incorrect to charge a number of persons jointly with giving false evidence. It may be that the statements which are said to be false were all made in the course of one particular trial, and that they were all made in order to attain one particular end. Still each statement may be made by one man only, however many statements to the like effect may be made by others; every man's statement is his own, and upon it, and upon it alone, must any charge against him stand or fall. The lie, if it be told by a witness, is none the less his own particular lie, because other witnesses have about the same time told similar lies; and it is each man's own lie, and not his neighbour's, that alone can be used against him, or be the subject of a prosecution under s. 193. I do not mean to say that, if the accused persons were properly charged, each in respect of his own particular false statement, the Sessions Court might not be justified in putting them up and trying them together. It may occasionally be convenient and proper that they should be so tried; but then the Court requires to be most careful in keeping the case of each prisoner distinct from that of the others, and in seeing that the case against each is complete in itself in all its details.

*Secondly*.—The charge does not show what the statement is which the accused persons, or any of them, are alleged to have made, and which is relied on as being false; it does not set out distinctly the particular statement on which the prosecution is based. It has been decided over and over again by this Court that the charge under s. 193 must show on the face of it the statement which is alleged to be false, and it is manifestly unfair to the accused when this rule is not attended to.

*Thirdly*.—The charge does not disclose either the day of the month, or the year, on or in which the offence charged was committed. It was “on or about” some day in some month of June, but there is nothing to indicate *what* June nor *what* day in *what* June.

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*Fourthly.*—The charge does not indicate the Court or the officer before whom the false evidence was given. The only information given is contained in the words “in a stage of judicial proceeding” and at “Tajpur”; but what stage of what judicial proceeding does not appear. In the case of *The Queen v. Fatik Biswas*,\* where the charge was fuller and better than in the present instance, the Court said: “We think it right to remark here that, in our opinion, both the charges made against the prisoner are seriously defective, in not specifying the judicial proceeding in a stage of which the prisoner is accused of having made the false statement. We even think that the particular stage of the proceeding ought to have been mentioned. It is only fair to the prisoner that the charge which is to stand for ever on record against him should be made as definite and specific as it reasonably can be.”

The six prisoners, being arraigned upon this remarkably loose and general charge, pleaded not guilty. At the trial their depositions, taken by Mr. Forbes, the Assistant Magistrate of Tajpur, on the 17th of June 1871, in a stage of a criminal case which he was trying, were put in and proved. Evidence was given for the prosecution that the statements made by the prisoners were false, and that the case which they attempted to support was false. But the whole evidence is of a general nature; and it was in fact deemed enough to prove that the case tried by the Assistant Magistrate was wholly false, without entering into details as to the statements made by the present appellants respectively.

The commission of the offence of giving false evidence under s. 193 is not proved, unless it is proved that the accused has intentionally made a particular statement which is shown to have been false to his knowledge. In the six depositions which have been put in, and which were treated as showing the false evidence with the giving of which the prisoners are charged, there are many statements which are probably true enough, and as to which there is certainly no evidence that they are false. The specific portions of these depositions which were relied on by the prosecution ought to have been picked out and proved expressly in detail to have been false; and the general evidence which has been given is insufficient.

On the whole, it appears to me that there are errors and defects both in the charge and in the proceedings on the trial which have prejudiced the prisoners, and I think that the convictions, and the sentences passed on them, should be set aside, and that they should be discharged.

The position of the other four appellants, Maharaj, Kali, Dariaow, and Umah Misser, is similar in all respects—except that the Assistant Magistrate has not attached to their depositions the memorandum required by s. 199 of the Criminal Procedure Code, and there is nothing to show that they ever acknowledged their evidence to have been correctly taken down—except also that the charge against them states the day of the month (but not the year), and correctly speaks of the offence as being that of “intentionally” giving false evidence, instead of using the word “voluntarily” as in the other charge. The remarks I have made as regards the six prisoners apply almost equally to the other four; and I think that as to these latter also the convictions and sentences should be set aside, and that they should be discharged.

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\* 1 B. L. R. A. Cr. 13 (see p. 9 of this book).

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## [APPELLATE CRIMINAL.]

*Before Mr. Justice Kemp (Offg. C. J.) and Mr. Justice Ainslie.*

IN THE MATTER OF ISWAR CHANDRA KOER *v.* UMESH CHANDRA PAL

(PRISONER).\*

*Criminal Procedure Code (Act XXV. of 1861), ss. 66 & 67—Act VIII.*

*of 1869, s. 66B.*

A Magistrate of a District, before whom a complaint had been made, without complying with the provisions of s. 66 of Act XXV. of 1861, sent the petition to be disposed of by a Deputy Magistrate not authorized to receive complaints without reference from the District Magistrate who tried and convicted the offender.

*Held, per KEMP, J.,* that non-compliance with the provisions of s. 66 of Act XXV. of 1861 made the subsequent proceedings void.

*Held, per AINSLIE, J.,* that the order sending the petition to the Deputy Magistrate for disposal gave the latter officer power to receive the complaint under s. 66B of Act VIII. of 1869, and that the subsequent proceedings therefore were valid.

ONE Iswar Chandra Koer presented a petition to the District Magistrate of Hooghly, charging one Umesh Chandra Pal and his two sons with having committed an assault on him and beaten him. The Magistrate passed an order on the back of it, making over the case to the Deputy Magistrate, Baboo Rangalal Banerjee, for disposal. The Deputy Magistrate took a short statement on oath of the petitioner as to the grounds of his complaint, and directed the issue of a summons against Umesh Chandra Pal alone. Baboo Rangalal Banerjee took the depositions of some of the witnesses for the prosecution, and left the station. The case was then taken up by Baboo Ramesh Chandra Mookerjee, another Deputy Magistrate, who, after taking the depositions of the witnesses for the prosecution anew, drew up a charge, and then recorded the evidence on behalf of the accused. He found the accused guilty of having committed an assault.

The accused then applied to the Court of Sessions to send the proceedings of the case to the High Court under s. 434 of the Criminal Procedure Code, in order that the conviction might be quashed, on the ground that the Magistrate had not jurisdiction to try the case. The Judge referred the proceedings to the High Court.

Mr. Woodroffe (with him Mr. Sandel) contended that the Deputy Magistrate had no jurisdiction to try the accused. The prosecution in this case preferred a complaint by petition which would make s. 66 of the Criminal Procedure Code applicable. By that section the Magistrate of the district, or a Magistrate who is authorized without reference from the Magistrate of the district to hear complaints, is required to examine the complainant, and the examination is to be reduced into writing, and signed by the complainant and the Magistrate. After this has been done, the Magistrate, under s. 67, is to consider whether there are sufficient grounds for taking action, and to issue summons or warrant as may appear best to him. He may, however, after the issuing of summons or warrant

\* Reference to the High Court, under s. 434 of the Code of Criminal Procedure, by the Sessions Judge of Hooghly.



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against the accused, direct that the trial be held before any other officer having jurisdiction to try that particular offence, as provided for by the latter part of s. 67. But up to the issuing of summons or warrant, only two classes of officers are authorized by law to deal with a complaint—*viz.*, the Magistrate of the district, or a Magistrate who is authorized without reference from the Magistrate of the district to receive complaints, and no other officer can admit a complaint. In this case the Magistrate of the district did not himself carry out the procedure laid down in s. 66 and the first part of s. 67, but, on the presentation of the petition of complaint, sent that petition to be dealt with according to law to the Deputy Magistrate, who was not an officer authorized to receive complaints without reference from the Magistrate of the district. The Deputy Magistrate did all the preliminaries up to the issuing of summons—*i. e.*, he initiated the complaint, which he had no authority to do. In this case there was a trial and conviction of an offence upon a complaint which was not lawfully admitted. There being then no initiation of the complaint, all the subsequent proceedings were void—*The Queen v. Girish Chandra Ghose*,\* *Dulali Bewa v. Bhuban Shaha*,† and *The Queen v. Mahim Chandra Chuckerbutty*.‡ [AINSLIE, J.—The order on the back of the petition of complaint by the Magistrate of the district sending it for disposal to the Deputy Magistrate would give the latter officer authority to receive that particular complaint under s. 66B, Act VIII. of 1869. By that section the Magistrate of the district could empower generally any Magistrate or Subordinate Magistrate in his district to entertain cases, either on complaint preferred directly to themselves, or on the report of a police-officer, pending the sanction of the Local Government, and therefore in a particular case.] S. 66B clearly could not apply to the order on the back of the petition in this case. The section gave the Magistrate of the district the power to authorize temporarily any other Magistrate or Subordinate Magistrate not to entertain cases on complaints preferred to the District Magistrate (which is what was done here), but on complaints preferred directly to themselves—*i. e.*, to such other Magistrate or Subordinate Magistrate. The District Magistrate under this section could only give this authority generally, and not in any particular case. In this case there was no complaint preferred directly to the Deputy Magistrate.

KEMP, J.—I have on three occasions, in *Queen v. Mahim Chandra Chuckerbutty*,\* *Dulali Bewa v. Bhuban Shaha*,† and *The Queen v. Girish Chandra Ghose*,‡ sitting with Justices Glover and Markby, ruled that a Magistrate is not competent to make over a case to a Subordinate Deputy Magistrate who has not been empowered to entertain cases either on complaint or on the report of the police, without first recording the prosecutor's statement. I would quash the conviction as illegal. The accused must be released.

AINSLIE, J.—It seems to me that, under s. 66B of the Criminal Procedure Code, a Magistrate who is competent to direct that all complaints or reports of police-officers may be dealt with by a Subordinate Magistrate, is also competent to direct any particular complaint or report to be so dealt with. I would therefore not interfere.

*Conviction quashed.*

\* 7 B. L. R. 513 (see p. 419 of this book);

† 3 B. L. R. A. Cr. 53 (see p. 122 of this book).

‡ 3 B. L. R. A. Cr. 67 (see p. 131 of this book).

## [FULL BENCH.]

Before Sir Richard Couch, Kt., Chief Justice, Mr. Justice Loch,  
Mr. Justice Jackson, Mr. Justice Glover, Mr. Justice Mitter,  
and Mr. Justice Ainslie.

THE QUEEN v. HIRA LAL DAS AND OTHERS IN THE MATTER OF

THE PETITION OF THE GOVERNMENT OF BENGAL.\*

Trial by Magistrate of Charge instituted by him as Sub-Registrar—  
Registration Act XX. of 1866.

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The proceedings of a Magistrate who tries prisoners charged with having committed offences under ss. 93 and 94 of the Indian Registration Act XX. of 1866† are not illegal, and without jurisdiction, or otherwise bad, merely because the prosecution was (with the sanction of the Registrar to whom he was subordinate) instituted against the accused by the same Magistrate in his capacity of Sub-Registrar.

Under such circumstances, where it can be done, it would be better if the case were tried by some other person.

THE prisoners in this case were charged by the Assistant Magistrate of Mudbhunnee in his capacity of Sub-Registrar with offences under ss. 93 and 94 of Act XX. of 1866, in having falsely personated or abetted the false personation of one Balgabinda Das, who was alleged to have executed a bond, which the prisoners presented for registration. They were afterwards tried by the same officer as Assistant Magistrate. On their trial they made a statement amounting to a plea of not guilty, and evidence having been taken, two of the prisoners were sentenced to a year's imprisonment, and the third to imprisonment for six months. Against this sentence they appealed to the Judge of Tirhoot, who, following the decisions of the High Court in the cases of *The Queen v. Chandra Sikar Rai*‡ and *In re Bharat Chandra Sen*,§ held that the proceedings of the Assistant Magistrate were *ab initio* without jurisdiction, inasmuch as the Sub-Registrar who had set on foot the prosecution, and the Magistrate who had convicted the prisoners, were one and the same person, and that he was therefore, according to the cases cited, debarred from trying a case which he had himself set on foot.

The record of the case was sent for by the High Court under s. 404, Code of Criminal Procedure, on the motion of Mr. Bell, the Legal Remembrancer. The case came on before Macpherson and Glover, JJ., on the 15th of September 1871, who, considering that the Magistrate had no such interest in the case as to disqualify him from trying it himself, referred the question to the Full Bench: "Are the proceedings of A B, a Magistrate who tries prison-

\* Miscellaneous Criminal Case, No. 89 of 1871.

† See s. 80, 81, Act VIII. of 1871.

‡ 5 B. L. R. 100 (see p. 193 of this book).

§ Before Mr. Justice Kemp and Mr. Justice Ainslie.  
The 26th November 1870.

*In re* BHARAT CHANDRA SEN, PETITIONER.

Baboo Kali Mohan Das and Nalit Chandra Sen for the petitioner.

[14 W. R. 74.]

KEMP, J.—This is an application on the part of Bharat Chandra Sen, head-clerk in the Sub-Registrar's office of Tipperah.

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ers charged with having committed offences under ss. 93 and 94 of Act XX. of 1866, illegal and without jurisdiction, or otherwise bad, merely because the prosecution was (with the sanction of the Registrar to whom he was subordinate) instituted against the accused by the same A B in his official capacity of Sub-Registrar."

Mr. Bell, the Legal Remembrancer, on behalf of the Government, contended that, assuming the Assistant Magistrate was an interested party, his proceedings would not, on this account, be void *ab initio*; they would only be voidable. The fact of the prisoners submitting without objection to be tried by the Assistant Magistrate amounted to a waiver of any objection which they might have urged as to the Magistrate being an interested party. *Reg. v. The Justices of Richmond, Surrey*;<sup>\*</sup> and cases collected at page 5109 of Fisher's Digest, Title, Justice of the Peace. [Couch, C.J.—The practice in England is that, if a Justice is interested in the subject-matter of the suit, he discloses his interest, and leaves the parties to decide whether they are willing to abide by his decision in the case.] The case discloses no interest on the part of the Assistant Magistrate at all. As Sub-Registrar it came to his knowledge that there was reason to believe that the prisoners had been guilty of false personation; and with the sanction of the Registrar he directed criminal proceedings to be taken against them. In instituting these proceedings he had no private interest to serve; he was merely discharging a public duty; he had no interest that could disqualify him from afterwards trying the case as a Magistrate. The interest that disqualifies must either arise from relationship to the parties or be of a direct pecuniary nature—*The Queen v. Rand*,<sup>†</sup> *The Queen v. The Manchester, Sheffield, and Lincolnshire Railway Company*.<sup>‡</sup> Circumstances from which a mere bias can be inferred are not sufficient—*Reg. v. Dean of Rochester*.<sup>§</sup> The fact that the convicting officer had in his public capacity instituted the prosecution is not an interest that disqualifies—*Wildes v. Russell*,<sup>||</sup> where the authorities are collected. In *The Queen v. Mukta Sing*,<sup>¶</sup> Norman, J., held that the conviction was good, though the Judge had not only instituted the prosecution, but had also given evidence before himself against the prisoners. To the same effect is the case of the *Justices of the Peace for the Town of Calcutta v. The Maharanee of Burdwan*.<sup>\*\*</sup> The principal case on the other side, upon which the Sessions Judge relied, is the case of *The Queen v. Chandra Sikar Rai*.<sup>††</sup> Now, that case decided that an Assistant Magistrate,

The point taken by his pleader is that the Magistrate, who is also Sub-Registrar, investigated the case in the first instance, and subsequently tried and convicted his client as Magistrate.

We think that, on the principle that no one should be a Judge in any case in which he is himself interested, as also on the principles laid down in a decision of a Divisional Bench of the Court in *The Queen v. Chandra Sikar Rai*,<sup>††</sup> the Magistrate ought not to have tried this case.

We therefore quash his proceedings, and direct that the case be tried by some other official having power to try it.

The fine must be refunded.

\* 8 Cox. C. C. 314.

† L. R. 1 Q. B. 230.

‡ L. R. 2 Q. B. 339.

§ 20 L. J. Q. B. 467; S. C. 17 Q. B. 1.

|| L. R. 1 C. P. 722.

¶ 4 B. L. R. Ap. Cr. 15 (see p. 221 of this book).

\*\* 1 L. J. N. S. 102.

†† 5 B. L. R. 100 (see p. 193 of this book).

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whose process had been disregarded by a witness, was not competent to try the witness under s. 174 of the Penal Code for disobedience to the summons of his own Court. [GLOVER, J.—The question referred to the Full Bench was whether the Assistant Magistrate could try a case which he had instituted as Sub-Registrar. The case of *The Queen v. Chandra Sikar Rai*<sup>1</sup> turns upon the construction of a particular section of the Procedure Code.] The principle involved in that case seems identical with that involved in the present reference. It decided that an Assistant Magistrate should not try a witness under s. 174 of the Penal Code for an offence committed against his own Court, and this is opposed to the rulings both at Madras and Bombay, at the latter in *Reg. v. Garu bin Tatia Selar*.<sup>2</sup> [COUCH, C.J.—The point was not decided there, for it was never raised.] The point was certainly not expressly raised, but the report shows that the Magistrate who convicted the witness was the same Magistrate whose process had been treated with contempt. The decision turned upon another point, but the case shows the practice of the Court. In the Madras High Court Proceedings, 26th July 1869,<sup>3</sup> the point was expressly decided. It was there held that ss. 171—175 of the Code of Criminal Procedure were enabling sections, and that under those sections a Magistrate could try a witness for disobeying the process of his Court, and was not obliged to send him to another Magistrate for trial. There are many sub-divisions in which there is only one magisterial officer, and if he is debarred from trying offences which have come to his knowledge in his official capacity, the great advantages of the sub-divisional system will be done away with, and petty cases, instead of being promptly tried upon the spot, will have to be disposed of, to the great inconvenience of the parties, at the distant station of the District Magistrate.

Mr. G. Gregory for the prisoners.—Assuming that a conviction under the circumstances is only voidable, and not void *ab initio*, there must be some means of getting rid of it. The prisoners appealed to the Judge, and the Judge on such appeal has set aside the conviction. It is now a nullity. It has no existence, and, therefore, no longer is it only voidable.

That the prisoners did not object in time is of no consequence, for serious informality like this cannot be waived in a criminal case—*The Queen v. Bertrand*.<sup>4</sup> Consent cannot give jurisdiction to a Judge in a criminal case if the Judge does not possess it or is disqualified by law. [JACKSON, J.—Suppose the prisoner does not challenge a juror in time.] The juror then is not disqualified. He is only disqualified when he is challenged. The men summoned to sit as jurors are not *ab initio* disqualified, but are competent to act as jurors. The law gives the prisoner the privilege to challenge a certain number, but he must exercise the privilege at a certain time. If he does not, the privilege is lost, but the cause of disqualification in this case existed, if at all, from the beginning, which even the express consent of the prisoner would not remove. Mr. Bell's reasoning could only prevail in a civil case. Besides, these matters have not been referred to the Full Bench by the Division Bench.

The interest in this case is, that the Magistrate decided a case in which he was both *actor* and *judex*. The maxim of law that disqualifies Judges to try cases on the ground of interest is variously expressed, but its real object is to exclude a Judge before whom the prisoner could not get a fair trial, whether

<sup>1</sup> 5 B. L. R. 100 (see p. 193 of this book).

<sup>2</sup> 5 Bom. H. C. Rep. C. C. 38.

<sup>3</sup> 4 Mad. H. C. Rep., Rulings L. II.

<sup>4</sup> L. R. 1 P. C. 520.

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it be for personal interest or any other cause. The Magistrate, as Sub-Registrar, satisfied himself that the prisoners were guilty of the offence under the Registration Act before he sent them before the Magistrate to be tried. When he afterwards tried them himself, can it be said that he tried the prisoners with that freedom from bias and foregone conclusion with which another Magistrate would have tried them? The object of the maxim is to secure to a party, in civil or criminal cases, the right of not being prejudiced in his trial by any interest in the Judge, or undue bias, or bad feeling, or any foregone conclusion. The existence or application of these wholesome maxims does not depend upon the sections of the Code of Criminal Procedure, but they apply in every Court where English jurisprudence prevails, "*for jura naturæ sunt immutabilia, and they are leges legum*"—*Day v. Savadge*<sup>1</sup>—to which all other laws are subservient. In an anonymous case reported in 1 Salkeld's Reports, 396, a Judge is said to have been laid by the heels for having sat as a Judge in his own cause. The cases given in the books are merely summary instances of the application of this useful rule of law, but are not exhaustive of its whole extent and application, and the true meaning and extent can only be gathered from a very large number of cases. In the case between the *Parishes of Great Charte and Kennington*,<sup>2</sup> it was held that Lord Raymond, a Justice, could not join in removing a pauper from his own parish. The case of *Wildes v. Russell*<sup>3</sup> is very easily explained. The relation there of Prosecutor and Judge is created by Statute. The true reason for that decision is given by Mr. Justice Montague Smith, where he says: "The maxim, *Nemo sibi esse judex vel suis jus dicere debet*, cannot have any reference to a state of things like this where the relation is created by Statute, and the Judges have a duty imposed upon them to investigate and decide. Suppose the Clerk of the Peace were wilfully to falsify a record of the Court, is it to be said that they have not power to bring him before themselves and investigate such a charge. It would plainly be their duty to do so."<sup>4</sup> Upon the same principle rests the decision of Norman, J., in *The Queen v. Mukta Sing*,<sup>5</sup> for the learned Judge says: "It may be said in the present case that the complaint in the Magistrate's Court was preferred by the Sessions Judge. It should be observed, however, the complaint is one which could hardly be made, except with the sanction of the Judge under s. 169, Code of Criminal Procedure." And on this principle also was the decision in *Queen v. Dean and Chapter of Rochester*.<sup>6</sup>

S. 172, Code of Criminal Procedure, expressly enacts that "it shall be competent to a Court of Session to charge a person for any such offence committed before it, or under its own cognizance, if the offence be triable by the Court of Session exclusively, and to commit or hold to bail and to try such person upon its own charge." If the Sessions Judge had this power already, why was s. 172 passed? The Legislature made an exception to the rule or maxim in question, because in cases of false evidence the Judge before whom the false evidence is given is perhaps the best Judge of the falsity of such evidence. But there is no similar provision in the law to enable subordinate tribunals to commit and to try at once.

The inconvenience alluded to is in this case imaginary. There are a great many Magistrates in Tirhoot competent to try this case. Where there is but

<sup>1</sup> Hob 87.

<sup>2</sup> 2 Str. 1173.

<sup>3</sup> L. R. 1 C. P. 722.

<sup>4</sup> L. R. 1 C. P. 747.

<sup>5</sup> 4 B. L. R. Ap. Cr. 15 (see p. 163, of this book).

<sup>6</sup> 17 Q. B. 1 S. C., 20 L. J. Q. B. 467.

one Magistrate, an exception may be made to the rule for the ends of justice. The rule is not an inflexible rule. But wherever it is possible, the Magistrate trying an accused person should be free from any bias or ill-feeling—Russell on Arbitration, 2nd edition, page 108, and the cases cited in the argument in *William Dimes's* case.<sup>1</sup> There are several cases in the Reports of this Court in which Magistrates have been censured by the High Court for the over-zeal displayed by them in such cases, arising, no doubt, from a conviction previously formed of the prisoner's guilt. The cases relied upon by the Judge—*The Queen v. Chandra Sikar Roy*<sup>2</sup> and *In re Bharat Chandra Sen*<sup>3</sup>—will shew that it has been the practice of this Court to exclude Judges who are or may be under a possible bias from trying cases commenced by them. The extent and application of the maxim can be gathered from a variety of cases. *The Parishes of Great Charte and Kennington*,<sup>4</sup> *The Queen v. Allen*,<sup>5</sup> *Ellis v. Hopper*,<sup>6</sup> *The Queen v. The Recorder of Cambridge*,<sup>7</sup> *In re Ollerton*.<sup>8</sup>

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Mr. Bell in reply.—The cases which have been referred to on the other side may be explained on the ground that the Justices whose proceedings were reserved were disqualified to act as Judges from having an interest in the subject-matter of dispute. The case of *The Queen v. Bertrand*<sup>9</sup> merely decides that it was irregular on the part of a Judge, even with the consent of the prisoner's Counsel, to read to the jury the depositions of the witnesses, instead of producing before the jury the witnesses themselves. But there is no question of any irregularity in this case. The argument founded on s. 172 of the Criminal Procedure Code, that the fact of the Legislature having specially authorized Sessions Judges to try offenders committed by themselves is a proof that it was never intended that any other officers should exercise the functions of both prosecutors and Judges, arises from a misapprehension of the circumstances under which s. 172 was passed. Formerly Sessions Judges could not commit for offences committed before themselves; and s. 172 was passed to give them this power. The fact of Sessions Judges being expressly authorized to try their own commitments shows that the Legislature recognizes the principle that public officers could be both prosecutors and Judges. S. 68 of the Procedure Code confers this two-fold power on Magistrates in the same way that s. 172 confers it upon Judges. The Magistrate who accuses a party does not necessarily make up his mind as to the prisoner's guilt. No one can seriously contend that a Magistrate would desire to convict an innocent man.

COUCH, C.J.—The question which is referred to us is (*reads*).

S. 95 (Act XX. of 1866) provides that "a prosecution for any offence under this Act coming to the knowledge of a Registering Officer in his official capacity may be instituted by the Registrar-General, the Registrar, or," which is this case "(with the sanction of the Registrar to whom he is subordinate), the Sub-Registrar in whose territory, district, or sub-district, as the case may be, the offence has been committed." And that "all prosecutions under this Act shall be instituted before a person exercising the powers of a Magistrate or subordinate Magistrate of the first class."

<sup>1</sup> 14 Q. B. 554.

<sup>2</sup> 5 B. L. R. 100 (see p. 193 of this book).

<sup>3</sup> *Ante*, p. 423 (see p. 455 of this book, note).

<sup>4</sup> 2 Str. 1173.

<sup>5</sup> 33 L. J. Mag. Ca. 98.

<sup>6</sup> 3 H. & N. 766.

<sup>7</sup> 8 E. & B. 637.

<sup>8</sup> 15 C. B. 796.

<sup>9</sup> L. R. 1 P. C. 520.

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I think that the Legislature, when this section was passed, did not contemplate the Sub-Registrar being also the Magistrate, and himself exercising the powers of a Magistrate, and trying the case ; and certainly, where it can be done, it would, to my mind, be better that some other person than the Sub-Registrar should try the case. But I agree with the referring Judges in thinking that the words of the section do not indicate that he must be another person. The words of the section are not sufficient to prohibit him from doing it ; and therefore the other question arises whether there is any general rule of law with regard to the Judge being interested which would apply, and which would prevent the Sub-Registrar being the Magistrate who tried the case.

Now, the interest which disqualifies a Judge is not merely a pecuniary interest ; that would be too limited a way of describing such an interest ; but in describing it we ought rather to use the language of Norman, J., in the case of *The Queen v. Mukta Sing*,<sup>1</sup> that is to say, "a personal or a pecuniary interest." A Magistrate could not try a person for an assault upon himself ; and without defining precisely what amounts to personal interest, it appears to me that there must be either a personal or pecuniary interest in order to disqualify a Judge or Magistrate from exercising the general jurisdiction which is conferred upon him. It is not a question of want of jurisdiction so much as of a disability arising from interest to exercise his jurisdiction in the particular case.

In this case I think the Sub-Registrar has not such an interest in the matter as disqualifies him from trying the case ; and I may observe, with reference to some of the arguments that have been used as to the Sub-Registrar having made up his mind, and that the accused would have no chance of a fair trial, that the sanction of the superior officer, the Registrar, is required before the prosecution can be instituted, and certainly I do not consider that the prosecution will not be instituted unless the Sub-Registrar has made up his mind as to the guilt of the party. It is his duty, when he comes to know that an offence has been committed, to cause a prosecution to be instituted ; by which I understand that there is *prima facie* evidence of an offence having been committed, that there is that which renders it proper that there should be an enquiry, and the Registrar accordingly gives his sanction to it ; and certainly I cannot suppose that, because an officer in his position sanctions the institution of a prosecution, his mind is made up as to the guilt of the party, and that he is not willing to consider the evidence which may be produced before him when he comes to try the case. In this case there appears to be no such interest as would prevent the case from going before the Magistrate as the trying authority ; but, as I have already said, it would be better, where it can be avoided, that it should not be done, and it may very well be that the Court in its discretion would, in similar cases, direct the transfer of the case, in order that it should be tried by some other officer.

S. 172 of the Code of Criminal Procedure does not, in my opinion, afford any argument in favour of the proposition that the Sub-Registrar could not try the case. I understand s. 172 to be this, that whereas the Court of Session would not have authority before the passing of the Code to frame a charge, or commit for trial in respect of offences committed under the preceding sections, a special power is given to it in this particular instance to do so. That is a sufficient explanation of s. 172, and the section does not afford any ground for the contention of Mr. Gregory, that, because there is a special provision of that

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<sup>1</sup> 4 B. L. R. Ap. Cr. 15, 20 (see p. 163 of this book).

kind, by the general law a Judge instituting proceedings against a person cannot also try him.

I think that the question that has been put to us by the Division Court must be answered in the negative, that it is not illegal or without jurisdiction or otherwise bad for the Magistrate to try a person in the case supposed.

Then there is another question which it may be well to consider, namely, what order should be made upon this answer being given to the question referred? I rather think that had better be disposed of by the learned Judges who referred the question, as they can deal with that matter better than we can, having had all the facts of the case before them.

LOCH, J.—I concur.

JACKSON, J.—I am of the same opinion. I admit that I have not been free from doubt. It seems to me, on reading the terms of s. 95, Act XX. of 1866, that the Legislature had in contemplation, first, the person by whom proceedings of this kind might be instituted, and then a Magistrate of a specified grade, before whom such charges must be instituted, and that the Legislature, in passing that section, did not contemplate the union of those two capacities in the same person. I admit, however, that the Legislature has not, in this instance, used words sufficiently clear to exclude the union of those two persons. In the case of *The Queen v. Chandra Sikar Rai*<sup>1</sup> we had to deal with the wording of a different Act, where the words used were more emphatic. There the law speaks of sending a particular person in custody and charged with having committed a certain offence before a specified Magistrate. If the same words had been found in s. 95, Act XX. of 1866, I should probably have held the same opinion in this case as I did in the other case.

GLOVER, J.—I concur in the answer proposed to be given to the question referred by the Division Bench.

MITTER, J.—I concur in the proposed answer to the reference.

AINSLIE, J.—I concur.

#### [APPELLATE CRIMINAL.]

*Before Mr. Justice L. S. Jackson and Mr. Justice Mitter.*

THE QUEEN *v.* HARI PRASAD GANGOOLY AND OTHERS (PRISONERS).<sup>2</sup>

*Special Verdict—Trial by Jury—Criminal Procedure Code (Act XXV. of 1861)  
—Penal Code (Act XLV. of 1860), ss. 330, 348.*

The prisoners were tried under s. 330 of the Penal Code (for voluntarily causing hurt to a girl), and under s. 348 (for wrongfully confining her). Circumstances of aggravation were alleged, as lifting up and using a sword, of lowering the girl into a well, and of pricking her with thorns. The jury in their verdict stated that they disbelieved these allegations, and also the charge of illegal confinement, but that they believed that some slaps had been given. The Judge then asked the jury whether they convicted on either, and, if so, which head of charge. They answered that they believed the prisoners had beaten the girl, and that they convicted them under s. 330. *Held* that the question put by the Judge to the jury was a proper one, and not one of law. The conviction was upheld.

Such a case is not governed by the rule of English law as to special verdicts.

<sup>1</sup> 5 B. L. R. 100 (see p. 193 of this book).

<sup>2</sup> Criminal Appeal, No. 530 of 1870, from an order of the Sessions Judge of Nuddea, dated the 8th June 1870.

1871.

QUEEN  
*v.*

HIRA LAL  
DAS,

7 B. L. R. 422.

1870.

Sep. 20.

8 B. L. R. 557.

[14 W. R. 59.]



1890.

QUEEN

v.

HARI

PRASAD

GANGOOLY,

8 B. L. R. 557.

[14 W. R. 59.]

THE prisoners were tried by jury before the Court of Session at Zilla Nuddea on charges framed under s. 330 of the Penal Code (voluntarily causing hurt to a girl), and under s. 348 (for wrongfully confining her).

They pleaded not guilty.

From the record of the Court of Session it appeared that the jury by their unanimous verdict found one of the accused persons tried on that occasion not guilty on both heads of charge, and also found the prisoners (appellants) not guilty on one head of charge, namely, that under s. 348 of the Penal Code, but found them severally guilty on the other head of charge under s. 330. They were sentenced to six months' rigorous imprisonment.

A motion was made before the High Court to set aside the verdict, supported by the following affidavit :—

"I am the brother of Hari Prasad Gangooly, and I conducted the criminal case of the Queen v. Hari Prasad Gangooly and others in the Sessions Court at Nuddea. The jury, when they came to Court, after retiring to return their verdict, informed the Judge that they did not believe the lifting up or the using of the sword at all, lowering into a well, or pricking with *babla kanta* (thorns) and illegal confinement, but they only believed that *shamanya churta chappurta mara hoya chilo*—that ordinary slaps were given. But the Judge, instead of applying the law himself in the matter, asked the jury whether the case fell under s. 330 of the Indian Penal Code. The foreman, without further retiring with his companions to consult, returned an answer in the affirmative, although no copy of the Penal Code was before them, neither did the Judge point out and explain to them the section in question."

The contention was that the record did not truly represent what had happened; that the jury had, by their finding, negatived the principal circumstances of the charge; that they had, in fact, given a special verdict, which was tantamount to a verdict of not guilty, and which the Judge was bound to receive and record; and that the Judge, in asking the jury whether they found the prisoners guilty under s. 330, had in fact put to them a question of law, and had thus committed an irregularity which was fatal to the conviction.

Copies of the affidavit and petition accompanying it were sent by the directions of the High Court to the Court of Session, and the Judge was directed to transmit the proceedings, with any observations on the matters stated which he might have to offer; and as the Judge before whom the trial was held had left the district, it was suggested that the present Judge should take down the statements of the officers of his Court who had been present at the trial.

The Officiating Judge sent up what appeared to their Lordships a very meagre return; but it contained a statement of the person who had acted as foreman of the jury on the trial, which was in the following words :—

"I was foreman of the jury that tried Hari Prasad Gangooly. We said to the Judge that we did not believe the evidence as to letting down a well or as to pricking with thorns. The Judge then asked us whether we convicted on either head, or, if so, which head. We said we believed the prisoner had beaten the girl, and that we convicted under s. 330. I cannot at all be certain whether I or any of us used the word '*shamanya*.' I certainly said '*char chapar*.'"

Mr. Anstey and Mr. Ghose for the prisoners.

Mr. Anstey, in support of the motion, contended that the verdict of the jury amounted to a verdict of not guilty. The prisoners were charged with voluntarily causing hurt under s. 330 and with wrongfully confining the

girl under s. 348 of the Indian Penal Code. The verdict was that the prisoners had merely committed an assault by slapping the girl. The prisoners should have been at once released upon this special verdict. It was improper for the Judge to question the jurors as to whether they convicted the prisoners, and, if they did, under which of the sections mentioned. The facts found by the jury, *viz.*, the slaps given to the girl, could not support a conviction under s. 330, which is one of causing hurt. The Judge should have decided this himself, as it was a question of law, and not have left it to the jury. —*Elliot v. The South Devon Railway*.<sup>1</sup> The prisoners were not charged with assault merely: the verdict, therefore, amounted to one of not guilty. The jury are not bound, nor are they competent, to find prisoners guilty under any particular section, but they are simply to give their verdict upon a question of fact upon the evidence. Where they do this unmistakably as in this case, their opinion ought not to be asked upon a question of law. The Judge is bound to take the verdict of the jury as it is given, without putting questions the answer to which referred to a particular section of the law. All considerations of this kind must be dealt with in the same way as in England. There is no difference between a jury here and one in England, except where the law makes special provisions in regard to juries here. The English rule, therefore, must govern all questions regarding special verdicts. Even if the conviction is good, the punishment is too severe.

Mr. Ghose on the same side.—The verdict of a jury, when once given, must be accepted as it is. The *Queen v. Gorachand Ghose*.<sup>2</sup> The verdict in this case amounted to a special verdict, and the Court has no power to add to or vary a special verdict as given by the jury—*Dean of St. Asaph's Case*;<sup>3</sup> *Bushell's Case*;<sup>4</sup> *Messengers' Case*;<sup>5</sup> *Rex v. Francis*;<sup>6</sup> *Hawkins' Pleas of the Crown*, under the head of Special Verdicts.

JACKSON, J. (after stating the facts as above, and averting to the statement made by the foreman of the jury, continued)—This statement, it will be seen, does not agree precisely with the allegations of the affidavit and petition; but it undoubtedly shows that a communication took place between the Judge and the jury which has not been made to appear on the record. Baboo Aushutash Chatterjee, a vakeel of this Court, who was then at Krishnaghur, and was retained for the defence of the petitioners, has since furnished us with a memorandum of his recollection of the circumstances. He differs in only one particular of any importance from the foreman of the jury, in that he represents the Judge as having asked the jury whether they considered the case to fall under s. 330, Indian Penal Code, while the foreman's account of it is that the Judge asked whether they intended to convict under either head of charge, and, if so, under which. The foreman's account appears to us the more probable, it was committed to writing three weeks earlier than that of the pleader, and, besides, the foreman, as being the person to whom the question was addressed, is perhaps the most likely to remember it accurately. The affidavit, indeed, contains a similar statement as to the Judge's question relating exclusively to s. 330, but the affidavit is that of the brother of the chief accused, and consequently that of an interested party, and, moreover, it is to be observed that it was the Judge's

1870.

QUEEN

v.

HARI

PRASAD

GANGOOLY,

8 B. L. R. 357.

[14 W. R. 59.]

<sup>1</sup> 2 Ex. 725.<sup>2</sup> 3 B. L. R. F. B. 1 (see p. 179 of this book).<sup>3</sup> 21 Howell's St. Tr. 847, 951, *et. seq.*<sup>4</sup> 8 Bac. Abr. Tit. Verdict 101.<sup>5</sup> Kelyng's Rep. 72.<sup>6</sup> 2 Str. 1015.

1870.

QUEEN

v.

HARI

PRASAD

GANGOOLY,

8 B. L. R. 557.

[14 W. R. 59.]

business to arrive at the finding of the jury on the second head of charge as well as on the first, and in point of fact there is a verdict of not guilty recorded on the second as there is one of guilty under the first head of charge; and we therefore think the Judge must have put the question as to both. The matter, indeed, is only of importance as bearing on the possibility of the jury's answer being brought about by a sort of suggestion from the Judge that they should give a verdict of guilty under s. 330.

On these materials we have to determine

1st.—Whether the proceedings are defective and void in law?

2nd.—Whether the conviction is in accordance with the real intention of the jury?

The points taken by the learned Counsel for the prisoners were these:—that the prisoners were entitled to their discharge by reason of the omission of the Court below to record the special verdict which in truth the jury returned, and which the Court was bound to receive; that the jury certainly meant a verdict under one of the general exceptions contained in s. 95, Indian Penal Code, being, in other words, a verdict of acquittal; that the Judge was not competent to put to the jury a question of law, and that the enquiry as to s. 330 was such a question; that the first verdict of the jury, which was their real verdict, was one of not guilty, as the prisoners were not on their trial for assault, which was the only offence of which the jury found them guilty; that the jury were not absolutely bound to find one way or the other; that the jury were not competent to find the prisoners guilty under a particular section of the Penal Code, and that, as the jury had acquitted the prisoners, there could be no new trial. It was also objected that the Judge had not properly summed up the evidence; and, lastly, that, supposing the verdict and conviction to be supportable, the sentence was excessive and cruel.

The arguments addressed to us were chiefly based on the assumption that the "trial by jury" spoken of in s. 322 of the Code of Criminal Procedure is the system of trial by jury prevalent in England, except where and in so far as it is expressly modified by the provisions of the Code, and accordingly a number of English cases were cited, and English law-books were referred to (Hale, Hawkins, Bacon's Abridgment, &c.). We have not thought it necessary to examine those cases, partly because we consider the assumption quite unfounded, and partly because they generally did not touch the point under consideration, but related to the powers of a Court to vary or add to a verdict once recorded. The trial by jury spoken of in s. 322, Code of Criminal Procedure, is, we have no doubt whatever, the mode of trial described in the 23rd and 25th chapters of that Code, and nothing else. It was observed that the word juror was not defined in the Code, and from this the inference was said to follow that we must resort to the English definition of juror as being familiar and well ascertained. But neither is the term assessor defined, and it will hardly be contended that we shall derive any information as to the meaning of this term from the English criminal law. The fact is, as most people conversant with the criminal law of Bengal are aware, that both notions, that of juror and that of assessor, are taken, greatly modified and expanded no doubt, from the Bengal Regulation VI. of 1832, which made, so to say, the first breach in the system of "trial and punishment under the provisions of the Mahomedan Criminal Code." A reference to cl. 4, s. 3, of that Regulation, will show with what sort of functions the Legislature of that day clothed persons who were called jurors. Under the Code, no doubt, in the places, and in respect of the class of offences, and for such period of time as the Executive Government directs, the jury of British

India decides upon the facts in criminal trials. But jurors who are not *jurati* at all, who may determine by a prescribed majority, and whose functions may cease at any time on the publication of an order in the *Gazette*, are clearly not the jurors, nor is the system of trial in such circumstances the system of England. We are of opinion that, when the proceedings upon a trial by jury in the *mofussil* are consistent with a reasonable construction of that part of the Procedure Code where such trial is provided for, the proceedings are good in the absence of any distinct ruling to the contrary, and ought not to be examined by the light of English rules of procedure.

By s. 379, Code of Criminal Procedure, it is provided that after the Judge's summing up "the jury shall deliver their finding upon the charge." Now, the charge must certainly mean the whole charge, and, in respect of offences under the Indian Penal Code, the section which relates to the offence is an essential portion of the charge. S. 234 is in these words: "The charge shall describe the imputed offence as nearly as possible in the language of the Indian Penal Code, and shall refer to the section under which such offence is punishable." The jury are thus apprized that the heads of charge fall respectively under particular sections of the Penal Code, and the Judge's direction to the jury in the case before us opens with the statement that the accused are charged with such and such offences under the sections specified.

The law does not prescribe any specific form in which the jury are to return their finding, and we are of opinion that they are at liberty to deliver it in any form which they think fit; and if that finding is not exhaustive as to the facts in issue which go to make up the charge or charges, we have no doubt whatever that it is competent to the Judge, and is indeed his duty, to put such questions to them as shall elicit a complete finding. We also think, with advertence to the observations already made, that a question whether they find the accused guilty of the charge under one of the sections named, and, if so, under which, is unobjectionable, where it is clear that the jury have the distinction between such sections present to their minds, and that putting such a question is not putting to them a question of law. It is merely a short way of stating something quite familiar for the moment to the questioner and the person questioned, and it is inconsistent with common sense to require that a question so put should contain every word of the section referred to, which would be needful if this objection is good for anything.

It cannot be doubted, indeed, that the record should contain an accurate statement of every communication between the Judge and the jury, and it appears certain that in this respect the record of the case before us is defective; but it is also manifest that the accused have not been prejudiced by the omission, and that being so, section 439 precludes any interference with the conviction on this ground.

We therefore think the trial is not vitiated in point of form by anything which took place, and we also think that the Judge sufficiently complied with the requirements of the law that he should sum up the evidence. The summing up is not perhaps very masterly, nor such as to satisfy criticism, but that, we apprehend, is given to few Judges in the Courts of Session, nor is it an invariable accomplishment of Judges elsewhere, but the Judge in this case has recapitulated what the witnesses said, has pointed out how it bears upon the charges, has drawn attention to what he considered its weakest parts, and given what appear to us very sensible suggestions to the jury in respect of the conclusions to be drawn from the evidence. We cannot therefore say that there has been any failure on this head either.

1870.

QUEEN

v.

HARI

PRASAD

GANGOOLY,

8 B. L. R. 557.

[14 W. R. 59.]

1870.

QUEEN

v.

HARI

PRASAD

GANGOOLY,

8 B L. R. 557.

[14 W. R. 59.]

The question remains whether the verdict as recorded is any other than what the jury really intended, and we think there is, in truth, no pretence for saying so. Much stress has been laid on the fact that the jury expressly negatived the specific acts of violence alleged, such as the use of a sword, the pricking with thorns, lowering into a well, and so forth; and in the use which may perhaps be conceded to have taken place of the word "*shamanya*" as qualifying the beating which they found to have been committed.

It has been supposed that the Bengali word in question means "slight," and that the jurors meant by this a beating so slight as to bring the case within the meaning of s. 95 of the Indian Penal Code, although the improbability of the jury having meant to find any such thing, which was not even suggested on the prisoner's behalf in the course of the trial, is obvious enough. Upon such a point, the opinion of this Bench may perhaps be entitled to some weight, and we think that more probably the word was used in its proper acceptation of "ordinary" or "common" so as to mean a beating with a man's natural weapons of offence, to wit, his hands and feet; and this opinion, we consider, is borne out by the almost concluding words of the Judge's direction, in which he refers to the other acts charged as probably circumstances of exaggeration. Those acts, if proved, would, no doubt, have greatly aggravated the offence, but they are not essential to the crime of causing "hurt," for striking with the hands, even with the open hand, might very well, and probably did, cause "hurt," that is, bodily pain, to a child of tender years; and when, as above intimated, the jury, in our opinion, knew very well what they were doing when they brought in a finding of guilty under s. 330, that makes their meaning unmistakable, both as to the hurt, and as to the intent.

We therefore think the finding and conviction on all points unimpeachable. We have only further to consider the sentence passed, and here we think the Judge has not given effect to the finding of the jury, which expressly negatives all the circumstances beyond a beating and slapping, for the purpose stated, and then the relationship between the parties must not be lost sight of, for although it does not appear that the accused were in any position of authority over the girl, yet the chief accused is undoubtedly a near relation, and on these findings the sentence passed, six months' rigorous imprisonment with added fine, is, in our opinion, much too severe: rigorous imprisonment in particular, we think, ought not to have been inflicted. Considering, therefore, that the accused underwent imprisonment of that description for nearly three months, we think they ought not to return to jail, but ought to be discharged on payment of the fines imposed.

The sentence passed by the Court of Session is therefore altered to one of imprisonment for two months and-a-half, which the accused have already suffered, and they are therefore to be discharged on payment of the fine, and in default they will be further imprisoned, but not rigorously, for the space of two months each.

*Sentence modified.*

## APPENDIX.

*Before Mr. Justice Kemp (Offg. C.J.) and Mr. Justice Ainslie.*

THE QUEEN *v.* RAJKRISHNA BISWAS (PETITIONER).<sup>1</sup>

*Criminal Breach of Trust—Penal Code (Act XLV. of 1860), s. 406—Dishonesty—Evidence—Conviction—Act I. of 1871.*

1871.

Sep. 25.

8 B. L. R.

App. 1.

[16 W. R. 52.]

THE accused, one Rajkrishna Biswas, was charged with having committed criminal breach of trust in respect of a pony, which had strayed and been confined in the pound at the station of Dumjar under the Cattle Trespass Act, No. 1 of 1871, by appropriating the same to his own use when it was his duty as sub-inspector in charge of the police-station of Dumjar to have sold the animal by public auction under the provisions of the aforesaid Act. The accused alleged that the pony had been regularly sold by public auction in full compliance with the law, entries of which fact and of the amount realized had been duly made in the station and the pound-keeper's book, and the money transmitted to the Magistrate's office; that the pony then passed through two hands, and was ultimately purchased by him from the last owner, who had no further need of the pony, and had expressed an intention to his neighbours of selling it, for his boy, who had taken a fancy to the animal. The Officiating Magistrate of Howrah disbelieved the evidence of the several successive purchasers and those present at the alleged auction-sale, and the entries in the police-station and pound-keeper's books, which were admittedly made by the witnesses for the prosecution, who were the immediate subordinates of the accused. He held upon the evidence that no sale took place, though all the preliminaries to the sale had been performed, and that the possession by the accused commenced from the time when the pony had been, at his request, tied to a kudum tree, where the intended sale was to have been held. He therefore convicted him of criminal breach of trust under s. 406 of the Indian Penal Code, and sentenced him to a fine of 25 rupees, or, in default, to rigorous imprisonment for ten days. In his judgment the Magistrate observed that the amount credited to Government as sale-proceeds was nearly the full value of the pony.

Mr. *Sandel* moved the High Court (AINSLIE, J.) under s. 404 of the Criminal Procedure Code to send for the record of this trial, and quash the conviction and sentence as being contrary to law.

The Court sent for the record.

Mr. *Sandel*, for the petitioner, contended that there was no evidence that the accused had been in any manner entrusted with the pony, or with any dominion over it, or that he had dishonestly dealt with it; that the finding of the Court below was opposed to such supposition; that the possession of impounded cattle remains with the pound-keeper, who is declared to be responsible for such cattle till actually disposed of: See Act I. of 1871, ss. 9 and 19. The petitioner was merely the salesman. The latter part of s. 19 of the Act declared that "no pound-keeper shall release or deliver any impounded cattle otherwise than in accordance with the former part of this chapter." [AINSLIE, J.—S. 19 prohibits a police-officer from purchasing at these sales, directly or indirectly, so that s. 169 of the Penal Code would meet

<sup>1</sup> Miscellaneous Criminal Appeal, No. 133 of 1871.

1871.

QUEEN

v.

RAJ-

KRISHNA

BISWAS,

8 B. L. R.

App. r.

[16 W. R. 62.]

this case.] S. 169 could only apply when there had been a sale. In this case the Magistrate found that there was really no sale, which was also the case set up by the prosecution. No doubt, the accused in his defence admitted that there was a sale; but he also declared that he came by the pony several months after honestly, and that the sales of the pony, previous to his purchase, were all *bond fide* transactions.

The judgment of the Court was delivered by

KEMP, J.—The petitioner, Rajkrishna Biswas, has been convicted, by the Officiating Magistrate of Howrah, of the offence of criminal breach of trust, and has been sentenced, under s. 406 of the Indian Penal Code, to pay a fine of 25 rupees, or to suffer rigorous imprisonment for a period of ten days. It appears that the petitioner was a sub-inspector of police stationed at the thanah of Dumjar. A pony mare was brought to the pound at the station, and after certain preliminaries were observed to bring about the sale of the pony, which had been kept for some time in the pound, the petitioner purchased the pony for Rs. 6. Under s. 19 of Act I. of 1871, "no officer of police shall; directly or indirectly, purchase any cattle for sale under this Act." The petitioner before the Magistrate alleged that there had been a sale under the Act, and that one Gapi Nath Sirdar had purchased the pony for 4 rupees, and that an entry had been made in the diary to that effect. Subsequently the petitioner purchased the pony, after it had passed from Gapi Nath to another party, who again sold it to the sub-inspector.

The Magistrate, however, has found on the evidence that no sale took place, and, as we have already observed, has convicted the petitioner under s. 406. Now, to constitute the offence of criminal breach of trust, it must be shown that the petitioner was entrusted with this property, that is, with this pony, or had dominion over this pony, and that he dishonestly misappropriated or converted to his own use that pony. There must be an intention proved on the part of the petitioner to cause wrongful gain or wrongful loss to constitute the offence of criminal breach of trust. The Magistrate in his finding and sentence clearly states that the petitioner paid almost the approximate value of the animal. It is to be regretted in this case that the Magistrate did not proceed under s. 19 of Act I. of 1871 taken with s. 169 of the Penal Code; but as the Magistrate has found on the evidence that no sale took place, and has convicted the petitioner under s. 406, we must hold as a point of law that the petitioner has not committed any such offence as to bring him under the provisions of s. 405—namely, that he has not dishonestly misappropriated or converted this pony to his use. We therefore think that the conviction must be set aside, and the fine refunded.

Before Mr. Justice Ainslie and Mr. Justice Paul.

THE QUEEN v. RAMDYAL SING AND ANOTHER.<sup>1</sup>

1871.

Oct. 9.

8 B. L. R.

App. 7.

[16 W. R. 65.]

*Criminal Procedure Code (Act XXV. of 1881), s. 404—Act XIII. of 1867, ss. 20 & 30.*

Upon the conviction of certain persons under s. 20, Act XIII. of 1867, for illicit possession of opium, the Magistrate sentenced them to payment of a fine, and directed that, upon the realization thereof, one-half should be paid to the inspector of police who had apprehended the prisoners, but refused to pay the other half in accordance with s. 30 (for reasons set forth in his order) to the person who gave the information.

<sup>1</sup> Reference, under s. 434 of the Code of Criminal Procedure, by the Officiating Sessions Judge of Patna.

On a reference by the Sessions Judge to the High Court—

*Held*, the High Court could not interfere under s. 404 of the Code of Criminal Procedure. The distribution of the fine under s. 30, Act XIII. of 1867, forms no part of the Magistrate's judgment.

THE following case was submitted to the High Court by the Officiating Sessions Judge of Patna. :—

"Ramdyal Sing was convicted by the late Officiating Joint-Magistrate under s. 20, Act XIII. of 1867, and sentenced to pay a fine of 800 rupees, half of which was, under s. 30, awarded to the sub-inspector of police who apprehended him. The Officiating Joint-Magistrate, however, refused to award the remaining half to Sheo Gobind Behari, because information had been given by an anonymous petition, that declared that the writer would not be responsible if no opium was then found. Notwithstanding that, in his judgment he states that Sheo Gobind, through spite, charged his uncles (one of them the convict) with having illicit opium in their houses, and the evidence shows that information was given to the police by an anonymous letter delivered by Ghasita Kurmi, who, on being questioned by the sub-inspector, said that he had received it from Sheo Gobind, and the latter, when asked, admitted that he had written and sent this letter. [16 W. R. 65.]

"There can, therefore, be no doubt that Sheo Gobind was the informer, and as the law, s. 30, declares that the other half of the fine levied from persons convicted under s. 20, together with a reward of one rupee eight annas for each seer of opium confiscated, shall be given to the informer, I am of opinion that the Officiating Joint-Magistrate acted contrary to law in refusing to give it to Sheo Gobind, and that his order should be set aside."

The judgment of the High Court was delivered by

AINSLIE, J.—We think that we cannot interfere under s. 404 of the Criminal Procedure Code. Under s. 26, Act XIII. 1867, all fines, penalties, and confiscations prescribed by the Act, shall be adjudged by the Magistrate. Under s. 30, "one-half of all fines and penalties levied from persons convicted of offences under ss. 19, 20, and 21 of the Act, together with a reward of one rupee and eight annas for each seer of opium confiscated and declared by the Civil Surgeon to be fit for use, shall, upon adjudication of the case, be awarded to the officer or officers who apprehended the offender, and the other half of such fines and forfeitures, together with a reward of one rupee and eight annas for each seer of opium confiscated as aforesaid, shall be given to the informer." The section then goes on to provide that, "when the fine or penalty is not realized, the Board of Revenue may grant such reward, not exceeding Rs. 200, as may seem fit.

We think that the Magistrate is not bound to declare in his judgment how the fine shall be disposed of. It is his duty to adjudge the fine, and it is a necessary consequence of such adjudication that the penalties realized shall go to the parties indicated by the Act. If no fine comes into the Magistrate's hands under the adjudication, the matter then passes to the Board of Revenue, who can grant a reward. This appears to indicate clearly that the distribution of the penalty is no part of the judgment, and, therefore, not a matter over which this Court can exercise control.

There is another point which the Sessions Judge seems to treat as immaterial, but on which we entertain considerable doubt—namely, whether a person who does not come forward in person as an informer, and take the responsibilities together with the possible profits of his information, is entitled to any part of the penalties recovered. It is, however, not necessary to consider this matter at length. We cannot interfere. Let the papers be returned to the Sessions Judge.

1871,

QUEEN

2,

RAMDYAL  
SING,

8 B. L. R.

App. 7.



1871.

Nov. 25.

8 B. L. R.

App. 9.

[16 W. R. 70.]

*Before Mr. Justice Kemp and Mr. Justice E. Jackson.*THE QUEEN *v.* DWARKANATH HAZRA (PETITIONER).<sup>1</sup>*Act III. of 1864 (B. C.), s. 67—Fine for suffering Premises to be in a filthy State.*

DWARKA NATH HAZRA petitioned the High Court stating as follows :

1. That your petitioner practises as a mooktear in the district of Burdwan, and is the mooktear of Baboo Pyari Mohan Mookerjee and several other persons. That Baboo Pyari Mohan, of Uttarpara, Zilla Hooghly, is the owner of a piece of land near the Railway Station which is occupied by his tenants Annada Prasad Bhattacharjee and others.

2. That the said Annada Prasad and others deposited certain broken earthen pots and some *sal* leaves on the land.

3. That thereupon your petitioner, as the mookhtear of Baboo Pyari Mohan Mookerjee, was fined by Mr. Cockburn, Municipal Commissioner, in the sum of Rs. 50, on the 23rd February last.

4. That your petitioner thereupon appealed to the Chairman, who rejected the appeal on the 20th March last.

5. That your petitioner then brought a civil suit, which was dismissed on the 21st July last on the ground that the suit does not lie.

6. That your petitioner therefore begs to move your Lordships under ss. 404 and 405 of the Criminal Procedure Code, and prays that the order of Mr. Cockburn, dated the 23rd February last, be quashed, and the fine be directed to be refunded.

Baboo *Anand Chandra Ghosal* for the petitioner.

The judgment of the Court was delivered by

KEMP, J.—This is a charge brought in the first instance against Baboo Jai Krishna Mookerjee, of Uttarpara, who was supposed to be the owner of the soil. The charge, looking to the form 5 of the nuthi, was for depositing *sal* leaves for more than 24 hours. Harish Chandra Mookerjee, a sub-overseer of the Burdwan Municipality, appeared as prosecutor. The mookhtear, Dwarka Nath Hazra, in defence stated that the land belonged to Baboo Pyari Mohan Mookerjee, the son of the aforesaid Jai Krishna Mookerjee; upon which notice was served upon Pyari Mohan Mookerjee. In answer to that notice, Baboo Pyari Mohan Mookerjee admitted that the land belonged to him, but urged that the ryots in occupation were liable, and not the landlord. The defence of Dwarka Nath Hazra was that he was the mookhtear; that the land was occupied by tenants; that his employer lived in another district, and, therefore, to use the words of the mookhtear, could scarcely be liable. He admitted that he was the employee of Baboo Pyari Mohan Mookerjee. Upon this Mr. Cockburn fined the mookhtear Rs. 20. Under s. 67 of Act III. of 1864 (B.C.), the Municipal Commissioner was empowered to fine either the owner or occupier of the land, who suffered the same to be in a filthy state. Now, looking to the fact that the owner of the land, Baboo Pyari Mohan Mookerjee, admittedly lives in another district, and as there is no evidence that he suffered the land to be in a filthy state, we think that the discretion which the above section of the Act gives the Court has not been properly exercised in this case. We therefore quash the proceedings, and direct that the fine, if paid, be refunded.

The Municipal Commissioners are at liberty to proceed against the occupiers of the land if they think fit so to do.

<sup>1</sup> Miscellaneous Criminal Case, No. 142 of 1871, against an order of the Municipal Commissioner of Burdwan, dated the 23rd February, 1871.

Before Mr. Justice Kemp and Mr. Justice Ainslie.

IN THE MATTER OF THE PETITION OF GAUR MOHAN SING.<sup>1</sup>

*Criminal Procedure Code (Act VIII. of 1869), s. 249—Penal Code*

*(Act XLV. of 1860), s. 211.*

Procedure before framing a charge under s. 211 of the Penal Code.

1871.

Sep. 9.

8 B. L. R.

App. 11.

[16 W. R. 44.]

THE Sessions Judge of Hooghly submitted the following case for the opinion of the High Court :—

"The petitioner first applied to the police, accusing certain persons of having committed theft. The police enquired into the case, and reported that the case was a false one. The petitioner, pending the enquiry, applied to the Deputy Magistrate, calling the acts of the police in question, and asking for the Deputy Magistrate's personal investigation into his complaint. The Deputy Magistrate took up the petition with the police-report, and summoned the petitioner on a false complaint under s. 211, without taking any evidence on petitioner's behalf."

The Sessions Judge cited the cases of *The Queen v. Sheikh Edoo*<sup>2</sup> and *Dinonath Gope v. Saroda Mookopadhia*,<sup>3</sup> and continued : "The Deputy Magistrate was bound to take the evidence of the witnesses of the complainant respecting the matter which he charged against the accused, inasmuch as it was a charge cognizable under chapter xiv. of the Code of Criminal Procedure ; and until he had done so, and found the charge to be unsustained, he was not justified in dismissing the petitioner's case and instituting proceedings against him under s. 211 merely upon the police-report."

The opinion of the High Court was expressed by

KEMP, J.—The rulings quoted by the Judge were passed before Act VIII. of 1869 came into operation. Under s. 249 of Act VIII., the provisions of s. 180 have been made applicable to trials of offences under chapter xiv. of the Criminal Procedure Code.

In this case the petitioner charged a number of people with dacoity. During the police enquiry the petitioner became dissatisfied with the proceedings of the police, and charged them with partiality. He applied to the Deputy Magistrate to proceed to the spot in person, and to examine the witnesses adduced by the prosecutor. The Deputy Magistrate took no action in the matter, but waited the report of the police. The police reported the charge as false, and the Deputy Magistrate, without taking any evidence, or making any further enquiry, has directed the petitioner to be tried for an offence under s. 211.

We think that, although, under s. 180, the Deputy Magistrate was competent to dismiss the complaint, if in his judgment there was no sufficient ground for proceeding in it, this was a case in which the Deputy Magistrate ought to have made some enquiry to satisfy himself that the proceedings of the police were not, as stated by the petitioner, partial and improper, before charging the petitioner under s. 211. We direct the Deputy Magistrate to proceed with reference to the above remarks.

<sup>1</sup> Reference, under s. 434 of the Code of Criminal Procedure, by the Sessions Judge of Hooghly.

<sup>2</sup> 2 W. R. Cr. 47.

<sup>3</sup> 7 W. R. Cr., 47.

1871.  
Aug. 14.  
8 B. L. R.  
App. 12.

*Before Mr. Justice E. Jackson and Mr. Justice Mookerjee.*  
**THE QUEEN v HARGABIND DATTA SIRKAR AND OTHERS.<sup>1</sup>**  
*Trial on a Sunday—Irregularity of Proceeding—Criminal Procedure Code*  
(Act XXV. of 1861), s. 171.

A MAGISTRATE, while travelling in his district, tried a case partly at a place called Oluhati, where he took the statements of the accused persons to certain charges. This took place on the 24th June 1871. He then fixed Sunday next at noon for the further trial of the case, to be held in another village called Nundail. On the Sunday the witnesses for the defence came to the place named, but at 3 P.M. instead of noon. The Magistrate, after waiting an hour beyond the time fixed, moved on to the next village in his district. The Magistrate then sentenced the defaulting witnesses for their absence at the appointed hour under s. 174 of the Penal Code to one month's simple imprisonment.

The Sessions Judge sent up the proceedings to the High Court under s. 434 of the Criminal Procedure Code, on the ground that three errors of law had been committed by the Magistrate:—

1st, in fixing Sunday as the day for hearing; 2nd, in assuming the delay, only three hours, to be intentional; and, 3rd, in retaining the case on his own file, because s. 171 of the Criminal Procedure Code renders it obligatory for a Magistrate to transfer a case under s. 174 of the Penal Code to another officer for trial.

The judgment of the Court was delivered by

JACKSON, J.—We are far from satisfied with the proceedings of the Magistrate in this case. He admits that he ought not to have tried the charge, but to have transferred it to another Court. His sentences are unnecessarily severe. He was very wrong to fix Sunday for the trial of the case. It is a recognized holiday, and the witnesses might, on that account, have refused to attend. That, however, was not their defence. The fact that none attended at the appointed time gives the appearance of intentional absence. But, on the other hand, they may not have known that the Magistrate would move away, and the delay of two or three hours may have been accidental. This system of trying cases by Magistrates, while moving about from day to day, must be very harassing to all parties. It is not necessary to pass further orders in the case, as the sentences have expired.

*Before Mr. Justice Kemp and Mr. Justice E. Jackson.*

1871.  
Dec. 2.  
8 B. L. R.  
App. 19.  
16 W. R. 72.]

**PANCHUDAS (PLAINTIFF) v. SRIMATI SHUDHAMAYI (DEFENDANT).<sup>2</sup>**  
*Criminal Procedure Code (Act XXV. of 1861), s. 316—Maintenance of Children—Willingness of Father to support them.*

IN this case the prosecutrix applied for an order against her husband under s. 316 of Act XXV. of 1861 for maintenance. The Deputy Magistrate held that she had failed to establish her right to maintenance under s. 316, but awarded maintenance to her for their two infant children, although the husband was willing to take charge of them, and also to support the mother, if she would live with him.

<sup>1</sup> Reference, under s. 434 of the Code of Criminal Procedure.

<sup>2</sup> Reference, under s. 434 of the Code of Criminal Procedure, by the Officiating Sessions Judge of Midnapore.

The Sessions Judge, being of opinion that the Deputy Magistrate's award of maintenance for the children was illegal, sent up the proceedings of the Deputy Magistrate to the High Court under s. 434 of Act XXV. of 1861 for the purpose of having the order quashed.

The judgment of the High Court was delivered by

KEMP, J.—We think that the proceedings of the Deputy Magistrate are illegal. He finds that the wife is not entitled to receive maintenance, as she has not been able to prove that her husband ill-treated her, or was living in adultery with another woman. There is no evidence that the husband is unwilling to support his infant children; on the contrary, he states that he is willing to do so, provided they reside under his roof, and not in his father-in-law's house. The order of the Deputy Magistrate is quashed.

1871.  
PANCHUDAS  
v.  
SRIMATI  
SHUDHA  
MAVI,  
8 B. L. R.  
Ap. 19.  
[16 W. R. 72.]

Before Mr. Justice E. Jackson and Mr. Justice Glover.

GOPAL MAZUMDAR (PLAINTIFF) v. HARO SUNDARI BAISTAMI  
(DEFENDANT).<sup>1</sup>

1871.  
Nov. 23.  
8 B. L. R.  
Ap. 20.  
[16 W. R. 69.]

*Criminal Procedure Code (Act XXV. of 1861), ss. 169 and 435—Sanction for Pro-secution of Certain Offences—Jurisdiction of Court of Session.*

A Court of Session has no power to interfere under s. 435 of Act XXV. of 1861 with an order of a Magistrate permitting a prosecution under s. 169 of Act XXV. of 1861.

In this case one Gopal Chandra Mazumdar was prosecuted before the Magistrate for an offence, and discharged. Subsequently the Magistrate permitted the accused, Gopal Chandra Mazumdar, to prosecute one Haro Sundari Baistami, who had deposed against him, for having given false evidence. The Sessions Judge, under s. 435 of Act XXV. of 1861, sent for the record of the preliminary enquiry by the Magistrate into the charge of giving false evidence, and held that the sanction given by the Magistrate for the prosecution was illegal. The Magistrate having expressed to the Judge that he doubted the jurisdiction of the latter officer to interfere with the sanction given by him for the prosecution for giving false evidence, the Judge referred the matter for the opinion of the High Court under s. 434 of Act XXV. of 1861. The point referred was whether, under s. 435, the Court of Session has not jurisdiction to interfere in any matter arising in a preliminary enquiry by a Magistrate of an offence triable exclusively by the Court of Session, and consequently in the matter of the sanction given by the Magistrate in this case for the prosecution for giving false evidence.

The opinion of the High Court was delivered by

JACKSON, J.—We think that the Sessions Judge had no authority under the law to interfere with the order of the Magistrate allowing the prosecution of Haro Sundari Baistami by Gopal Chandra Mazumdar, and that such order of the Magistrate was in no way illegal. The Sessions Judge's order of the 29th July is set aside, and if Gopal Chandra Mazumdar desires, he can proceed with his complaint, and the Deputy Magistrate will hear and pass orders upon it.

The Deputy Magistrate's decision of the 14th August, dismissing Gopal Chandra Mazumdar's complaint, is set aside.

<sup>1</sup> Reference, under s. 434 of the Code of Criminal Procedure, by the Officiating Sessions Judge of Rajshahye.

1871.

July 31.

8 B. L. R.

Ap. 21.

[16 W. R. 36.]

*Before Mr. Justice Macpherson and Mr. Justice Ainslie.*THE QUEEN *v.* ZULFUKAR KHAN AND OTHERS.<sup>1</sup>*Evidence—Intoxication—Recording Evidence.*

Evidence taken on the trial of one prisoner wrongly admitted as evidence on the trial of another. Intoxication wrongly treated as an aggravation of offence.

THE facts sufficiently appear in the judgment of the Court, which was delivered by

MACPHERSON, J.—The case against Zulfukar Khan has been so carelessly and badly tried that the conviction and sentence must be set aside and a new trial had.

It appears that Kamru Khan, Guldad Khan, Dyanath, and others, on the one side, had a regular fight with Zulfukar Khan and others, on the other side; both parties using swords and *latties* freely. Dyanath received a sword-wound, of which he subsequently died; and Zulfukar Khan also received very serious injuries.

The matter having been taken up by the Magistrate, Kamru and Guldad were committed for trial in respect of the injuries done to Zulfukar, while Zulfukar was committed for trial charged with causing the death of Dyanath. Their separate commitment in this manner was quite regular and in proper form.

The Sessions Judge first tried Kamru and Guldad; and the whole matter having been fully gone into, the jury found them guilty (under ss. 326 and 109 of the Penal Code) of abetting the causing of grievous hurt to Zulfukar, being armed with weapons of offence, &c.

As soon as their trial was over, Zulfukar was put on his trial, charged with causing the death of Dyanath, causing grievous hurt to him, &c.

The jury was composed of the same persons who had just tried the case of Kamru and Guldad; and the Judge seems to have considered that all the evidence taken in the first trial was to be deemed as imported bodily into the second, and might be fairly used as evidence against Zulfukar. The result is, that the record of the case against Zulfukar, taken by itself, contains absolutely no evidence of the death of Dyanath, or of grievous hurt to Dyanath, caused or abetted by the prisoner. The Judge, in his summing up to the jury, treated the evidence which had been taken in the first case as evidence against Zulfukar; and the jury, also treating it as such, found him guilty of abetting the causing of grievous hurt, &c., to Dyanath.

Kamru and Guldad and Zulfukar were thereupon, on their several convictions, sentenced to rigorous imprisonment for five years each. And now they have filed a joint appeal to this Court.

It is impossible to say that the trial of Zulfukar has been properly conducted, or that there was any evidence whatever before the jury of the offence of which he has been convicted. It may be that, if the evidence which had just been taken in the first case had been repeated in the second, there would have been ample evidence to support a conviction. But the knowledge that this may be so is not enough. There is no evidence at all on the record as it stands; and if the evidence necessary to support the conviction of Zulfukar is imported from the record of the case against Kamru and Guldad, it is evidence given behind

<sup>1</sup> Criminal Appeal, No. 401 of 1871, against the order of the Sessions Judge of Patna, dated the 9th June 1871.

the back of Zulfukar—evidence given by witnesses in his absence, whom he has had no opportunity of cross-examining. The irregularities which have been committed are most serious and patent. It is the duty of a Judge to take care that the evidence in each case is complete in itself; and no Judge has any right whatever to place before the jury any evidence save that which has been legally put in, in the particular case which is under trial.

The Judge in the case against Kamru and Guldad alludes to the evidence of Dr. Jackson, but there is nothing to show that that evidence was formally put in, in either of the trials in the Sessions Court. It ought to have been expressly noted by the Judge that it was put in, and the deposition ought to have been taken from among the proceedings before the Magistrate, and placed with the record, first of the one, and then of the other, of the cases in the Sessions Court, a memorandum of its removal from each record being made. [16 W. R. 36.]

The Judge, in his summing up, told the jury that drunkenness, in the eye of the law, makes an offence the more heinous. There is no authority for such a proposition, and all that the Judge should have said was that drunkenness is no excuse, and that an act which, if committed by a sober man is an offence, is equally an offence if committed by one when drunk if the intoxication was voluntarily caused.

The Judge has taken down the evidence of the witnesses, for the most part, in the third person. This causes much awkwardness and confusion, and must waste a good deal of the time of the Judge himself. The ordinary and proper and convenient way of recording evidence is to take it down in the first person, exactly as spoken by the witness.

As regards Kamru and Guldad the conviction and sentence will stand, and this appeal is dismissed.

The conviction of Zulfukar and the sentence passed on him are set aside, and a new trial is ordered.

Before Mr. Justice Ainslie.

THE QUEEN v. HOSSAIN ALI.<sup>1</sup>

*False Evidence—Contradictory Statements—Two Charges—Plea of Guilty on one Charge—Acquittal on the other.*

Where a prisoner is charged separately for having given false evidence with regard to two statements directly opposed to each other, a plea of guilty on one of the charges does not involve an acquittal on the other. A Sessions Court is bound to take evidence and try a charge before it can acquit a prisoner of that charge.

The prisoner in this case, in a certain suit in the Small Cause Court, made two statements regarding the preparation of a document directly contradictory of each other. The Judge of the Small Cause Court disbelieved the statement first made by the prisoner, and sent him to the Magistrate with a view to his being placed on his trial for having given false evidence, but he did not specify the particular statement or parts of the evidence given before him which he considered to be false. The committing Magistrate, however, framed two charges, based one on each statement. In the Sessions Court the prisoner pleaded guilty to the charge framed on the second statement—i. e., the one considered to be true by the Judge of the Small Cause Court.

<sup>1</sup> Revision of proceedings under s. 404 of the Code of Criminal Procedure.

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v.

ZULFUKAR

KHAN,

8 B. L. R.

Ap. 21.

1871.

Aug. 15.

8 B. L. R.

Ap. 25.

1871.  
 QUEEN  
 v.  
 HOSSAIN  
 ALI,  
 8 B. L. R.  
 Ap. 25.

The Sessions Judge was of opinion that, as the prisoner pleaded guilty to the charge based on one of the statements, he must be acquitted of the charge based on the other and contradictory statement, and so he convicted the prisoner on his own admission, and acquitted him of the other charge without trying it at all. The case came before the High Court as a Court of Revision, and the following judgment was passed by

AINSLIE, J.—The charge preferred against Hossain Ali by the Judge of the Court of Small Causes was that he had falsely denied the drawing up of a certain bond which was said to have been prepared by him. The second statement made by the accused, before the Small Cause Court, was referred to as evidence in support of this charge.

The committing Magistrate has altered the nature of the prosecution by framing two charges, one based on each statement, instead of proceeding on the charge on which the Judge of the Small Cause Court apparently intended to prosecute. The Judge, however, had omitted to specify the particular statement or parts of the evidence given before him which he considered to be false, and this probably led to this change. The Sessions Judge has treated the case as if the plea of guilty on one charge necessarily involved an acquittal on the other, and has acquitted the accused on the first charge without taking any evidence. He has, indeed, come to a conclusion as to the facts of the case, but not from any evidence before him.

Taking the Judge's own view of it, the sentence of 24 hours' imprisonment is quite inadequate. The accused made a statement which he asserts to be true—he found it was disbelieved, and he was in danger of being prosecuted, so to suit himself to the view taken by the Court, he, on being recalled, made a directly contrary statement, knowing the same to be false, deliberately doing his best to mislead the Court and prejudice the party who was defendant in the Small Cause Court in order to shield himself. This is a very different case from that of a man who, having made a false statement, afterwards repents and reveals the truth.

But this is not the most serious defect in this case. The result of the proceedings is that there has really been no trial at all on the only charge which was preferred by the Small Cause Court Judge. He did not charge the accused with giving false evidence in making the statement embodied in the second charge, for which he has undergone a nominal punishment. On the contrary, he believed that statement to be true. The Magistrate might have dismissed the charge, but he did otherwise: he committed the accused for trial by the Court of Session on the charge preferred by the Judge of the Small Cause Court. The Sessions Judge was bound to hear the evidence tendered in support of it before he recorded a judgment of acquittal. As matters stand, the prisoner has been allowed to elect to be punished on a charge of an offence which the Judge treated as scarcely an offence at all, and to escape trial on a charge which, if proved, would probably have brought on him a severe penalty. As pointed out in a letter dated 19th June 1867,<sup>1</sup> an accused person cannot be allowed to make such election. It is to be regretted that the Judge of the Small Cause Court did not exercise the powers vested in him by s. 173 of the Criminal Procedure Code; the mis-trial could not have occurred if he had done so.

<sup>1</sup> 8 W. R. Cr. Letters, 6.

*Before Mr. Justice Loch and Mr. Justice Ainslie.*

THE QUEEN v. JUNGLI BELDAR.<sup>1</sup>

*Act XXI. of 1856—Abkari Laws—Criminal Procedure Code (Act XXV. of 1861 and Act VIII. of 1869), s. 61.—Fine, Realisation of.*

1871.  
Janv. 13.  
8 B. L. R.  
Ap. 47.  
[17 W. R. 7.]

The provisions of s. 61 of the Criminal Procedure Code do not apply to fines imposed under Act XXI. of 1856; such fines cannot be levied by distress and sale of the offender's property.

THE following case was submitted for the opinion of the High Court by the Magistrate of Monghyr. Jungli Beldar was sent in by the police on a charge under XXI. of 1856 of illicit distillation of spirits, and he admitted his guilt.

The lower court sentenced him to pay a fine of Rs. 20, and in default to undergo two months' rigorous imprisonment under s. 3, Act XXIII. of 1860. The defendant elected to go to jail, yet the Joint-Magistrate ordered the issue of a warrant for recovery of the fine by distress and sale.

In referring the case, the Magistrate submitted that s. 61 of the Criminal Procedure Code was not applicable.

The question was whether the provisions of section 61, Act XXV. of 1861, apply to fines and forfeitures under Act XXI. of 1856.

The judgment of the Court was delivered by

AINSLIE, J. (who, after reciting ss. 49, 71-74 of Act XXI. of 1856, proceeded)—It is to be observed, first, that s. 72 makes the rules for the trial of cases before a Magistrate applicable, but leaves the punishment to be adjudged under the Abkari Act; and, second, that it is only by inference from s. 74 that imprisonment, on account of non-payment of a penalty is warranted. There is no specific provision in the Act authorising such imprisonment. By s. 3, Act XXIII. of 1860, it was specially provided that imprisonment might be awarded in default of payment of a fine or forfeiture under Act XXI. of 1856. At the time when Act XXIII. of 1860 was passed, and up to the passing of Act XLV. of that year, there was no law under which a fine could be realised, after the person sentenced to such fine had undergone imprisonment in default of payment. S. 3, Regulation XIV. of 1797, specifically declares that such imprisonment is to be held as equivalent to the fine; and Act II. of 1839, which gave power to levy the amount of a fine by distress and sale of the goods and chattels of the offender found within the jurisdiction of the Magistrate, made imprisonment in default conditional on, and therefore subsequent to, the non-realization of the fine by such distress and sale. The Indian Penal Code for the first time provided in s. 70 for the realization of fines, notwithstanding imprisonment on default, and this was expressly done to take away from an offender a choice (which up to that time he had been able to exercise in most cases) whether he would suffer in person or property, but s. 70 only applies to offences under the Code (see s. 40), and s. 5 declares that nothing in the Act is intended to vary or affect any of the provisions of any special or local law.

By s. 5, Act I. of 1868, the provisions of s. 63 to 70, both inclusive, of the Penal Code, and of s. 61 of the Criminal Procedure Code, were declared to apply to all fines imposed under the authority of any Act thereafter to be passed,

<sup>1</sup> Reference to the High Court, under s. 434 of the Code of Criminal Procedure, by the Magistrate of Monghyr.



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 BELDAR,  
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 [17 W. R. 7.]

unless such Act shall contain an express provision to the contrary. S. 61, as amended by Act VIII. of 1869, is as follows: "Whenever an offender is sentenced to pay a fine, the Court which sentences him, whether or not the offence be punishable with fine only, and whether or not the sentence direct that, in default of payment of the fine, the offender shall suffer imprisonment, may issue a warrant for the levy of the amount by distress and sale of any moveable property belonging to the offender \* \* \* \* ." The first words of this section are apparently very wide, but I am of opinion that they cannot operate to give a Magistrate any extended power of punishment. This section is part of a Code of Procedure, and we must look, not to the rules of procedure, but to the law which declares an act to be an offence, and prescribes the penalty for it, to ascertain the extent of punishment that can legally be awarded. As regards offences under the Penal Code, this section, however read, gives no extended power, for all that may be done under it may be done under that Code. As regards offences under special or local laws, it seems to me clear from s. 5 of the Penal Code and ss. 9 and 21 of the Procedure Code that it does not give such extended power. S. 5 of the Penal Code expressly excepts special and local laws from being in any way affected by its enactments. S. 9 of the Procedure Code shows that "trial" does not include punishment—the words are "and the word 'determined' (shall be deemed) to comprise trial and every subsequent proceeding, including the punishment of the offender," and s. 21 declares that "the Criminal Courts shall have jurisdiction in respect of offences punishable under any special or local law (*exceptis excipiendis*), and, in the investigation and trial of the offences hereby declared to be within their jurisdiction, shall be guided by the provisions of this Act;" therefore reading this last section with s. 9 I hold that the Procedure Code was not intended to give any power of punishment as a result of trial beyond what is given by the special or local law. A different construction would be inconsistent with s. 72, Act XXI. of 1856, which certainly does not contemplate that any rule of procedure should operate to modify the substantive law.

The true construction of s. 61 of the Criminal Procedure Code appears to me to be this; that directly on passing a sentence which includes a fine leviable by distress, whether that be the only punishment or not, and whether any provision be made for imprisonment on default of payment or not, it shall be lawful for the Magistrate to issue his warrant for the levy of the fine by distress and sale of the goods of the offender; or, in other words, that the provisions of Act II. of 1839, which postponed imprisonment till the distress and sale of goods had failed to realize the fine, are modified so that imprisonment and distress may be simultaneously ordered, and that imprisonment, whether as a part of the original punishment or as a contingency arising out of it, shall not be allowed to stop the process for levy of the fine so as to give the offender time to remove his goods beyond the reach of the law, when the law under which the fine is imposed authorizes such levy by distress and sale of the goods.

The fact that the general clauses of Act I. of 1868, s. 5, and the similar Bengal Act V. of 1867, s. 4, extend the provisions of s. 63 to 70 of the Indian Penal Code and section 61 of the Criminal Procedure Code to all fines imposed under laws enacted subsequently to the passing of those Acts, without any direct recital of those sections in such laws, shows that those provisions could only be previously applied by direct reference thereto.

Moreover, on general principles, I think, we are bound to hold that an enhanced punishment for any offence must be based on positive enactment and not on inference.

Consequently, I am of opinion that the order of the Joint-Magistrate of Monghyr, directing the levy of the fine imposed on Jungli Beldar, notwithstanding his having undergone imprisonment in default of payment of that fine, is without authority in law, and must be quashed, and that the fine, or any part of it that may have been levied, must be refunded.

1871.  


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**QUEEN**  
*v.*  
**JUNGLI**  
**BELDAR,**  
 8 B. L. R.  
 Ap. 47.  
 [17 W. R. 7.]

*Before Mr. Justice Kemp and Mr. Justice E. Jackson.*

THE QUEEN *v.* DINANATH GANGOOLY (PETITIONER).<sup>1</sup>

*Police Officer, Offence by—Act V. of 1861, ss. 8 and 29.*

1871.  
 Feb. 10.  


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 8 B. L. R.  
 Ap. 58.  
 [17 W. R. 12.]

ONE Dinanath Gangooly was a head-constable in the Bengal Police Force in the District of Howrah. On the 2nd September he was suspended by the District Superintendent of Police, and ordered to remain in the police lines. On the 20th of October 1871, he applied to Mr. Godfrey, Deputy Magistrate, then in charge of the district, to be released from illegal restraint. He was then brought up before Mr. Godfrey, who passed the following order on his petition:—

“I submit this for final orders of the District Magistrate. There is no one in Court to prevent petitioner's free movement, or to show cause why he should not be free, therefore he may go with his pleader.”

Subsequent to this order he left the police lines. On hearing that a warrant was out for his arrest, he, on the 30th November 1871, voluntarily appeared before the District Magistrate, who ordered him to take his trial under s. 29, Act V. of 1861, for having disobeyed his superior officer, the District Superintendent.

On the above state of facts, the Magistrate, on the 4th of December 1871, convicted him under s. 29 of Act V. of 1861, and sentenced him to pay a fine of 30 rupees, or in default to undergo rigorous imprisonment for 20 days.

Mr. *Bonerjee* (with him *Baboo Kamalakant Sen*), for Dinanath Gangooly, moved the High Court (KEMP and E. JACKSON, JJ.) to call for the records of the trial under s. 405 of Act XXV. of 1861, and to quash the conviction and sentence passed by the Magistrate for the following reasons:—

1st.—That, after suspension, the applicant had ceased to be a police-officer under s. 8 of Act V. of 1861, and the act complained of having been committed subsequent to the suspension, the conviction under s. 29 of Act V. of 1861 was illegal; and

2nd.—That if the applicant were a police-officer after suspension, the conviction was also wrong, because the applicant left the lines in pursuance of an order of a Magistrate having jurisdiction to pass such order.

The Court sent for the papers, at the same time intimating to the Magistrate that he might submit any explanation he liked, or appear to support the conviction.

Baboo *Jagadanand Mookerjee*, Junior Government Pleader, appeared for the Magistrate to support the conviction. He urged that there were several

<sup>1</sup> Miscellaneous Criminal Case, No. 3 of 1872.

1871.

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kinds of suspension, *viz.*, suspension without pay, and suspension on quarter pay or half pay: see the rules of 17th July 1867. The petitioner was not dismissed from the service. During his suspension he could not act as a police-officer; but still, not being dismissed, he was bound to obey the orders of his superior officer.

KEMP, J.—We think that the conviction in this case is illegal. The petitioner has been convicted under s. 29 of Act V. of 1861 of withdrawing from the duties of his office without permission. The petitioner was a head-constable in the police-force. Under s. 8, Act V. of 1861, which is enacted for the regulation of the police, every police-officer is to receive on his appointment a certificate in the form annexed to the Act. The form is to this effect: "A B has been appointed a member of the police-force under Act V. of 1851, and is vested with the powers, functions, and privileges of a police-officer;" and under s. 8 this certificate ceases to have effect whenever the person named in it is suspended, or dismissed, or otherwise removed from employment in the police-force, and it must be immediately surrendered to the superior officer of such person, or to some other officer empowered to receive the same. It is admitted that the petitioner was under suspension, and therefore, under s. 8 aforesaid, the powers, functions, and privileges of a police-officer vested in him by the certificate ceased to have effect; he was no longer a police-officer, and therefore s. 29, Act V. of 1861, which applies to police-officers guilty of violation of duty, or wilful breach or neglect of any rule or regulation, or lawful order, &c., does not apply to the petitioner, who was not a police-officer within the meaning of the Act. We have already showed the inclination of our minds in our order sending for the record, but at the same time we thought it proper to give the Magistrate an opportunity to appear in this Court, either in person or by agent, or to submit any explanation which he might deem proper. The Junior Government Pleader has now appeared, and he contends that there are recognised in the police department different kinds of suspension—suspension without any pay, suspension on quarter pay, and suspension on half pay; and he referred us to the rules promulgated by Government with reference to the adjustment of the salaries of uncovenanted officers under suspension. These rules, dated 17th June 1867, which apply to the whole body of uncovenanted officers, and not to the police-force alone, merely provide for the payment of a subsistence allowance to uncovenanted officers under suspension. We think, as already remarked above, that the petitioner, not being a police-officer under the meaning of the Act, could not be legally convicted under s. 29 of that Act.

We therefore quash the conviction, and direct that the fine be refunded to the petitioner.

Before Mr. Justice Bayley and Mr. Justice Markby.

THE QUEEN v. RADHU SING (PETITIONER).<sup>1</sup>

Police Officer, Offence by—Act V. of 1861 s. 29.

1872.  
March 2.  
8 B. L. R.  
Ap. 60.

[17 W. R. 34.]

RADHU SING, a head-constable, was one morning investigating a police-case in the garden of one Mr. Foley in Sylhet. The evidence for the prosecution established that, while Radhu Sing was in the garden, one Jadab came and informed him of an impending disturbance at another place, at which he declined to do anything upon the information; that Radhu Sing subsequently went into the house of Mr. Foley, who repeated to him the news conveyed by Jadab, to whom he said that, on finishing the enquiry in the case in hand, he would attend to the matter; that after finishing his enquiry he went to eat; that in the meantime the disturbance spoken of had taken place; that on his way home he met the sub-inspector proceeding to the scene of the riot, who told him to finish his breakfast soon and join the police-party; that after some of the principal rioters had been captured, Radhu Sing joined in and succeeded in making prisoners of a few of the rioters.

Radhu Sing was charged by the District Magistrate with having committed an offence punishable under s. 29 of Act V. of 1861, in that he did not take personally any prompt action on first receiving information of a breach of the peace likely to take place. The defence was that, when the accused got information of the disturbance, he was at the time *bond fide* engaged as a police-officer in enquiring into the case of another party suspected of having committed an offence, and that he could not attend to anything else until he had finished the enquiry. The Magistrate, considering the defence to be no justification of the conduct of the accused in not at once repairing to the scene of the impending riot, convicted him under s. 29 of Act V. of 1861, and sentenced him to rigorous imprisonment for three months.

Mr. *Sandel*, for the accused, moved the High Court (BAYLEY and MARKBY, JJ.) to send for the record of the case, and to quash the sentence on the ground that there was no evidence of any offence having been committed punishable under s. 29 of Act V. of 1861; and that, it being an admitted fact that the accused was actually investigating another case, his refusal to neglect the work he had in hand, and attend to another case, amounted to no offence under s. 29 of Act V. of 1861.

The Court sent for the papers.

Baboo *Jagadanand Mookerjee*, Junior Government Pleader, for the Crown.—S. 23 of Act V. of 1861 lays down the duties of police-officers, one of which is “to collect and communicate intelligence affecting the public peace.” The accused in this case neglected to do his duty in refusing to take any notice of information received by him regarding the likelihood of a breach of the peace taking place.

Mr. *Sandel* in reply.

MARKBY, J.—The charge against the prisoner in this case is made under s. 29, Act V. of 1861; and the question to be considered here is whether the prisoner has been properly convicted of the offence under that section. That

<sup>1</sup> Criminal Motion, No. 25 of 1872, from an order of the Sessions Judge of Sylhet, dated the 5th January 1872, affirming an order of the Magistrate of that district, dated the 27th December 1871.

1872.

GURU

v.

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SING.

8 B. L. R.

Ap. 60.

[17 W. R. 34.]

section provides: "Every police-officer who shall be guilty of any violation of duty, or wilful breach of neglect of any rule or regulation, or lawful order, made by competent authority, &c., shall be liable to a penalty not exceeding three months' pay or to imprisonment."

Now, I must say that I see no reason whatever to doubt the conclusion which has been arrived at by the Magistrate and the Sessions Judge that the police-officer behaved in a manner which was altogether improper, but the error which I think has been committed is where the Judge of the first Court says: "The defendant all but admits the charge." I think that the defence set up by the prisoner was, if true, an answer to the charge, and one which, if true, ought to have prevailed. His defence was that he was engaged in investigating another case, that is to say, he was engaged upon one of the duties of a police-officer. He is charged with violating another of the duties of a police-officer, *viz.*, his duty to prevent the commission of offences, and it is one thing to question the conduct of a police-officer, as a police-officer, in not leaving one case to interfere in another, and another thing to say that he is guilty of an offence under s. 29. Before he can be convicted of an offence under s. 29, it must be found that he is guilty of more than mere neglect; he must be guilty of a violation of his duty, which must mean an intentional violation, and therefore it was necessary to enquire in this case whether or not the violation of duty was deliberate and intentional, or whether (as the defence is), however mistaken and erroneous it may have been, it was the result of his opinion that he ought not to quit the performance of one duty to perform another. Therefore I think that the defence set up by the defendant, that he was acting to the best of his discretion, has not been disposed of. In regard to the prisoner having gone to his dinner, we think that it cannot be relied upon in evidence, because it appears to have been done under the direction of his superior officer.

I think, therefore, that we are bound in this case to quash the conviction, and order the prisoner's release.

BAYLEY, J.—I am of the same opinion. The particular facts of the case put it out of the purview of the offences mentioned in s. 29.

1872.

April 6.

8 B. L. R.

Ap. 62.

W. R. 47.]

*Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Ainslie.*

ISWAR CHANDRA KARMAKAR v. SITAL DAS MITTER.<sup>1</sup>

*Penal Code (Act XLV. of 1860), s. 441—Intention to intimidate.*

The complainant, Iswar Chandra Karmakar, brought charges against the accused, Sital Das Mitter, under ss. 447, 404, 403 of the Indian Penal Code, on the ground that the accused had unlawfully taken possession of a house, the property of his deceased mother-in-law, Brahma Bewa. The complainant laid the charge as guardian of Brahma's two surviving daughters.

The accused stated that he had purchased the land on which Brahma's house stood at Baranagore, and had afterwards become aware that Brahma's house stood on this land; that he demanded rent from her, and, on her refusing to pay, instituted a suit against her, but allowed it to drop, on consideration of her selling the house to him, and his taking a verbal lease from her. Shortly

<sup>1</sup> Reference, under s. 434 of the Code of Criminal Procedure, by the Officiating Magistrate of 24-Pergunnas.

before her death, she had vacated the house, and gone to live with her son-in-law at Panihatti. The accused took possession of the house after she had left, but two or three days before her death, and sold it to one Bidhu. On these grounds the Deputy Magistrate convicted the accused of criminal trespass, saying that he did not consider his explanation proved: and that, if deceased had known what he had done, she would have been much annoyed thereat.

The Judge of 24-Pergunnas referred the case to the High Court, observing that it did not seem to him that the accused committed the act, which he admitted, with the intention to insult, annoy, or intimidate any person, neither did he actually insult, annoy, or intimidate any one. He was of opinion, therefore, that the order of the Deputy Magistrate should be reversed.

1872.  
ISWAR  
CHANDRA  
KARMAKAR  
3.  
SITAL DAS  
MITTAR,  
8 B. L. R.  
Ap. 62.  
[17 W. R. 47.]

Baboo Keshab Chandra Roy for the complainant.

The judgment of the Court was delivered by

COUCH, C.J.—In this case the criminal law has been improperly resorted to, as it too frequently is in disputes of this kind. There was not here an intention to commit an offence, nor was there an intention to intimidate, insult, or annoy any person who was in possession of the house. That does not mean to insult or annoy any person in constructive possession. It obviously means to intimidate, insult, or annoy any person actually in possession of the premises. Here the intention, so far as appears, was to assert either a real or a fancied right to the property. The man might have been mistaken with regard to his rights, but that was the intention with which he appears to have entered the house. The conviction must be quashed.

Before Mr. Justice Loch and Mr. Justice Ainslie.

THE QUEEN v. WAZIRA AND ANOTHER (APPELLANTS).<sup>1</sup>

Penal Code (Act XLV. of 1860), s. 498—Presumption of Marriage—Burthen of Proof—Procedure—Depositions before the Magistrate.

In a charge under s. 498 of the Penal Code, the proof that the woman and a man, other than the accused, were living together, is sufficient to throw the burthen of proof on the accused that they were not man and wife.<sup>2</sup>

Evidence taken before the Magistrate, but not used at the trial, cannot be referred to on appeal.

THE prisoners in this case were charged by the Magistrate under s. 365 of the Indian Penal Code. The Sessions Judge of Patna added another charge under s. 498, on the ground that the prosecutor had, in his petition to the Magistrate, prosecuted the prisoners under that section. The Sessions Judge found the prisoners guilty under s. 498 of the offence of having taken away Dawlati from the prosecutor, knowing or having reason to believe that she was his wife, with intent that she might have illicit intercourse, and sentenced the prisoners to undergo rigorous imprisonment for nine months.

The prisoners appealed to the High Court.

Mr. C. Gregory for the appellants contended that there was not sufficient evidence of the marriage upon which to convict the prisoners: that the evidence

1872.  
Jan. 6.  
8 B. L. R.  
Ap. 63.  
[17 W. R. 5.]

<sup>1</sup> Criminal Appeal, No. 681 of 1871, from an order of the Sessions Judge of Patna, dated the 25th September 1871. [Overruled by *Empress v. Pitambur Singh*, 1 L. R., 5 Cal. 566; 5 C. L. R. 597.—Ed.]

<sup>2</sup> See Act f. of 1872, s. 50.

1872.

QUEEN

v.

WAZIRA.

8 B. L. R.

Ap. 63.

[17 W. R. 5.]

given in the Sessions Court was not reliable, being contradictory to the statements made before the police, and the evidence recorded by the Magistrate; that it has always been usual on appeal to refer to these statements and to the evidence recorded by the Magistrate when they form a part of the record, although there is nothing in particular to show that these were referred to before the Sessions Court.

LOCH, J.—The prisoners in this case were committed for trial by the Magistrate under s. 365 of the Indian Penal Code. The Sessions Judge added another charge under s. 498 of that Code, being the charge which was originally made against the prisoners by the complainant Ghasita, and the Judge, agreeing with two out of seven of the assessors, convicted the prisoners on this charge, and sentenced them to nine months' rigorous imprisonment.

In appeal, the pleader for the appellant wished to read certain statements made by the witnesses before the police-inspector; he also wished to read the evidence that was taken before the Magistrate. But the Court refused to allow either the one or the other to be read. The statements made before the police-inspector are not evidence, and could not be used as evidence in the trial; and unless the pleader could show that the evidence taken before the Magistrate had been used as evidence at the Sessions trial, and laid before the Judge and the assessors, and that they, after hearing that evidence, based their opinion upon it, we think that that evidence cannot now be laid before us, and made use of in support of the appeal.

An objection has been taken to the conviction in this case, that there is no evidence of the marriage of the parties Ghasita and Dawlati. But the law says: Whoever takes, or entices away, any woman who is, and whom he knows or has reason to believe to be, the wife of any other man, from that man, &c. Now, in this case it is clear that Ghasita and Dawlati were living together. It appears that they had been living together in the house of Larmin, and had removed from that house to the house of Moracho, from which the woman Dawlati was taken away. The fact of their living together is sufficient to raise the presumption of their being man and wife; and it was for the prisoners to show that they were not married, and that Ghasita had no legal right to prevent her going away.

With regard to the facts of the case, it is urged that the evidence is untrustworthy, it being very contradictory. No doubt, the evidence of Ghasita and the evidence of his wife are contradictory on certain points, but both of them have deposed to one fact, *viz.*, that the woman was taken away; and accepting the deposition of Dawlati, which is most favourable to the prisoners in this case, as containing the true account of the occurrence, we think that the evidence of her being taken away from the person whom the prisoners had reason to believe to be her husband is proved, and that therefore this appeal must be dismissed.

AINSLIE, J.—With regard to the point as to whether there is evidence of the marriage, I wish to add that there is the evidence of Ghasita and the woman Dawlati to the effect that she is his legally married wife, and that this evidence stands altogether un rebutted; and that no evidence is shown that the alleged marriage did not take place; it must, therefore, be taken that there was a marriage.

I concur with my learned colleague in dismissing this appeal.

## BENGAL LAW REPORTS.

## [APPELLATE CRIMINAL.]

*Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Ainslie.*THE QUEEN *v.* CHANDRA JUGI (APPELLANT).<sup>1</sup>*Power of a single Judge of the High Court—Appeals in Criminal Cases.*

1872.

April 9.

A Judge of the High Court, sitting alone on the Appellate Side, has the power to hear and dispose of appeals in criminal cases.

9 B. L. R. 6.  
[17 W. R. 47.]

THE Sessions Judge of Jessore, not concurring with the assessors, found the prisoner, Chandra Jugi, guilty of an attempt to commit murder, and sentenced him to rigorous imprisonment for the term of seven years. The prisoner, on the 18th December 1871, presented a petition of appeal from the conviction, which petition was heard and rejected on the 27th January 1872 by Glover, J., sitting alone.

On the 15th February 1872, Baboo *Bhairab Chandra Banerjee* for the prisoner presented another petition of appeal from the said order. This appeal came on for hearing before a Division Bench of the High Court (Couch, C.J., and Ainslie, J.).

Baboo *Bhairab Chandra Banerjee*, for the prisoner, contended that there was nothing in the Criminal Procedure Code expressly authorizing a single Judge of the High Court to try and reject criminal appeals, but the practice had been for a single Judge to hear criminal appeals in the first instance, and to refer them to another Judge if it was necessary either to modify or reverse the sentence of the lower Court. This practice was adopted by the High Court, and continued to be in force till 1867 or 1868, since which time all such appeals have been heard by a Division Bench consisting of two Judges. In 1869, Peacock, C.J., questioned the authority of a single Judge to decide criminal appeals, and re-tried certain cases which had been so decided. Under 24 and 25 Vic., c. 104, s. 13, the High Court has the power, by its own rules, to provide for the exercise of appellate criminal jurisdiction by a single Judge; but as no rule seems to have been made by the High Court since 1869, conferring upon a single Judge the power of exercising criminal appellate jurisdiction, the order passed by Glover, J., rejecting the appeal was passed without jurisdiction. Cl. 36 of the Letters Patent of 1865 does not confer any authority upon a single Judge to dispose of such cases, unless there be a rule of Court authorizing the same, and a single Judge be appointed under such rule to dispose of such cases. As a matter of practice, however, it must be admitted that, since November 1870, single Judges have tried criminal appeals, but such a practice does not confer any authority, and the decisions passed by Judges sitting singly might be questioned.

COUCH, C.J.—In this case the prisoner presented a petition of appeal to this Court from a conviction by the Sessions Judge, which was disposed of on the 27th of January by Glover, J., sitting alone. The learned Judge rejected the petition. The petitioner has now, by his pleader, presented another

<sup>1</sup> Criminal Appeal, No. 143 of 1872, from an order of the Sessions Judge of Jessore, dated the 18th December 1871.



1872.

QUEEN

v.

CHANDRA

JUGI,

9 B. L. R. 6.

[17 W. R. 47.]

petition, which was filed on the 15th of February, within the time allowed by law; and therefore the question arises whether the first petition was properly disposed of. If it was, the Court will not allow the matter to be re-opened.

Now, the 13th section of the 24 and 25 Vic., c. 104, for constituting the High Court, enacted that the exercise of the original and appellate jurisdiction vested in the Court by one or more Judges, or by Division Courts constituted by two or more Judges, was to be provided for by rules of the Court. I have not found that any formal rules under this section were passed until the 1st of January 1865; but the practice of disposing of some business by one Judge, and of other business by a Division Court, existed from the time of the institution of the High Court, which, on the appellate side, for the most part, adopted the practice of the Sudder Court. But, on the 1st of January 1865, a rule was made, by which it was declared that all rules, which at the time of the abolition of the Sudder Court were in force in that Court, were to extend, so far as they were applicable, and as nearly as might be, to all proceedings of appellate jurisdiction in the High Court, not being cases of appeal from the ordinary original civil jurisdiction of the Court, except so far as such rules were, contrary to the said 24 and 25 Vic., c. 104, or to the Letters Patent, or as the same might have been or should thereafter be altered or modified by the Court. Those words are very important; the rules of the Sudder Court were to be in force, except so far as the same might have been altered or modified by the Court before that time. Now, it appears that there was the rule of the Sudder Court of the 27th of April 1854, which required that all criminal cases, whether appeals or referred cases, should be tried before a Bench of at least two Judges. But on the 14th of June 1854 a modification of that rule was made, and it was then provided that, "if, by accident or indisposition, one of the Judges, forming a double Bench for the trial of nizamat cases, is prevented from attending the Court, it shall be competent to his colleague, sitting alone, to take up and dispose of any appeal or referred criminal trials, in which the opinion of the Sessions Judge agrees with the fatwas of the law-officer, or the verdict of the jury or assessors who tried the case, reserving for the consideration of his colleague any case in which he may entertain doubt, or may be inclined to differ from the Sessions Court."

In the rules made on the 1st of January 1865, which were continued in force by a rule made on the 2nd of January 1866, after the issuing of the Letters Patent now in force, there is another rule (No. 30) which says that "appeals on the [criminal side of the appellate branch of the Court, which are in the first instance heard before one Judge, may, if he think fit, be referred to such Division Court." And the previous rule (No. 29) is that "a Division Court for the hearing of criminal appeals may consist of two or more Judges." This rule, 30, shows that, either in the time of the Sudder Court or of the High Court, a practice had existed of criminal appeals being in the first instance heard before one Judge. The language of the rule clearly shows this. It recognizes it as a practice which was then in existence, and provides that the Judge may, if he think fit, refer the appeal to the Division Court. Therefore, whatever might have been the rule of the Sudder Court, it had, before the passing of the rules of the 1st of January 1865, been altered or modified so as to allow of criminal appeals being heard in the first instance before one Judge. Even if that were not so, this rule, 30, might be considered as implied by allowing appeals so to be heard, although it does not in terms say that they shall be. By providing that the Judge may refer appeals to a Division Bench, it impliedly authorizes him to hear them in the first instance.

There is really, then, a rule of this Court made under the authority conferred upon it by the 13th section of the Act constituting the Court, allowing a single Judge in the first instance to hear criminal appeals; and the papers which we have got, showing what took place in the matter when it came before Sir Barnes Peacock, confirmed the view of what was the practice of the High Court at the time the rules of 1865 were made.

There is a minute of Sir Barnes Peacock, dated the 8th of February 1869, in which, speaking of what the practice had been, he says: "As criminal appeals were formerly heard and determined by one Judge of the Sudder Court, except in cases in which the order had to be signed by two Judges under s. 420 of the Code of Criminal Procedure, I have thought it right to appoint each of the Judges of the 3rd and 5th Benches, sitting alone, to hear and determine criminal appeals." The appointment of four of the Judges to sit singly to hear criminal cases was made by an order of the same date. That appears to have been objected to as being an exercise of a power which did not belong to the Chief Justice under the Act of Parliament. The power of the Chief Justice was not to make a rule that criminal appeals should be tried by a single Judge; but that if there was a rule of the Court to that effect, he was to determine what Judges should sit to hear them. And his attention having been called to that, Sir Barnes Peacock, in a minute, dated the 12th of February 1869, says: "I find that there was a rule of the late Sudder Court under which all appeals in criminal cases and cases for revision were required to be heard before two Judges. I do not find that that rule was ever revoked. Under these circumstances, I doubt whether the rule of this Court, which provides that all such business as was formerly heard and determined by one Judge of the Sudder Court may be heard and determined by one Judge of the High Court, authorizes the appointment of one Judge to hear criminal appeals or revisions." And he revoked the order which he had made on the 8th of February.

Now, it is to be observed that the learned Chief Justice appears not to have had present to his mind the rule 30 at all. He does not refer to it, and he assumes that the matter was governed by the rule of the Sudder Court which required that criminal appeals should be heard before two Judges. And that rule never having been revoked, he considered that every criminal appeal must be heard by two Judges. But there was the circumstance which appears in his own minute that it had been the practice in the Sudder Court for one Judge to hear criminal appeals; and there was the rule 30 showing that the High Court had adopted that practice. I think that Sir Barnes Peacock, if he had had his attention called to rule 30, and the undoubted practice for one Judge to hear criminal appeals, would not have considered that a single Judge, sitting alone, had no power to try criminal appeals. He had exceeded the power of the Chief Justice in making the rule that single Judges should sit alone to hear criminal appeals. But these papers do not show that the rules of the Court did not and have not allowed criminal appeals to be disposed of by single Judges. And it appears that from November 1870, if not from the constitution of the Court, single Judges have constantly heard appeals in criminal cases, and disposed of them, as was done by Glover, J., in this case. I think the learned Judge had power to reject the former petition, and therefore we cannot allow the second petition to be considered.

*Appeal dismissed.*

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vs

CHANDRA

JUGI,

9 B. L. R. 6.

[17 W. R. 47.]

1871.

Dec. 21.

*Before Sir Richard Couch, Kt., Chief Justice, Mr. Justice L. S. Jackson,  
and Mr. Justice Macpherson.*

9 B. L. R. 36.

[17 W. R. 15.]

THE QUEEN *v.* AMIR KHAN AND OTHERS (APPELLANTS).<sup>1</sup>

*Jurisdiction—Act XI. of 1857—Act XVII. of 1862, s. 4—Waging War against the Queen—Abetment—Penal Code (Act XLV. of 1860), s. 121—Code of Criminal Procedure (Act XXV. of 1861), s. 28—Warrant of Arrest under Reg. III. of 1818—Effect and Weight of Evidence.*

Where the prisoner was charged with having, at Calcutta, abetted the waging of war against the Queen, and was tried at the Sessions Court of Patna, it was held that the Court of Sessions at Patna had jurisdiction to try him, because he was a member of a conspiracy, other members of which had done acts within the district of Patna in pursuance of the original concerted plan, and with reference to the common object. The Court of Patna had jurisdiction also, because the prisoner had sent money from Calcutta to Patna by hundis, and, until that money reached its destination, the sending continued on the part of the prisoner.

The Governor-General, in issuing a warrant of commitment under Regulation III. of 1818, does not, in any way, act judicially or as a Court of Justice, nor is he to be considered as having adjudicated that the person, placed under personal restraint, had been guilty of some specific offence. The proceeding is not in the nature of a conviction of the person placed under restraint; therefore the person so placed under restraint cannot, in any future proceeding taken against him, plead that he has been already tried, convicted, and punished.

Letters, &c., found in a man's house, after his arrest, are admissible in evidence, if their previous existence has been proved.

PIR MAHOMED, Amir Khan, Hashmadad Khan, Mobaruk Ali, Tobaruk Ali, Haji Din Mahomed, and Aminuddin, were, on the 27th March 1871, committed by the Officiating Magistrate of Patna to take their trial at a special Sessions to be held on the 1st May 1871.

The Officiating Magistrate drew up thirteen different charges against the prisoners with different heads or counts:—

The first was against Pir mahomed; that he, in or about the years 1862, 1863, 1864, and 1865, and also in or about the years 1866, 1867, 1868, and 1869, at Dinapore, abetted the waging of war and attempted to wage war against the Queen, and thereby committed offences punishable under s. 121 of the Indian Penal Code.

The second was against Amir Khan, Hashmadad Khan, and Mobaruk Ali; that they, in or about the year 1867, at Patna, abetted the waging of war and attempted to wage war against the Queen, and thereby committed offences punishable under s. 121 of the Penal Code.

The third was against Pir Mahomed and Mobaruk Ali: that they, in or about the year 1867, at Dinapore, abetted the waging of war and attempted to wage war against the Queen, and thereby committed offences punishable under s. 121 of the Penal Code.

The fourth against Amir Khan alone, under fourteen different heads, charged that he, in or after the month of May 1861, in or about the year 1862, in or about the year 1863, in or about the year 1864, in or about the year 1866, in or about the year 1869, at Calcutta, abetted the waging of war and attempted to wage war against the Queen, and thereby committed offences punishable under s. 121 of the Penal Code.

<sup>1</sup> Criminal Appeal, No. 522 of 1871, from the order of the Sessions Judge of Patna, dated the 26th July 1871.

The fifth was against Hashmadad Khan : that he, in or after the month of May 1861, in Calcutta, and in or about the years 1862, 1863, 1864, and 1867, at Patna, abetted the waging of war and attempted to wage war against the Queen, and thereby committed offences punishable under s. 121 of the Penal Code.

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The sixth was against Mobaruk Ali : that he, in or about the years 1863, 1864, 1865, 1866, 1867, and 1868, at Patna, and in or about the years 1864, 1866, and 1869, at Delhi, abetted the waging of war against the Queen, and thereby committed offences punishable under s. 121 of the Penal Code.

The seventh was against Tobaruk Ali : that he, in or about the years 1864, 1865, 1866, 1867, and 1868, at Delhi, abetted the waging of war against the Queen, and thereby committed offences punishable under s. 121 of the Penal Code.

The eighth was against Tobaruk Ali and Aminuddin : that they, in or about the years 1866 and 1867, at Delhi, abetted the waging of war and attempted to wage war against the Queen, and thereby committed offences punishable under s. 121 of the Penal Code.

The ninth was against Aminuddin : that he, in or about the years 1862, 1863, 1864, 1865, 1866, 1867, and 1868, at Delhi, abetted the waging of war against the Queen, and thereby committed offences punishable under s. 121 of the Penal Code.

The tenth was against Haji Din Mahomed : that he, in or about the years 1862, 1863, 1864, 1865, 1866, 1867, and 1868, at Rawul Pindee, abetted the waging of war against the Queen, and thereby committed offences punishable under s. 121 of the Penal Code.

The eleventh and twelfth were against Haji Din Mahomed and Pir Mahomed : that they, in or about the year 1866, at Dinapore, abetted the waging of war and attempted to wage war against the Queen, and thereby committed offences punishable under s. 121 of the Penal Code.

The thirteenth was against Tobaruk Ali : that he, in or about the year 1863, at Umballa, waged war, abetted the waging of war, and attempted to wage war, against the Queen, and thereby committed offences punishable under s. 121 of the Penal Code ; and that he, at Mulka, prepared to wage war, with the intention of either waging war or being prepared to wage war, against the Queen, and thereby committed an offence punishable under s. 122 of the Penal Code.

The charge against Amir Khan was amended by the Sessions Judge at the trial. In the first two counts he was charged with having, during or about the month of September 1861, at Calcutta, abetted the waging of war, or attempted to wage war, against the Queen, and thereby having committed an offence punishable under s. 1. of Act XI. of 1857,<sup>1</sup> and within the cognizance of the Court of Session. In ten succeeding counts he was charged with having, during or about the month of May 1862, during or about the month of September or October 1863, during the months of January, February, March, or April 1864, on or about the 13th June 1866, and during or about the month of July 1869, at Calcutta, abetted the waging of war, or attempted to wage war, against the Queen, and having thereby committed offences punishable under s. 121 of the Penal Code, and within the cognizance of the Court of Session.

<sup>1</sup> See Act XVII. of 1862, s. 1.

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Amir Khan had been arrested in Calcutta, on the 10th July 1869, under a warrant of the Governor-General in Council, issued under the provisions of Regulation III. of 1818. He was kept in confinement at various places till the 20th of January 1871, when he was released, and again arrested under a warrant of the Officiating Magistrate of Patna, dated the 4th January 1871. Under that warrant he was removed to Patna, and there put upon his trial with the other prisoners, who had likewise been imprisoned under the provisions of Regulation III. of 1818.

The prosecution attempted to make out the charge of conspiracy against Amir Khan by proving (among others) the following facts by the evidence of accomplices: That [the North-West frontier of India has been in a state of warfare since the year 1827, when Syad Ahmed, at the head of a body of fanatics, fought with the Sikhs; that fighting has been going on down to the present day under various leaders, and has, for many years past, been directed against the British Government, between whose troops and the fanatics there have been several fights; that these fanatics receive support by voluntary contributions of money, and recruits come to them from several places in Bengal; that the money from Bengal is sent, by hundis or in cash, in the first instance to Patna, whence it is forwarded to the frontier; that at Patna the movements of the conspiracy were directed by Fyaz Ali, Yahiya Ali, and Harhat Hossein, who were said to be the chief agents of the malcontents; that Amir Khan was a disciple of the leading fanatic, and at one time entertained *jehadis* at his house in Patna; that Amir Khan was in the habit of living at his house in Patna with his family, except when he came to Calcutta on account of his business; that he attended a masjid at Patna, where *jehad* was regularly preached; that he directed his treading agent, Amir Khan of Pubna, to collect *sekat*, and that his agent did collect sums of money, and that he sent these moneys to Yahiya Ali, the head of the conspiracy, at Patna, and Ahmadulla of Saduttpore, who acknowledged the receipt of them; that one Kazi Mian Jan, an inhabitant of Comarcolly, Zilla Pubna, was concerned in the conspiracy, and that he was one of the agents for the collection and transmission of money for *jehad* purposes; that one Daimulla, a disciple of Kazi Mian Jan, paid Mian Jan *sekat* and *fira* every year, and on one occasion took Rs. 200 (Rs. 125, his own money, and Rs. 75 given to him by Kazi Mian Jan) by Mian Jan's order, and made it over to Amir Khan of Pubna; that Kazi Mian Jan's house was searched by Nabakrishna Ghose of the Bengal Police some time in February 1864, and, among a vast mass of correspondence found there, were three letters which purported to have come from Amir Khan, the prisoner, to Kazi Mian Jan, and, accordingly, Nabakrishna proceeded to Calcutta with Kazi Mian Jan and his brother Kazi Murad; that he there met Major Parsons, District Superintendent of Police of Umballa, and these two, with others, proceeded to Amir Khan's place of business, and, from what passed there, Amir Khan was arrested; that these letters were explained to Amir Khan, and he was asked if he wrote them, and was called upon to show the entries in his books of the transactions mentioned in them; that Amir Khan pointed to one of his munshis, Mosahib Ali, as having written the letters, and being able to show the accounts; that Mosahib Ali admitted having written the letters, and said he wrote them by his master's orders, and pointed out the entries; that a sum of Rs. 200 was received by Yahiya Ali and Fyaz Ali, through Asad Ali, the son-in-law of Amir Khan, the receipt of which was announced to Kazi Mian Jan as purporting to be an account of the balance of the price of books, the same term as was used in the letter N<sup>o</sup> 1 A from Amir Khan to Mian Jan. It was contended by the prosecution that this

term signified money for the support of *jehad*, and that other fictitious names were used in the account-books of Amir Khan. These letters were marked L1, M1A, and N1A, and were as follows :—

(Translation of Exhibit L1.)

MY DEAR SHEIKH SAHIB,—After compliments and wishes for a happy interview, which is the sole object of my heart, be it known to you that, thanks to God, I am all right up to the present time through God's favour, and I pray to him every moment for your good health. Your kind note containing (your) happy news, and asking about the transmission of a hundi, for Azimabad to Hatkhola, came to hand by post, and I learned the contents thereof. My friend, whatever sum of money you wish to send to Azimabad, you can lodge at the firm of Amir Khan Sahib in Nazirpore, Pubna, and in lieu thereof get a hundi drawn out in favour of (*ba nam*) Zarawar Khan, and send it into Azimabad, or you can send it to me, and I will forward it from here to Zarawar Khan Sahib. If this cannot be done, get a hundi drawn out on the mahajans (or the bankers) of Hatkhola, and send it to me. On receipt of the hundi I shall realize the amount and remit it to Zarawar Khan Sahib at Azimabad. Rest assured.

Dated 8th Zikadi 1278 (8th May 1862), Thursday, from Calcutta.

(Translation of Exhibit M1.)

(Envelope.)

God willing, this envelope, having reached Comarcolly, should reach the Khan Sahib (who is kind to his friends) Kazi Abdulla Khan *ahaf* Mian Jan. May God increase his favour.

Comarcolly, dated the 3rd Zilhigga 1278 Hijra (2nd June 1862).

From Amir Khan, Calcutta.

Post-marks—Calcutta, 2nd June 1862. Jessore, 3rd June 1862.

Comarcolly, 4th June 1862.

Bearing—1 anna,

(Translation of Exhibit M1A.)

MY DEAR KHAN SAHIB,—After compliments and wishes for a happy interview, which is the chief object of friends, I have to inform you that your letter, with two hundis for Rs. 125 written by Amir Khan of Pubna, on account of the sale of books, came to hand by post, and I was thereby highly obliged. My friend I have sent the said amount to Azimabad through (*marfat*) Zarawar Khan Sahib. Rest assured by all means.

I conclude with best wishes.

(Translation of Exhibit N1.)

(Envelope.)

God willing, this envelope, having reached the Moonsiff's Court at Comarcolly, should reach my friend Kazi Abdul Rahman Sahib, &c., &c.

Comarcolly Moonsiff's Court.

From Amir Khan, Calcutta.

Dated the 8th Rubi-ool-owal 1278 Hijra (14th September 1861).

Bearing.

Post marks—Calcutta. Comarcolly, 17th September.

(Translation of Exhibit N1A.)

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MY DEAR KAZI SAHIB, &c., &c.,—After compliments and wishes for a happy interview, which are more than I can speak and write, I have to state that, thanks to God, the news of this place is all right, and I always pray to him for your good health. Your kind letter containing (your) happy news, with a hundi for Rs. 200 on account of the sale of books for transmission to Azimabad, dated the 3rd Rubi-ool-owal, came to hand by post under a registered cover, and I fully learned the contents. May you be ever so kind and live well and in good health. As you have sent a hundi, I have given credit for it in the Azimabad account. God willing, I shall, as desired by you, write about the remittance to Azimabad. Rest assured by all means. Two days before I had the pleasure to receive from you a kind note, dated the 2nd Rubi-ool-owal. This I write for your information.

Dated the 8th Rubi-ool-owal 1268 Hijra (14th September 1861).

At the trial Mir Mahomed and Hashmadad Khan were acquitted and released. As to Amir Khan, the Sessions Judge, differing from three of the four assessors, found him guilty on the first head of the amended charge, and sentenced him to transportation for life and to forfeiture of all his property. The Judge, differing from three of the assessors, also found Amir Khan guilty on the third head of the amended charge;<sup>1</sup> but the Court did not pass any separate sentence, as he had been already sentenced on the first head of the charge. The other prisoners, Mobaruk Ali, Tobaruk Ali, Haji Din Mahomed, and Amir-uddin, were also convicted, and sentenced to transportation for life, and forfeiture of all their property.

The prisoners appealed to the High Court. The appeal of Amir Khan was heard separately.

Mr. *Anstey* and Mr. *Ingram* for Amir Khan.

The *Advocate-General* and the (Offg.) *Standing Counsel* for the Crown.

Mr. *Anstey*.—There is no direct evidence except that of accomplices uncorroborated. Confessions extorted are no evidence. This rule is not peculiar to English law. There is no difference in this respect between confessions out of Court and those made in Court.

The only overt act relied upon against Amir Khan was committed in Calcutta, if anywhere. This is a vital objection, not one of form. The trial took place at Patna, in consequence of an opinion expressed by two Judges of this Court, Phear and Macpherson, JJ., that one of the acts took place out of Calcutta. Amir Khan was in Calcutta, but was seized and taken away to Patna. He was entitled to be tried by a jury and a Judge of this Court, and to be heard on all the charges under the law obtaining in Calcutta. Every act done at Patna could at best be an abetment of the original offence, *vis.*, the waging of war. The charges of actual conspiracy were abandoned. What he has been convicted of, are acts done by him only, and not for acts of conspiracy.

<sup>1</sup> The first and third heads of the amended charge were as follows:—

1st.—That he, during or about the month of September 1861 A.D., at Calcutta, abetted the waging of war against the Queen, and that he has thereby committed an offence punishable under s. 1 of Act XI. of 1857, and within the cognizance of the Court of Sessions. 3rd.—That he, during or about the month of May 1862 A.D., at Calcutta, abetted the waging of war against the Queen, and that he has thereby committed an offence punishable under s. 121 of the Indian Penal Code, and within the cognizance of the Court of Sessions.

The second objection may be expressed in the maxim *nemo debet bis puniri*. The Government had two courses open to them; the one under Regulation III. of 1818, and the other an ordinary prosecution under the Penal Code. The Government elected the former. They thought fit for two years to proceed under this Regulation, and not under the Penal Code. During the whole of that time they kept Amir Khan in imprisonment. On appeal before Phear and Markby, JJ., from the order of Norman, J., refusing a writ of *habeas corpus*,<sup>1</sup> Phear, J., said of the Governor-General's warrant: "It is equally clear that the warrant is not a warrant of arrest. It is a warrant of commitment, reciting that which is, by virtue of the Regulation, equivalent to a conviction."<sup>2</sup> If it was equivalent to a conviction, the maxim *nemo debet bis puniri* applies. The appellant was entitled to plead *autrefois convict*. It was in evidence before Mr. Prinsep that Amir Khan had been arrested, and had undergone his punishment for certain offences; that he had been discharged; and that he had been re-arrested upon charges relating to acts committed between the years 1861 and 1867. It is not pretended that he committed any offence between the arrest on the 10th July 1869 under the warrant of the Governor-General, and his being put in jeopardy before the Officiating Magistrate of Patna. The proceeding under Regulation III. of 1818 is similar to a proceeding by a Bill of Pains and Penalties as in the case of *Bishop Atterbury*.<sup>3</sup> The Acts of Parliament, 9 Geo. I., cc. 15, 16, and 17, were passed in consequence of the opinion stated in that case. The objection was taken on the part of the noble Lord that there would be injustice if Parliament gave judgment and passed a Bill of Pains and Penalties, and yet such judgment could not be pleaded as *autrefois convict* or *acquitted* in the ordinary Courts of Justice.<sup>4</sup> Phear, J., correctly describes the warrant under which Amir Khan was arrested. In fact, the Government elected their own remedy. The prisoner is entitled to plead *autrefois convict*, and on his behalf I tender now the plea which was rejected by the Sessions Judge.

A third preliminary objection, which is a formal one, is that the Magistrate issued a warrant without any evidence before him. He had no jurisdiction even if the offence was committed out of Calcutta, for the depositions were not taken before the 5th of January 1871, whereas the warrant, which was issued upon them, was dated the 4th January, *i. e.*, the day preceding that on which the depositions were taken.

The genuineness of the letters produced is denied. They were not marked when taken, as stated, at Amir Khan's house after his arrest by the detectives, who have taken the place of the former *goindas* (spies). Thus a necessary link in the chain wholly fails. The trover of the letters did not take place, *ex concessis*, until after Amir Khan's arrest. The house was vacant at the time, and, what was worse, in the possession of the detectives. Letters so found ought

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<sup>1</sup> *In the matter of Amir Khan*, 6 B. L. R. 392.

<sup>2</sup> *Ib.* 468.

<sup>3</sup> 16 How. St. Tr. 323.

<sup>4</sup> At p. 515.—"It is a rule both in law and reason that *nemo bis puniri debet pro eodem delicto*, and yet that may happen to be the Bishop's case. For the charge in the bill is general, intending to raise a rebellion, and holding treasonable correspondence in order to bring in foreign forces; but there is no particular fact charged upon him. Now, if he should be indicted for either of those species of treason, and particular overt acts of such treason should be alleged, as buying arms, and listing men for the Pretender, and the overt acts should be proved by two witnesses, he might be condemned and executed for it; for he could not plead this bill in bar to such indictment, because the indictment would not be for the same facts, there being no particular ones charged in the bill."



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not to be received in evidence. They were proved by the evidence of witnesses who had been under detention and restraint for months and years. One of the witnesses says: "I was arrested at Hazara, and confined for ten months in the Abbotabad jail. I am not now under guard. I was when I gave evidence before the Magistrate, but after that the guard was removed." Before the Magistrate he said: "I am still under *pahra* (guard). I am now living in a compound. I don't know whose compound it is. Mr. Reily lives in the house. There are constables always on *pahra* over us. There are four constables over us; they watch us. There are about 100 of us altogether." Yet Mr. Reily was not called to say whether the witnesses were in a state of terror or not. The prisoners were deprived of his cross-examination, and thus have been prejudiced in their trial.

The Magistrate ought to have tendered a pardon to the accomplices in open Court under s. 209 of the Criminal Procedure Code: s. 203 says: "Except as provided in s. 209, no influence, by means of any promise, or threat, or otherwise, shall be used to the accused person to induce him to disclose or withhold any matter within his knowledge."

In cases of treason and waging of war against the sovereign, no room for conjecture must be left; everything must be certain and clearly proved. In *Reg. v. Barnardiston*,<sup>1</sup> it is said that no man shall be put in peril of his life on the forced construction of language or letters. In *Bishop Atterbury's Case*,<sup>2</sup> Sir Constantine Phipps contended that inuendoes, which make criminal letters and documents not otherwise criminal, are not allowed. In *Reg. v. Crosby*,<sup>3</sup> also referred to in *Bishop Atterbury's Case*,<sup>4</sup> Holt, C.J., says: "Were these papers ever so treasonable, they are addressed to none, though the French King be mentioned in them, and that the indictment supposes them to be contrived for to invite him over," although the evidence was not sufficient for such a supposition, and therefore no presumption could be supplied. The detectives imagined a cypher, but could not discover a key, although they have been in possession of the books and letters for years. Milk may mean gunpowder. Mr. Prinsep, in accepting the key of the cypher, has done that which cannot be done. It has taken the prosecution eight years to get up the case from these letters and books taken in 1864. The witnesses who pretend to explain the correct meaning of certain words and expressions are men who have either been convicted of, or have confessed to, taking part in disloyal practices.

In the charges the dates were not specified as prescribed in the Code of Criminal Procedure.

Letters and books have been proved by oral evidence, without an effort to produce them. In one case the witness says: "I tore up the letter I received immediately, and my answer I have not been able to see." Yet he is allowed to speak to the contents.

A witness (Mobaruk Ali) was allowed to say that *jihad* was preached out of a book, which was not produced, and no notice was served upon any one to produce it, and it is not shown that Amir Khan was present. The question, "What were the contents of the book?" though objected to, was allowed by the Judge to be put.

<sup>1</sup> 9 How. St. Tr. 1333.

<sup>2</sup> 16 How. St. Tr. 323.

<sup>3</sup> 12 How. St. Tr. 1291.

<sup>4</sup> 16 How. St. Tr. 508.

No plot is shown to exist. The only evidence is that of approvers. Besides these approvers, no other person is shown to have been party or privy to the alleged plot.

Suppose the evidence was not only admissible, but untainted, it does not establish a connection between orthodox Sunnis and the Puritans or reformers, the Wahabis. Amir Khan has been to Mecca. *Zekat* and *jehad* are the two words used by the Magistrate and by the Judge. Amir Khan is shown to have been a charitable man. His accounts show it. If *sekat* is given at the same time that *jehad* is going on, it must be for the *jehad*. Such is the reasoning employed. In Mahomedan times all these gifts were collected in one place, which was called "*bytalmat*." (*Reads* who are the objects of charity from the Hedaya, Vol. I., p. 53.) *Zekat* had fallen into disuse; the great labour of the Arab, Abdul Wahab, 120 years ago, was to restore the *sekat*. In Bombay, in the case of *The Queen v. Agha Khan*,<sup>1</sup> Arnold, J., in 1866, held that the collection of *sekat*, although enjoined by the Mahomedan religion, gave no cause of action that a Court of Justice could enforce. He recognized the legality and the levy of *sekat* under spiritual compulsion. (*Reads* Sale's Koran, c. 2, p. 23; c. 22, pp. 277-278, as to the duty of taking up arms against unbelievers. See also c. 10, p. 174. Having said all this of idolators, he speaks of the Christians in a note to c. 6, p. 115.) What *jehad* is no one can tell. Its literal meaning is "endeavour." It may be an endeavour to effect a supremacy by a military force, if the interpretation wished to be put upon it by some is accepted. Suppose the term *jehad* is applicable to a military enterprise, it is equally applicable to the endeavour to extend the Mahomedan faith in the time of profoundest peace by means of the most peaceful methods. Amir Khan has suffered great hardship from the perverted views put forward, in the shape of articles and criticisms, on the subject of the duty of Mahomedans to wage war against the ruling powers. The appellant has to cope with the prejudices thus raised against him. It is asserted that the preaching or waging of *jehad* must be either strife or Islam, and that *jehad* in either case is making war against the ruling powers. It is not so. There is a third class or condition of things under which the preaching of *jehad* means no such thing, and that is in a land of security. British India is not *dar-al-harb*. The Sikh country would be *dar-al-harb* when it was under the Sikhs, because the Mahomedan religion was kept under subjection by the violence and tyrannical rule of the governing powers. This is *dar-al-aman*, or the place of security. Abdulla Kowidi, a witness, says: "*Our jehad was against the Sikhs and kafirs (infidels).*" When the Sikhs passed under the British rule, the British stepped in to protect the Sikhs, their new subjects, so the *jehadis* fought against the British; but it is clear that they were not treated as rebels, but as prisoners of war.

Mr. Ingram on the same side.—In this case seven prisoners were tried at the same time, on thirteen different charges, for acts done by them separately in different parts of India, and supported by different evidence, no common object or design having been alleged or proved. The charges are dissimilar. Toharuk Ali is charged with waging war against the Queen in a foreign country, and it is not proved that he is a British subject; others, with having abetted the waging of war at Patna; others, again, with having abetted it at Calcutta. It was impossible for any man to keep in memory the direct line of evidence against any one of the prisoners. Where evidence was adduced that would have been objected to as to one man, it was received because it was good evi-

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dence against another. We could have examined some of the prisoners as our witnesses ; but as they were all put upon their trial at the same time, we were deprived of the advantage of their evidence.<sup>1</sup>

All the acts that made up the offence said to have been committed by Amir Khan were committed at Calcutta. In the first charge, as to which a verdict of not guilty was entered, he was charged with abetting and attempting to wage war at Patna. The second charge consisted of seven different acts put in the different forms of abetting the waging of war and the attempting to wage war, and all were laid as having been committed at Calcutta. The rule of English law making conspiracies triable in any county where any overt act, in furtherance of the conspiracy, is proved to have been done, therefore did not apply. If crime is local according to the rule of practice in English law, it is still more so in this country, where special provision is made for the trial of offences in the district in which the offence is committed, and under a Code that is complete in itself. By s. 26 of the Criminal Procedure Code, it is provided that, "except where otherwise expressly provided by this Act, every offence shall be enquired into and determined in the district or division of a district in which the offence was committed ;" and s. 27 provides that, "when a person shall be accused of the commission of any offence by reason of anything which has been done, and of any consequence which has ensued, such offence may be enquired into or determined in any district or division of a district in which any such thing shall have been done, or any such consequence shall have ensued ;" and s. 28 says: "The abetment of an offence, wherever such abetment shall have taken place, may be enquired into or determined in any district, or division of a district, in which the offence abetted may be enquired into or determined by any Court which has jurisdiction to try such offence, as if the abetment had been committed at the same place at which the offence abetted was wholly or partly committed ; or the abetment may be enquired into or determined in any district or division of a district within which the abettor has done anything for abetting the commission of such offence." As to the acts charged against him as having been done in 1863, 1864, 1866, and 1869, in furtherance of an alleged conspiracy, he was found not guilty by Mr. Prinsep. The substance of the charge against him now is that he sent Rs. 200 and Rs. 125 by means of hundis to conspirators, with a knowledge of the purposes for which the money was wanted. The defence is that these hundis were on account of commercial transactions, and Amir Khan's books bear this out. The evidence begins with acts that occurred 35 years ago. The proceedings were opened by the reading of a notice. There was no opening speech or statement of facts which the prosecution intended to put forward and prove. We laboured under great disadvantage in not knowing what case we were called upon to meet, or within what period the charges were to be limited until the close of the prosecution.

A notice was served on the accused on the 23rd January 1871, when the trial had already proceeded three days. The notice was to produce before the Magistrate, on the 22nd January 1871, books and two letters dated prior to 1859. This notice was not sufficient for the final trial. The letters and book mentioned in the notice had been in the possession of the prosecution for several years. The existence of these letters was only proved by the evidence of the convicted felon, Mahomed Shafi, who was allowed to give secondary evidence of their contents. The object of the notice was to enable the prosecution to give oral evidence of the book and of the letters.

<sup>1</sup> See *The Queen v. Payne*, L. R., 1 C. C. R., 349.

The amended charges all relate to acts said to have been committed at Calcutta. The Sessions Court of Patna had no jurisdiction to try Amir Khan. The warrant was issued by the Magistrate before any of the depositions were taken. [Couch, C.J.—The case came properly before the Patna Court, as the charge prepared by the committing Magistrate embraced acts committed at Patna, as well as in Calcutta. You do not say that the Magistrate had not the power to commit. It is not necessary to show the entire regularity of the proceedings before the Magistrate. You might have applied to this Court to send for the record and make the requisite order: you cannot now object to the proceedings before Mr. Prinsep.] The learned Counsel then proceeded to discuss the merits of the case and the evidence.

The *Advocate-General* for the Crown.—The case is one that rests upon evidence alone. The theory put forward by the defence, that these *hundi* transactions were commercial transactions on account of the sale of books, is absurd, because it is proved that there were no book transactions between the parties. The theory that the letters were forgeries is destroyed by what was said by Amir Khan and Mosahib Ali in Major Parsons' presence.

The *Advocate-General* proceeded to read the evidence as to acts prior to the year 1861. [Mr. *Anstey* objected to this evidence being gone into.] The evidence has been gone into fully on the other side. I read this to show the acts during the period covered by the charge, *i.e.*, the years 1861 and 1862; to understand them we must see the history of the case and the antecedent facts; I also read it on the ground that, although the Judge has acquitted the prisoner (I am not opening these charges), yet the evidence of these witnesses can be looked at, because the Judge, while not disbelieving it, rejected it because it was not corroborated; yet that evidence will be a corroboration of, and would have a bearing on, the two charges on which the prisoner has been found guilty. [Mr. *Anstey*.—That cannot be done; there is no appeal on an acquittal. We went into that evidence only to show the contradictions between the witnesses and the strong objections which existed to the whole, and the utter untrustworthiness of the evidence on the other charges. Couch, C.J.—The evidence is admissible to explain, particularly when the offence charged is a conspiracy.]

Three preliminary objections were taken: the first, that the warrants bore date the day before the depositions were taken, has already been disposed of; the other two were the removal of Amir Khan from the jurisdiction of the High Court, and the plea of *autrefois convict*. To notice the second first, the act of the Governor-General, in arresting and imprisoning Amir Khan under the powers vested in him by Regulation III. of 1818, was in no sense a judicial proceeding. Phear, J.'s remarks<sup>1</sup> are misunderstood. The word "determined" in that Regulation, in the connection in which it is found, means simply resolved, and not that a question being raised between the Crown and the prisoner, the Governor-General in Council has come to a judicial determination on the point. The procedure under Regulation III. is purely *ex parte*, and executive in its nature, and in no sense can it be said that a decision on the merits of the case has been given under that Regulation. Phear, J., only says that the warrant is a warrant of commitment, reciting that which is, by virtue of the Regulation, equivalent to a conviction. The act was a proceeding in the interests of the State. The preamble to the Regulation explains the nature of the proceeding. [Mr. *Anstey*.—There is no mistake about Phear, J.'s meaning. At page 476 of

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the Report, he says, after referring to Act XXXIV. of 1850 and Act III. of 1858 : "The real effect of these Acts is that they create and make lawful a new cause of imprisonment, and constitute the Governor-General in Council a Court, endowed with the fullest discretion to adjudicate such a cause, and with power to imprison therefore during pleasure," which, Lord Coke says, means imprisonment for life. "It may, indeed, be taken in effect that, on the present occasion, the High Court has enquired into the legality of Amir Khan's imprisonment, and has ascertained that he is imprisoned under a conviction and commitment of a competent tribunal, the warrant of which conviction and commitment is good on the face of it." The preamble has the words "with a view to ulterior proceedings." [Couch, C.J.—Was the point argued at the bar whether the Governor-General acting under that Regulation is a Court?] No, the question was not argued by me. I only argued that no appeal lies from a refusal of a writ of *habeas corpus*. It certainly was not my argument before Norman, J. [Couch, C.J.—The difficulty is that the law was laid down in this very man's case.] Norman, J., based his judgment on very different grounds. There is no reason for saying that Markby, J., agreed with Phear, J., further than in dismissing the appeal. Phear, J., made those remarks on appeal. The case was not, in its nature, an appealable matter. I urged this, but the Court gave no decision upon that point. If one Judge refused a *habeas corpus*, another Judge might have granted it. Phear, J., dismissed the appeal on grounds of his own. It can hardly be said that it was the opinion of the Court that the Governor-General in Council was empowered to pass judgment and sentence, and that those proceedings might be pleaded in bar of a trial under the usual procedure. If Phear, J.'s judgment does decide what it is said to lay down, I maintain it is not good law. There is nothing in the Regulation in the nature of a judicial enquiry. The preamble and the whole Regulation show that it is a statutory power given to the Governor-General in Council to imprison persons without a judicial enquiry when it is dangerous to the State to let them be at large. That regulation is more in the nature of a permanent Statute for the suspension of the *Habeas Corpus* Act whenever the exigencies of the State in the judgment of the Governor-General in Council may so require. The same might now be effected by the Governor-General alone in the form of a proclamation under the Councils Act for a period of six months.

As to the question of the prisoner's removal from Calcutta, and the jurisdiction of the Patna Court, what peculiar right had Amir Khan to be tried in Calcutta? There was no birthright, but only the right of residence. Under the Statutes of William III. and Anne,<sup>1</sup> no evidence can be given in cases of treason of acts that transpired more than three years before trial. The Penal Code introduces a new law by s. 121. There is no limitation in Calcutta or elsewhere. The offence is the same, and the punishment is the same, whether the trial takes place in Calcutta or Patna. How then was Amir Khan prejudiced? The English law does not apply in Calcutta. He is a native of Patna, where his family have always resided, except on two occasions. He goes and lives there himself whenever his business allows him. Calcutta is only a temporary residence to such men engaged in trade. He was charged with crimes committed at Patna and Calcutta. It is true in the result the only overt acts found as proved were committed at Calcutta, but all the other charges were pending against him then. The accusation was that he was a member of a conspiracy at Patna. These charges were afterwards amended by the Sessions Judge.

<sup>1</sup> 7 & 8 Wm. III., c. 3, s. 5; and 7 Anne, c. 21.

[COUCH, C.J.—The offence is under the Penal Code, and must be tried by the Criminal Procedure Code. We cannot decide according to the English law of conspiracy. The crime here amounts to an abetment of conspiracy. How was the charge framed?] (*Reads the charges.*) The prisoner was found guilty under the first and third heads of the amended charge. Under the first, under Act XI. of 1857, he would be liable for certain acts of abetment of the conspiracy. Under the other, the third head of charge, he would, upon the evidence, come under the definition of abetment contained in the Penal Code, s. 107. It really amounts substantially to a charge of conspiracy to wage war against the Queen with others, known or unknown, which was afterwards abetted, by different overt acts, at different times and places. It was a treason of which the focus was at Patna, where all the principal acts took place, and where Amir Khan was properly tried for such acts. If he was not properly tried there, the Government would have to institute numerous prosecutions all over the country for the same conspiracy. In *Queen v. Nelson and Brand*, the Lord Chief Justice in his charge to the Grand Jury does not lay down, as a general proposition of law, that a man has a right to be tried in the place where he is arrested; but that it would be an arbitrary and unwarrantable exercise of authority to remove a person from a place where he was arrested, and might be tried, to another jurisdiction, where he might equally be tried, if such were done for the purpose of getting the trial before a Judge who was known to be more likely to convict, or who, on conviction, was likely to pass a more severe sentence.<sup>1</sup> These remarks are not at all applicable to this case. But he does not impugn the general proposition of law that a trial may take place anywhere where overt acts have taken place. There is no suggestion that Mr. Prinsep was a severe Judge, or a Judge who was likely to convict; but upon other grounds the prisoner objected to being tried at Patna. In the case of *The King v. Brisac*,<sup>2</sup> it was decided that an information at common law for a conspiracy between the captain and purser of a man-of-war for planning and fabricating false vouchers to cheat the Crown (which planning and fabrication were done upon the high seas) is well triable in Middlesex, upon proof there of the receipt by the Commissioners of the Navy of the false vouchers transmitted thither by one of the conspirators through the medium of the post, and the application there by a third person, a holder of one such vouchers (a bill of exchange) for payment, which he there received. The application by the holder for payment in London was held to be an overt act, which gave jurisdiction to the Courts in London.

There is no doubt that a conspiracy has been proved at Patna, and Amir Khan has been found to have taken part in it. There were a great many men to be tried for their joint action, and it was more convenient to try them there than here. There may be a little hardship, but it is not illegal. Substantially and really, the conspiracy is the offence; the overt act is the evidence of it according to English law—*Reg. v. Best*,<sup>3</sup> *King v. Seward*,<sup>4</sup> and *King v. Gill*.<sup>5</sup>

I shall now consider the provisions of the Criminal Procedure Code with respect to the offence of abetting under s. 107 of the Penal Code. That section says: "A person abets the doing of a thing, who (first) instigates any per-

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<sup>1</sup> At p. 116 of the Charge to the Grand Jury.<sup>2</sup> 4 East. 164.<sup>3</sup> 2 Ld. Raym. 1167.<sup>4</sup> 1 A. & E. 706.<sup>5</sup> 2 B & A. 204.

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son to do that thing ; or (secondly) engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing ; or (thirdly) intentionally aids, by an act or illegal omission, the doing of that thing." Under the second and third branch, Amir Khan has been properly found guilty of abetting. Even if the case be not treated as a conspiracy, it would be aiding to do a thing, &c., but I put it under the second branch. The conspiracy or agreement of several persons to act together with a common object must be proved, before evidence can be given of the acts of any person not in the presence of the prisoner. It is said in East's Pleas of the Crown, page 96: "As it happens more frequently in trials for this" (*i. e.*, the offence of high treason) "than for any other offence, that the acts of some of the conspirators, in the absence of the others, are given in evidence against them, it may be worth a more particular enquiry in what manner the rule is applied. In this, as in other cases founded in conspiracy, the conspiracy or agreement among several to act together for a particular end must be established by proof, before any evidence can be given of the acts of any person not in the presence of the prisoner. And this must, generally speaking, be done by evidence of the party's own acts, and cannot be collected from the acts of others, independent of his own; as by express evidence of the fact of a previous conspiracy together, or of a concurrent knowledge and approbation of each other's acts. But it may also be done by evidence of the acts of the prisoner and of any other with whom he is attempted to be so connected, concurring together at the same time and to the same purpose or particular object." What a concurrence there is here between the letters of Amir Khan to Khaja Mian Jan and those of Yahia Ali to the same man referring to the purpose for which the money was transmitted—in both price of books, &c., and other secret terms are used! When the conspiracy is established, all the acts of the persons engaged in the common undertaking are receivable in evidence. *Rex v. Horne Tooke*,<sup>1</sup> *Rex v. Hardy*,<sup>2</sup> and *King v. Stone*.<sup>3</sup> In a later case of *Reg. v. Frost*,<sup>4</sup> the Chartist trial of 1840, acts previous to the prisoners' joining were allowed to be given in evidence. In *Reg. v. Esdaile*,<sup>4</sup> the same principle was laid down, and the doctrine was carried very far, and a rule on the ground of misdirection was refused. The third head of charge also was properly tried at Patna. By s. 28 of the Criminal Procedure Code, the abetment of an offence may be enquired into and tried by the Court which would have jurisdiction to try the offence abetted. The offence here is the conspiracy at Patna. [Couch, C.].—The offence is waging of war. There was no war in Patna.] It would be abetment of an abetment, which of itself is an offence. [Macpherson, J.—The prisoner is not charged with that.] True, the charge is not put in that specific form; but, considering that the substance of the accusation was conspiracy, it matters little whether these overt acts are treated as abetment of the conspiracy or as abetment of an abetment of that conspiracy, so that the Court could give judgment upon that. Although the entries of these moneys were made in Calcutta, yet they could be enquired into at Patna, because the abetment was in Patna of an abetment of the offence of waging war. It comes round very nearly to the English law. If there are 100 men to be tried for abetting in various ways and at different places with one common design, they are guilty of acts of abetment of the principal offence.

<sup>1</sup> East's Pleas of the Crown 98.<sup>2</sup> *Id.* 99.<sup>3</sup> 9 C. & P. 129.<sup>4</sup> 1 F. & F. 213.

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I must call attention to another part of the case without making a distinct point of it, *vis.*, the acquittal on several charges. These acquittals were on the ground that they were supported by the evidence of accomplices who were not corroborated, although the Judge believed the witnesses, but he thought he was bound by the rule that required corroboration of the evidence of an accomplice. The Court can look into that evidence to see Amir Khan's connection with the conspiracy, and in confirmation of other evidence. [Couch, C.J.—Does not that evidence require corroboration before we look at it?] Your Lordships can read it and say whether it is not sufficient evidence on collateral points. Suppose the Judge cautions the jury properly against the danger of believing such evidence, but notwithstanding such caution, the jury believe the evidence, they may act upon it, and their verdict cannot be set aside; so if the Judge believe it, why may he not act upon it? [Couch, C.J.—Suppose that to be so, we are not bound to believe, because the Judge might have believed. We shall require corroboration. This is merely a rule of practice as to what weight should be given to the evidence of an accomplice.] The Judge has treated it as a stringent rule of law binding on him, without allowing him to exercise his discretion as to the acceptance or rejection of the evidence of any particular witness if that witness was not to be depended on. He rejects evidence which he evidently believed. [Couch, C.J.—Do you mean to say that one can act upon evidence not corroborated, and which three assessors have disbelieved? Yes, corroboration is not necessary. [Couch, C.J.—We should be setting a bad example.] Supposing it to be even a rule of law, and not one of practice merely, it would not exclude the evidence as to collateral matters. In *The Queen v. Stubbs*,<sup>1</sup> it is laid down that “it is not a rule of law, but of practice only, that a jury shall not convict on the unsupported testimony of an accomplice. Therefore, if a jury chose to act on such evidence only, the conviction cannot be quashed as bad in law.” So too in *The Queen v. Elahi Bax*,<sup>2</sup> it was laid down that “a conviction founded upon the uncorroborated evidence of one or more accomplices alone is valid in law.”

(After stating the facts and circumstances, as already stated, to show Amir Khan's connection with the conspiracy, the Advocate-General proceeded):—The letters in *Reg. v. Barnardiston*<sup>3</sup> were totally different from the letters in this case. They were in plain ordinary language, and had a natural meaning of their own, but it was attempted to make them treasonable by strained meanings of words and expressions employed in them: but the letters here were not reconcilable with any natural meaning, or with any theory of commercial business, and could only be understood by those who understood their real and secret meaning.

Whether the true doctrine of the Koran and the Mahomedan religion be to make war against the British Government or not, does not touch the question of Amir Khan's guilt or innocence. It is proved that certain persons consider such war a religious duty, and that fights have taken place between them and the British troops, and Amir Khan has done acts to abet such waging of war.

Mr. Anstey in reply.—The evidence as to the earlier matters being disbelieved by the Judge, the prosecution is reduced to the solitary case of the three hundis, which rests on the most dangerous of all kinds of evidence. It

<sup>1</sup> 25 L. J. Rep., M. C. 16.

<sup>2</sup> Case No. 186; 29th May 1866.

<sup>3</sup> Case No. 186 of 1866.



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seems to have escaped the attention of my learned friend that neither Naba-krishna Ghose nor Major Parsons was present at the arrest of Kazi Mian Jan, or knew anything about his arrest.

The only evidence is that of approvers and accomplices, and of these, moreover, some were prisoners and convicted felons, and many had received rewards and remissions of parts of their punishments from Government. The account-books do show the sale of books and also of salt, but the persons to whom those sales purported to have been made, and who ought, in fairness to the defendants, to have been called by the prosecution, were not so called.

The consideration of treason is apparently omitted from the Penal Code from design. Abetment seems to have been intended to take its place. Abetment has taken the place of conspiracy. The learned Advocate-General says there may be an abetment of an abetment. Such an interpretation of the law ought not to be allowed. If abetment of abetment is allowed, why should it not be allowed to go on from 1861 to 1871, and then to 1881, and so on to eternity, generation after generation?

The Advocate-General's view of *The Queen v. Elahi Bax*<sup>1</sup> is imperfect. The accomplice knows all the secrets and facts, and has only to name persons to destroy them; that is the reason Lord Abinger gave, Sir Barnes Peacock gave, and Mr. Justice Jackson gave, for discrediting an accomplice. Here evidence was given under the pressure of fear and under a hope. This last remark is applicable to nearly all the witnesses. Confessions drawn by promises of favour are not receivable, but these were obtained by artifice, promise, &c. It rests with those who bring such confessions into Court to show that there was no influence exercised over the mind of the witness. The Judge says the Code of Criminal Procedure has been violated; yet he has received and given full effect to such evidence. If it is a rule of practice, it is a rule of law. It is the same thing to a Judge, though it may be open to a jury to act upon such evidence. In this case it is a rule of law, and not of practice, see s. 28, Act II. of 1855. That Act must be read *in pari materia* with the Penal Code. It was not in the discretion of the Judge to take into consideration the evidence not corroborated.

It appears from a pamphlet report of the arguments that the learned Advocate-General argued that the sole jurisdiction was with the Governor-General, and the case was concluded. [The *Advocate-General*.—I have said that I did not argue the point. The argument did not turn upon that question at all. It is a mistake in the report.]

COUCH, C.J.—In this case the appellant, Amir Khan, has been convicted by the Sessions Judge of Patna of the offence of abetment at Calcutta of waging war against the Queen in the years 1861 and 1862; the first charge being laid as an offence under Act XI. of 1857, and the second as an offence under s. 121 of the Penal Code.

The learned Counsel for the appellant, Amir Khan, took three preliminary objections on his behalf. The third objection, namely, that the proceedings before the Magistrate who committed the case for trial were irregular, in that none of the depositions were taken before the accused persons were brought before him (as I understand the objection), was disposed of in the course of the argument. It is clear, upon the decisions of this Court, as well as upon the decision of the High Court of Bombay, that such an objection as that ought not to prevail, and I do not think it necessary to say anything more with regard to it.<sup>2</sup>

<sup>1</sup> 16 How. St. Tr. 323.

<sup>2</sup> See *The Queen v. Narayan Naik*, 5 B. L. R. 660 (see p. 223 of this book).

The first of the remaining two objections was that the Sessions Court at Patna had no jurisdiction to try the accused for offences which were committed at Calcutta.

Now, by s. 4, Act XVII. of 1862, it is provided that, "in the investigation and trial of offences committed before the 1st day of January 1862, the Criminal Courts of the several grades, and the officers of police, shall, after the passing of this Act, be guided by the provisions of the Code of Criminal Procedure, so far as the same can be applied, wherever the said Code shall be in operation at the time of such investigation or trial; and for the trial and punishment of such offences, such Courts shall exercise the jurisdiction and powers vested in them under the said Code of Criminal Procedure: provided that no person convicted of any such offence shall be liable to any other punishment than that to which he would have been liable had he been convicted of such offence before the said 1st day of January 1862, and that no such person, who shall claim the same, shall be deprived of any right of appeal or reference to a Sudder Court which he would have enjoyed had the trial been held under any of the Regulations or Acts hereby repealed." These words, which are very extensive, "shall exercise the jurisdiction and powers vested in them under the Code of Criminal Procedure," would give to the Sessions Court at Patna jurisdiction to try the accused, Amir Khan, not only for the offence which was charged to have been committed contrary to the provisions of the Penal Code, but also for the offence under Act XI. of 1857. In order to see whether there was jurisdiction, we must look to the provisions of the Code of Criminal Procedure. S. 26 of that Code provides that, "except where otherwise expressly provided by this Act, every offence shall be enquired into and determined in the district in which the offence was committed: provided that nothing in this section shall exempt European British subjects from being tried and convicted before the Supreme Courts of Judicature for offences committed beyond the local limits of such Courts." Then comes s. 27, which does not apply here; and the next section, which is applicable to the present case, is s. 28, which provides that "the abetment of an offence, wherever such abetment shall have taken place, may be enquired into or determined in any district, or division of a district, in which the offence abetted may be enquired into or determined by any Court which has jurisdiction to try such offence, as if the abetment had been committed at the same place at which the offence abetted was wholly or partly committed; or the abetment may be enquired into or determined in any district, or division of a district, within which the abettor has done anything for abetting the commission of such offence." The offence of which the accused Amir Khan has been convicted is the abetment of waging war against the Queen, the act abetted having been committed, and the abettor, therefore, being liable to the punishment for the offence of waging war against the Queen, as provided by s. 109 of the Penal Code. Now, the waging of war did not take place in the district of Patna; and the part of this section (28), which is applicable to the present case, is the latter, which provides that the "abetment may be enquired into or determined in any district within which the abettor has done anything for abetting the commission of the offence." The abetment charged against Amir Khan was that he had engaged in a conspiracy to wage war against the Queen, which was an offence under s. 107 of the Penal Code. That section provides that "a person abets the doing of a thing who instigates any person to do that thing, or engages with one or more other person or persons in any conspiracy for the doing of that thing, if any act or illegal omission takes place in pursuance of that conspiracy and in order to the doing of that thing." That was the abetment charged, and of which Amir Khan has been found guilty by the Sessions

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Court. Now, the rule of law is that, where several persons are proved to have combined together for the same illegal purpose, any act done by one of the parties in pursuance of the original concerted plan, and with reference to the common object, is, in the contemplation of law, the act of the whole. Each party is an agent of the others in carrying out the objects of the conspiracy, and doing anything in furtherance of the common design. This was determined in England in the case of *Rex v. Bowes*,<sup>1</sup> cited by Grose, J., in *The King v. Briscoe*,<sup>2</sup> and cited to us by the learned Advocate-General, and the law has, from the period when that case was decided, been the settled law in England. It rests upon a principle which is equally applicable in this country. There is not any peculiarity of English law in this matter, but it rests upon the general law which has been stated that, where parties concert together, and have a common object, the act of one of the parties, done in furtherance of the common object and in pursuance of the concerted plan, is the act of the whole of them. To apply that principle to the present case. If it were proved that Amir Khan engaged in a conspiracy to wage war against Her Majesty, acts done within the district of Patna by any one of the persons with whom he so engaged in pursuance of the original concerted plan, and with reference to the common object, would be, in point of law, the acts of the accused, Amir Khan; and it would be the same as if he himself had done the acts within the district of Patna, although at the time he might not be there, and might be remaining at Calcutta. Thus, the case is, in my opinion, brought within the provisions of s. 28 of the Code of Criminal Procedure, the abettor having done something for abetting the commission of the offence within the district of Patna, and that appears to me to be one and a conclusive answer to the objection taken to the want of jurisdiction in the Patna Courts to try Amir Khan for the abetment of waging war against the Queen, of which he has been convicted. I do not think that the offence committed can be regarded as the abetment of an abetment. It was not that Amir Khan abetted other persons to abet the waging of war; he engaged with other persons in a conspiracy to wage war, and did acts in furtherance of that conspiracy.

There is another way in which the matter may be regarded, which equally affords an answer to the objection of want of jurisdiction. In this case the acts of abetment of which the Sessions Court has found the prisoner guilty are the sending of money on several occasions from Calcutta to Patna, in furtherance of the common design that that money should be made use of in waging war against Her Majesty. Now, the money was received at Patna, and sent by Amir Khan there through hundis, as proved by the evidence; and until that money reached its destination, the sending, in point of law, continued on the part of Amir Khan; the money was in the process of being sent to the persons by whom it was intended to be received until they received it at Patna, and there was, in that view of the case, a sending of the money by Amir Khan within the district of Patna, where he has been tried and convicted. It is on this principle that it has been held, and it is considered settled law, that an indictment for sending a threatening letter may be tried either in the county in which the offender sent the letter, or in the county in which the prosecutor received the letter; and, in like manner, in the case of a libel or letter containing a challenge, if the letter be sent from one county to another, the trial may take place in either county. That is applicable to this case of sending the money, and would, if

<sup>1</sup> 4 East. 171.<sup>2</sup> 4 East. 164.

there was not an answer to the objection of want of jurisdiction on the ground I have previously stated, afford in itself a sufficient answer to that objection. In my opinion, therefore, the Court at Patna had jurisdiction to try the accused Amir Khan for this offence, of which he has been convicted.

There is, no doubt, an apparent want of jurisdiction on the face of the proceedings, because both the charges upon which the conviction has taken place allege that the abetment was "at Calcutta," and there is this apparent inconsistency, that the Sessions Court at Patna has found the accused guilty of an offence committed at Calcutta. But that is an error or defect in the charge, which is cured by s. 426 of the Code of Criminal Procedure.<sup>1</sup> The charge might and ought properly to have been a charge of the offence of abetment at Patna; and then evidence might have been given, not merely of what he did at Calcutta, but of what the other conspirators did at Patna. It cannot be said that the defect is not one to which s. 426 would apply, or that the accused has been in any way prejudiced in his defence by the erroneous statement of the abetment having taken place at Calcutta, when the evidence was sufficient to show an abetment at Patna. In truth, the proper mode of framing the charge would have been that all the conspirators should have been jointly charged with the conspiracy, it being alleged to have been an abetment at Patna, and then the acts of the various conspirators in Calcutta and in Patna might have been given in evidence, and there would have been jurisdiction to try the accused at Patna if any acts were done in Patna. Had the accused been so charged in this case, there would have been no plausible ground even for the objection that the trial should not have been held at Patna. It cannot be contended that it is not proper or right, where persons are engaged in a conspiracy, that they should be tried at the chief place of the conspiracy; and that is really what has been done in the present case. This disposes of the first of the two preliminary objections.

Then the second objection, which was taken by the learned Counsel for Amir Khan, was that Amir Khan had already been tried, convicted, and punished.

I am now speaking of these two objections as applying to the case of Amir Khan only; but, in fact, they apply to the other accused persons as well, and it will not be necessary to repeat the remarks which I have to make with regard to Amir Khan's case when I come to deal with the case of the others.

With respect to this objection, the learned Counsel relied upon the judgment of Phear, J., *In the Matter of Amir Khan*.<sup>2</sup> The matter was then before Phear, J., on the appeal from the decision of Norman, J., on an application for a writ of *habeas corpus*. The first passage on which the learned Counsel relied, and to which he called our attention, is to be found at p. 468 of the Report,

<sup>1</sup> S. 426.—"No finding or sentence passed by a Court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error or defect either in the charge or in the proceedings on trial, unless the accused person shall have been sentenced to a larger amount of punishment than could be awarded for the offence of which, in the judgment of the Appellate Court, the accused person ought, upon the evidence, to have been found guilty, or unless, in the judgment of the Appellate Court, the accused person shall have been prejudiced by such error or defect; and in case the accused person shall have been sentenced to a larger amount of punishment than could have been awarded for the offence which, in the judgment of the Appellate Court, is proved by the evidence, the Appellate Court may reduce the punishment within the limits prescribed by the Indian Penal Code or any law for the time being in force for such offence."

<sup>2</sup> 6 B. L. R. 468 (see p. 297 of this book).

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1871. where Phear, J., speaking of the warrant which had been issued under Regulation III. of 1818, says: "It is a warrant of commitment reciting that which is, by virtue of the Regulation, equivalent to a conviction." In a subsequent passage, to be found at p. 476, the learned Judge says, after noticing the Acts of Parliament and the Regulations with regard to the power of the Governor-General in Council, to commit persons and keep them in custody: 9 B. L. R. 36. "The real effect of these Acts is that they create and make lawful a new cause [17 W. R. 15.] of imprisonment, and constitute the Governor-General in Council a Court endowed with the fullest discretion to adjudicate such a cause, and with power to imprison therefore during pleasure. It may, indeed, be taken in effect that on the present occasion the High Court has enquired into the legality of Amir Khan's imprisonment, and has ascertained that he is imprisoned under a conviction and commitment of a competent tribunal, the warrant of which conviction and commitment is good on the face of it." It appears that in the present case the commitment actually took place on the 10th July 1869; and it is to be observed that what Phear, J., said was with reference to a warrant dated the 10th August 1870, in the case of *In the Matter of Amir Khan*,<sup>1</sup> which is in the form given in the Regulation. But we may assume that there was some warrant in a similar form previously; and, if not, still the objection which the learned Counsel took would arise, namely, that there had been a commitment amounting to a conviction by the Governor-General in Council under the Regulation, and a subsequent discharge of the persons who had been so committed. Now, Mr. Anstey, and also Mr. Ingram, who followed on the same side, contended—and it was necessary for them to contend—that Amir Khan, having been committed under Regulation III. of 1818, and afterwards discharged, could not be punished for any political offence committed previously to that commitment. That, as I understand, was the objection. They urged that that gave him immunity from all political offences (it cannot be supposed that the argument went beyond that) committed before that period; and it was necessary for them to go to that extent, because the warrant of commitment being in the general form given in the Regulation, no offences were specified in it, and there would be no means of ascertaining for what particular offence (if their view is correct) the commitment had been made. The opinion expressed by Phear, J., in the passages I have referred to, appears to be very distinct; and it has become necessary for us to consider whether we can concur in it. With every respect for the learned Judge by whom that opinion was pronounced, I am unable to concur in it, and it appears to me to be opposed both to the preamble and to the enactment in the Regulation III. of 1818. The preamble of that Regulation says: "Whereas reasons of State, embracing the due maintenance of the alliances formed by the British Government with foreign powers, the preservation of tranquillity in the territories of native princes entitled to its protection, and the security of the British dominions from foreign hostility and from internal commotion, occasionally render it necessary to place under personal restraint individuals against whom there may not be sufficient ground to institute any judicial proceeding, or when such proceeding may not be adapted to the nature of the case, or may, for other reasons, be unadvisable or improper; and whereas it is fit that, in every case of the nature herein referred to, the determination to be taken should proceed immediately from the authority of the Governor-General in Council; and whereas the ends of justice require that when it may be determined that any person shall be placed under per-

<sup>1</sup> 6 B. L. R. 434 (or p. 276 of this book).

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sonal restraint, otherwise than in pursuance of some judicial proceeding, the grounds of such determination should from time to time come under revision. The language of the preamble points to cases where a commitment may be made when there are not sufficient grounds for a judicial proceeding, or when a judicial proceeding may not be adapted to the nature of the case, or when it may be determined that the person shall be placed under personal restraint otherwise than in pursuance of a judicial proceeding. Looking to that language, I am unable to see that the Legislature intended that the Governor-General, in issuing a warrant of commitment under this Regulation, was in any way to act as a Court of Justice, or to act judicially, or to be considered as having adjudicated that the person placed under personal restraint had been guilty of some specific offence; I am unable to see that this proceeding was at all intended to be treated as in the nature of a conviction of the person so placed under personal restraint. That is the language of the preamble. Then the other parts of the enactment are consistent with the preamble, and show again what was the intention of the legislative authority by which this Regulation was passed. S. 2 says: "When the reasons stated in the preamble of this Regulation may seem to the Governor-General in Council to require that an individual should be placed under personal restraint, without any immediate view to ulterior proceedings of a judicial nature, a warrant of commitment under the authority of the Governor-General in Council, and under the hand of the Chief Secretary, or of one of the Secretaries to Government, shall be issued to the officer in whose custody such person is to be placed." The form of the warrant is next given, and it states "that, whereas the Governor-General in Council, for good and sufficient reasons, has seen fit to determine that (*the prisoner's name*) shall be placed under personal restraint at (*the name of the place*), you are hereby required and commanded, in pursuance of that determination, to receive the person above-named into your custody," and so on. There is nothing to my mind, in the language here used, which points to the proceeding being in the nature of a judicial proceeding, or of a conviction of the person placed under restraint. The whole of the Regulation indicates that what was intended was what is expressed by my lamented colleague, Norman, J., in his judgment, when he refused the writ of *habeas corpus*, namely, that the Regulation does no more than give to the Governor-General in Council a power analogous to that which the Parliament of the United Kingdom exercises when by legislative enactment it suspends the *Habeas Corpus* Act. That is more like what the proceeding is than what the learned Counsel for Amir Khan compared it to; and Markby, J., who sat with Phear, J., on the occasion when the opinion I am now considering was expressed by Phear, J., does not appear to have concurred in the view which that learned Judge took of this question. Markby, J., concurred in refusing the writ of *habeas corpus*; but he gave his own reasons for doing so; and I do not find that he assented to the proposition which had been laid down by Phear, J.; and certainly Norman, J., did not take that view of the matter, because he expressed himself quite in the opposite way. After carefully considering the language of this Regulation, I must come to the conclusion that there is not in this case any real ground for the objection taken by the learned Counsel that the accused had already been tried and convicted and punished for the offence with which he was charged before the Sessions Court at Patna. It was said that this proceeding, under Regulation III. of 1818, was like a proceeding by a Bill of Pains and Penalties, and we were referred to *Bishop Atterbury's Case*<sup>1</sup> in the

<sup>1</sup> 16 How St. Tr. 323.

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State trials. But there is no similarity in the proceedings. The Bill of Pains and Penalties was a conviction by Act of Parliament of a person for an offence or an attaching to the offence of which the person was found guilty certain pains and penalties which went beyond the common law, and was a bar to a subsequent prosecution in respect of the same matter, on the principle that a person once convicted cannot be tried again. As I have said, when we look to the language of Regulation III. of 1818, it does not attach such consequences to a commitment by the Governor-General in Council for good and sufficient reasons. This disposes of the second of the preliminary objections which were taken on behalf of Amir Khan.

It now becomes necessary for us to consider the evidence in the case, and see whether that was sufficient to support the conviction. The offence charged being the abetment of waging war against the Queen, and the punishment being, as I have stated, the punishment which is to be awarded where the offence abetted has been committed, it was necessary in the first instance to prove the actual waging of war. Although probably little doubt could be entertained that war was waged, yet on the trial it was necessary that evidence should be given on that point.

(His Lordship then read the evidence of Mahomed Israil, and proceeded):—There, then, is evidence that, during the period to which the charge against Amir Khan is applicable, there was a waging of war against the English Government, against Her Majesty the Queen.

(After reading the evidence of Jan Mahomed, His Lordship proceeded):—These two witnesses show beyond doubt that there was a waging of war.

Then what is the evidence as to the abetment of waging of war? Now, I do not think it necessary to go through the evidence either of Abdulla Kowidi or Abdul Gaffur. The Judge says, as to both of these witnesses, that it would not be safe to rely upon their uncorroborated statements; and for that reason it was that the accused Hashmadad Khan was acquitted entirely, and Amir Khan was acquitted of certain of the charges against him. The Judge says that Abdulla Kowidi gave his evidence in a manner which impressed him favourably; that there was a calmness and self-possessed demeanour in the witness in giving his evidence. It is possible that the Judge may have attributed too much to that demeanour; it might be the demeanour of a man who was an adept in giving false evidence, as well of a man telling the truth. I am not inclined to place reliance on the testimony of either of these witnesses.

(After reading the evidence of Abdul Karim, His Lordship proceeded):—The witness is here speaking of some matters which occurred before 1859, and therefore before the time at which this abetment is charged to have been committed; but this is evidence against Amir Khan, and is so far of importance as tending to show that he had then engaged in the conspiracy; and it is to be taken with other evidence, showing that the conspiracy in which he was so engaged continued, and that he continued to be engaged in it.

(After reading the evidence of Hosseini and Moazim Sirdar, His Lordship proceeded):—In reading the depositions of these witnesses, I do not forget that they are accomplices, and require corroboration.

(His Lordship then read the evidence of Kazi Murad, Daimula, and Amir Khan of Pubna, and, speaking of the last witness, proceeded):—This witness, if corroborated, appears to me to show, conclusively, that Amir Khan was engaged in this conspiracy. The question then arises, what corroboration there is of the statements of Amir Khan of Pubna. I must say, however, that per-

haps it is scarcely right to treat this witness as an actual accomplice, though he does show, by his evidence, that he knew what the money was intended for which he took part in remitting.

Now, the corroborative evidence relied upon consists in the three letters, L<sub>1</sub>, M<sub>1</sub>A, and N<sub>1</sub>A, which were found in Kazi Mian Jan's house. It was objected as to these letters by the learned Counsel for Amir Khan that Kazi Mian Jan had been previously arrested, and that letters found in his house, subsequent to his arrest and whilst he was in custody, could not be used in evidence. But that rule of evidence is subject to this exception—that, if the previous existence of the letters found is established, either by direct proof, or by strong presumptive evidence, the objection that they were found after the arrest of the party in whose house they were found cannot prevail. The reason for not allowing them to be received in evidence would not apply in such a case; that reason being that it is necessary to guard against the possibility of persons, after a man has been arrested and is in custody, placing in his house papers which might be used to criminate him. But if the evidence shows that the papers were in existence before the arrest, then the papers may be used in evidence. And the evidence, which I am now about to notice, shows, I think, conclusively, that these letters were in existence previous to the arrest of Kazi Mian Jan. I do not know that it does not appear that he had been arrested before the search of his house; but I do not think that is material, seeing what the evidence is with regard to these letters.

(After reading the evidence of Mosahib Ali, His Lordship proceeded):—This witness, if believed, shows that these three letters were written by him by direction of the accused Amir Khan. His position, no doubt, is the position of a witness who requires some corroboration, and upon whose unsupported testimony it would not be safe to rely. But we have most material evidence in support of what this man says, and that is the evidence of Major Parsons. Major Parsons says that he is District Superintendent of Police, Rajshahye. Then he speaks of having searched the house of Mahomed Jaffer at Thaneshwar, and found certain letters there; he then says: "I proceeded to Calcutta, where I searched the house of Amir Khan (the prisoner) in company with Mr. Reily, Nabakrishna Ghose, and some Calcutta Police. I asked Amir Khan for an explanation of statements made in some letters found in Kazi Mian Jan's house at Comarcolly, supposed to have been written by him, in which allusion was made to money having been forwarded to Patna. He pointed to a munshi sitting there, whose name I afterwards ascertained to be Mosahib Ali, and said that Munshi had written the letters."

(After reading the rest of Major Parsons's evidence, and commenting upon it, His Lordship proceeded):—A doubt has occurred to us in the course of the consideration that we have given to this case, although the point was not taken by the Counsel for the accused. The doubt to which I allude is as to whether the evidence of Major Parsons as to what Amir Khan said and did when he searched the house can be said be an admission or confession of guilt made to a police-officer (for Major Parsons was a police-officer), and, as such, inadmissible in evidence according to s. 148 of the Code of Criminal Procedure. But it does not appear to me that in what passed there was any admission or confession of guilt such as is contemplated by s. 148. Supposing, however, it to be doubtful whether what Amir Khan actually said could be used in evidence, I entertain no doubt that his conduct at that interview, when he was distinctly informed of what these letters were, and when his servant Mosahib Ali said that he had got orders to write them, in not denying that statement, and not attempting to offer any explanation of it, is admissible in evidence against him. I think

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s. 148 of the Code of Criminal Procedure cannot be carried to the extent of excluding such evidence as that.

The case then stands thus. There is against the prisoner Amir Khan, not putting aside, but not placing entire reliance upon the evidence of persons who may be regarded as accomplices, the evidence of Dajmulla about the money being sent, the evidence of Amir Khan of Pubna, and the important evidence of these letters, as to the contents of which, and as to their referring to money which was to be sent for purposes of the *jehad*, I think there can be no doubt.

(After reading the letters L1, M1A, and N1A, His Lordship proceeded):—Now, it was argued by the learned Counsel for Amir Khan that a meaning such as was put forward in the case for the prosecution ought not to be attached to the expression “sale of books” used in these letters. If we take these letters in connection with the evidence of the witnesses, especially that of Amir Khan of Pubna, it is clear that these remittances were not made on account of the sale of books, but for some other purpose; and then it comes to this, that the expressions contained in these letters were evidently used for the purpose of concealment; and the letters themselves very strongly corroborate the evidence which the witnesses on the part of the prosecution give. I have not alluded to the other letters which were found in Mian Jan’s house. The reason why I have not done so is, that the handwriting of those letters appears to be proved only by accomplices, such as Abdul Gaffur and Elahi Bax; and their evidence not having been corroborated in this respect, I have not thought it safe to rely upon those letters. In regard to the three letters L1, M1A, and N1A, the evidence is of a very different nature; and upon that evidence I can come to no other conclusion than that the prisoner Amir Khan was a party to this conspiracy, and did acts in furtherance of the objects of the conspiracy; and therefore I think that he has been properly found guilty by the Sessions Judge of Patna upon these two charges, and that his conviction ought to be affirmed.

Having disposed of the case against Amir Khan, His Lordship proceeded to consider the case as against the other appellants.

Mr. Evans and Mr. Lingham appeared for Tobaruk Ali and for Mobaruk Ali.

Mr. Ghose for Haji Din Mahomed and for Aminudin.

The plea of *autrefois convict* was taken on behalf of these prisoners. The evidence against all was objected to, as being that of accomplices, without any trustworthy corroboration.

Couch, C.J.—The preliminary objections taken in the case of Amir Khan, in so far as they apply to the case of these prisoners, may be considered as already disposed of, and the judgment in Amir Khan’s case on those objections applies equally to their cases.

I proceed to consider, first, the case of Tobaruk Ali, who has been convicted of waging war against the Queen at Umbeyla in 1863.

(His Lordship, after reading the evidence of Nur Shah Ali and of Sanata, proceeded):—It is difficult to see in what other way evidence of this character, as to persons engaged in the fight, could be obtained, except by the Government instituting enquiries as to what persons were capable of speaking to these facts, and sending them down to give evidence. And when such persons were sent down, it is difficult to see in what other way they could be dealt with than that they should be kept by Government, and subsistence afforded them by Government. Of course, witnesses, so obtained and supported by Government, may be in some degree disposed to give evidence in favour of the party who sent for them; but it does not follow from this that their evidence is to be rejected, and it is the duty of the Court to consider to what extent it deserves credit.

(His Lordship then read the evidence of Jan Mahomed, Narayan Sing, and Mahomed Shah, and proceeded):—According to these witnesses, therefore, Tobaruk Ali was actually engaged in the waging of war. Four of them speak to their having seen him so engaged; and another speaks to a statement which Tobaruk Ali made to him, which shows also that he was so engaged. Upon this evidence, it appears to me that Tobaruk Ali was properly convicted, and that the conviction against him also ought to be affirmed.

The next prisoner whose case is to be considered is Mobaruk Ali. Now, the principal evidence against him is that of Umed Ali, who is an accomplice. I do not think I need read that, because if he is sufficiently corroborated, his evidence would establish the guilt of the prisoner Mobaruk Ali. The question to be considered is whether there is in his case sufficient corroboration upon which we may safely act and sustain the conviction.

(After reading the evidence of Umed Ali, Purna Chandra Banerjee, and of Harak Lal, his Lordship proceeded):—It appears to me that this evidence is of a most unsatisfactory character, and that it cannot be regarded as evidence corroborative of Umed Ali upon which we can safely rely, so as to sustain the conviction of Mobaruk Ali. Umed Ali was a witness of that character that it would not be safe to rely upon his uncorroborated evidence; and the evidence which is put forward in corroboration is most unsatisfactory, and I cannot come to the conclusion that it would be right to sustain this conviction. The evidence leaves such a serious doubt in my mind as to whether the conviction should be supported that I think the conviction and sentence, with regard to Mobaruk Ali, must be reversed.

(His Lordship then proceeded to consider the case of Haji Din Mahomed, who was convicted by the Sessions Judge of abetting the waging of war, and after commenting on the evidence of the witness Bandhu Khan, and observing that his evidence as to Pir Mahomed had been disbelieved by the Judge, proceeded):—This evidence, as I have said, seems to me to amount to very little; and the witness is scarcely in the situation of a witness upon whose evidence any great reliance can be placed. He has been a very considerable time in the hands of the police, and, under such circumstances, it may be supposed that he would be disposed to give evidence which he thought might be in favour of the prosecution. The evidence is too slight materially to affect this prisoner; and the case against him appears to me to fail. I think the assessors were right in the conclusion they came to when they thought that he ought to be acquitted. The conviction of Haji Din Mahomed cannot be sustained, and must be reversed.

(His Lordship then proceeded to dispose of the case against Aminuddin):—The principal witness against this prisoner was Umed Ali, who was said to be corroborated by Jaya Narayan and Mahomed Shah. (His Lordship, after reading Jaya Narayan's evidence, proceeded):—As regards Jaya Narayan, what he states in his evidence about Aminuddin having brought out the gold mohurs has been disbelieved by the Judge, and Aminuddin has been acquitted of that charge. I cannot see that Jaya Narayan can be relied upon as a witness in support of the witness Umed Ali against Aminuddin. The other witness, in corroboration of Umed Ali, is Mahomed Shah, who speaks about Aminuddin having made a statement to him of the objects of the conspiracy. But that is not the kind of evidence one would expect or require for the purpose of corroborating a witness like Umed Ali; it is not such evidence as we can safely rely upon. When the evidence comes to be examined, and looking to the circumstances of the Judge having actually acquitted Aminuddin of the matter as to which Jaya Narayan speaks, we cannot, I think, rely upon the evidence of this witness suffi-

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1871. ciently to sustain the conviction of Aminuddin. I think his conviction must be reversed. This disposes of all these appeals. The result will be that the convictions and sentences with regard to Amir Khan and Tobaruk Ali will be affirmed; and the convictions and sentences in the cases of Mobaruk Ali, Haji Din Mahomed, and Aminuddin, will be reversed, and the said prisoners, Mobaruk Ali, Haji Din Mahomed, and Aminuddin, will be released.

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9 B. L. R. 146.  
[18 W. R. 18.]

*Criminal Procedure Code (Act XXV. of 1861), ss. 66 & 273—Reference by District Magistrate to Subordinate Magistrate of Complaint without Previous Examination of Complainant.*

A District Magistrate is not bound, on receipt of a complaint, to examine the complainant under s. 66 of Act XXV. of 1861, before referring the complaint to a Subordinate Magistrate for disposal. The examination of the complainant by the Magistrate to whom the case has been referred is sufficient.<sup>2</sup>

In this case the accused had been convicted of the offence of using criminal force. The Officiating Sessions Judge of Hooghly, in a letter dated the 6th January 1872, made a reference to the High Court, under s. 434 of the Criminal Procedure Code, observing: "The illegality, on account of which I have been called upon to make this reference, consists in the omission of any preliminary examination under s. 66 of the Code of Criminal Procedure. In all other respects and in all proceedings held in the presence of the accused, the procedure enjoined in the Code has been observed."

The case came on for hearing before Couch, C.J., and Ainslie, J.

The Court referred the following point for the decision of a Full Bench: "Whether, on receipt of a complaint, the Magistrate of a district is bound, under s. 66 of the Criminal Procedure Code, to examine the complainant before referring the complaint to a Subordinate Magistrate."

In making the reference the Court observed:—

Couch, C.J.—The Officiating Sessions Judge of Hooghly has sent up the proceedings of the Magistrate in this case, in order that the fine of Rs. 10, imposed on the petitioners, may be remitted, and the conviction quashed. The only alleged irregularity in the proceedings has been the omission by the Magistrate of the district to examine the complainants under s. 66 of the Criminal Procedure Code before transferring the complaint for trial to a Subordinate Magistrate.

"This irregularity was held fatal to the validity of the whole proceedings in certain cases cited by the Judge, the principal of which is that of *The Queen v. Girish Chandra Ghose*,<sup>3</sup> in which Glover, J., delivered judgment as follows: "In the first place, he (the District Magistrate) did not record the complainant's statement before referring the case to the Deputy Magistrate, as he was bound

<sup>1</sup> Reference to the High Court, under s. 434 of the Code of Criminal Procedure, by the Sessions Judge of Hooghly.

<sup>2</sup> See *The Queen v. Narayan Naik*, 5 B. L. R. 660 (see p. 223 of this book).

<sup>3</sup> 7 B. L. R. 513 (see p. 419 of this book).

to do under s. 66 of the Code (Act XXV. of 1861). There is an order on the back of the petition making over the case, but no examination of the complainant 'reduced into writing,' and signed by the complainant and the Magistrate." In the cases of *Dulali Bewa v. Bhuvan Shaha*<sup>1</sup> and of *The Queen v. Mahim Chandra Chuckerbutty*,<sup>2</sup> it has been decided that such a departure from the rules of procedure makes the acts of a Magistrate illegal. This case was followed by that of *In the Matter of Iswar Chandra Koer v. Umesh Chandra Pal*,<sup>3</sup> 30th September 1871, one of the Judges (Ainslie, J.) dissenting. On the other hand, it was held, in the case of *The Queen v. Umesh Chandra Chowdhry*,<sup>4</sup> that a transfer of a complaint by the Magistrate of a district to a Deputy Magistrate exercising full powers, without previously recording any examination of the complainant, was warranted under s. 66 of the Criminal Procedure Code. The first case, cited by Glover, J., does not bear materially upon the question before us. In the case of *The Queen v. Mahim Chandra Chuckerbutty*,<sup>2</sup> Kemp, J., decided that, as a matter of fact, the Magistrate had no complaint before him, and Markby, J., concurred in this finding. It may possibly be gathered from the judgments that the learned Judges were inclined to hold that omission by the District Magistrate to record a complainant's examination, as required by s. 66,

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<sup>1</sup> 3 B. L. R. A. Cr. 53 (see p. 122 of this book).

<sup>2</sup> 3 B. L. R. A. Cr. 67 (see p. 131 of this book), overruled by *The Queen v. Narayan Naik*, 5 B. L. R. 660 (see p. 223 of this book).

<sup>3</sup> 8 B. L. R. 19 (see p. 453 of this book).

<sup>4</sup> *Before Mr. Justice F. B. Kemp and Mr. Justice E. Jackson.*

#### THE QUEEN v. UMESH CHANDRA CHOWDHRY.\*

*The 14 June 1870.*

Also reported  
in

5 B. L. R. 160  
or p. 197 of  
this book  
and in  
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IN this case the Sessions Judge of Beerbhoom made a reference to the High Court, under s. 434 of Act XXV. of 1861, to have the sentence of the Deputy Magistrate quashed, on the ground that the Magistrate of the district, without examining the complainant, and reducing the examination into writing, and signing his name as Magistrate to such examination, referred the petition to the Deputy Magistrate for trial, contrary to s. 66 of Act XXV. of 1861. In making the reference, the Sessions Judge cited as an authority the case of *The Queen v. Mahim Chandra Chuckerbutty*.†

The judgment of the Court on this reference was delivered by

KEMP, J.—In the case of *The Queen v. Mahim Chandra Chuckerbutty*,† referred to by the Judge, there was a statement, but it was not such a statement as to amount to the complaint contemplated by s. 66 of the Code of Criminal Procedure.

In the case referred to us, the Magistrate sent the petition presented by the complainant to the Deputy Magistrate, who exercises the full powers of a Magistrate. We think that, under s. 66 of the Procedure Code, and the Circular Order No. 6, dated the 16th May 1864, the Magistrate of the district was justified in making over the petition to the Deputy Magistrate for enquiry and trial.‡

\* Reference to the High Court, under s. 434 of the Code of Criminal Procedure, by the Sessions Judge of Beerbhoom.

† 3 B. L. R. A. Cr. 67. See n. 3.

‡ But see *per* Kemp, J., in *Issur Chandra v. Umesh Chandra Pal*, 8 B. L. R. 19 (or p. 453 of this book); and *per* Glover, J. (Kemp, J., concurring), in *The Queen v. Girish Chandra Ghose*, 7 B. L. R. 513 (or p. 419 of this book).

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would invalidate all subsequent proceedings by a Subordinate Magistrate, to whom the complaint might be transferred; but this was not the point on which the judgments turned, so that it seems that there is really no authority, except that of the case of *The Queen v. Girish Chandra Ghose*,<sup>1</sup> for holding the examination of the complainant before transfer of the complaint absolutely essential.

S. 273 of the Criminal Procedure Code (Act XXV. of 1861), under which District Magistrates are empowered to refer complaints to Magistrates subordinate to them, in no way defines the stage at which the transfer may be made; and s. 275 makes all rules prescribed for the guidance of the Magistrate of the district applicable to proceedings by the Subordinate Magistrate. This Court, in Circular No. 6, dated 16th May 1864, para. 2, held that "a Magistrate may at once make over the complaint to be enquired into and tried by any Magistrate subordinate to him." Such Subordinate Magistrate should, in this latter case, proceed in the manner laid down by ss. 66 and 67, Code of Criminal Procedure (Act XXV. of 1861).

No one appeared for the petitioners or the Crown in this case.

The judgment of the Full Bench was delivered by

COUCH, C.J.—We are of opinion that the question referred to the Full Bench should be answered in the negative. We agree in the decision in the case of *The Queen v. Umesh Chandra Chowdhry*.<sup>2</sup> This case was not cited in the case of *The Queen v. Girish Chandra Ghose*,<sup>1</sup> where no one appeared to support the conviction. In the other cases the point was not decided. The examination of the complainant by the Magistrate to whom the case is referred is sufficient for the regularity of the proceedings.

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Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Ainslie.

9 B. L. R. 229. IN THE MATTER OF THE PETITIONS OF J. D. SUTHERLAND AND ANOTHER.<sup>3</sup>  
 [18 W. R. 11.] *Actual Possession—Criminal Procedure Code (Act XXV. of 1861, ss. 282 and 318—Breach of the Peace regarding Possession of Land.*

The possession of a master by his servant—of a landlord by his immediate tenant, the person who pays rent to him—of the person who has the property in the land by the usufructuary, come within the meaning of the words "actual possession" in s. 318 of the Code of Criminal Procedure. Their meaning is not limited to bodily possession. But a person is not in "actual possession" where the rents are paid by the actual occupier, not to him, but to an intermediate holder.

All that is required to make a proceeding under s. 318 proper and valid is that the Magistrate should be satisfied that a dispute exists, and he is to record the grounds of his being so satisfied. There is nothing which defines upon what grounds he shall be satisfied, or limits him to being satisfied by evidence given before him.

If a Magistrate is satisfied that the circumstances of a case require it, he may make an order under s. 282, notwithstanding that he has taken recognizances under s. 282.

<sup>1</sup> 7 B. L. R. 513 (see p. 419 of this book).

<sup>2</sup> *Ante*, 147 (see foot-note case, p. 513 of this book).

<sup>3</sup> Miscellaneous Criminal Cases, Nos. 50 and 51 of 1872, against the orders of the Magistrate of Monghyr, dated the 6th February 1872.

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9 B. L. R. 279,  
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THIS was an application to the Court on behalf of Harda Narayan and J. D. Sutherland based upon two petitions. By the first of these petitions it was prayed that a certain order, dated the 6th February 1872, made by the Magistrate of Monghyr, under s. 282 of the Code of Criminal Procedure,<sup>1</sup> requiring the petitioners to enter into recognizances for the sums of Rs. 10,000 and Rs. 2,000 respectively, to keep the peace towards L. Crowdy for a period of six months, might be set aside on, among others, the following grounds: That there was no evidence before the Magistrate of a breach of the peace having been committed, or of an intention to commit a breach of the peace by the petitioners; that the Magistrate proceeded upon police-reports only; that the admissions made by one or both of the petitioners did not amount to evidence of an intention to commit a breach of the peace; and particularly, as regarded Harda Narayan, that the Magistrate was wrong in making the order against him on the ground that Sutherland was his manager. No witnesses were examined against the petitioners, but Sutherland, in answer to questions put to him by the Magistrate, said: "It is my intention to carry out the business of constructing this factory. Some of the factory buildings, for instance, the wheel-house for taking water, &c., will be on this very piece of ground disputed, that is, which Mr. Crowdy says is his." The Magistrate remarked upon this as follows:—

"It appears to me on review that the position of affairs between the parties is distinctly such as in the words of s. 282 would probably occasion a breach of the peace. Mr. Crowdy has not furnished any evidence in support of his account of the matter (or points dwelt upon by the pleader of the other side), but this want is supplied by the admissions of Mr. Sutherland, for he declares that he must have the lands on which Crowdy's tent is pitched, instead of having recourse to law to settle the dispute."

By the other petition it was prayed that an order made by the same Magistrate on the 15th February 1872, in a proceeding under s. 318,<sup>2</sup> by which the Magistrate had declared Mr. Crowdy to be in possession of a certain piece of land, known in the proceedings as plot C, and directed the petitioners to resort to the Civil Court by a regular suit, might be set aside on, among others, the following grounds: That the Magistrate did not hold and record such a proceeding as is required by s. 318 of the Code of Criminal Procedure; that the

<sup>1</sup> S. 282.—It shall be lawful for the Magistrate of the District, or other Officer exercising the powers of a Magistrate, whenever he shall receive credible information that any person, whether a European British subject or not, is likely to commit a breach of the peace, or to do any act that may probably occasion a breach of the peace, to summon such person to attend at a time and place mentioned in the summons, to show cause why he should not be required to enter into a bond to keep the peace with or without sureties, as such Magistrate shall think fit.

<sup>2</sup> S. 318.—Whenever the Magistrate of the District, or other Officer exercising the powers of a Magistrate, shall be satisfied that a dispute, likely to induce a breach of the peace, exists concerning any land, premises, water, fisheries, crops, or other produce of land, within the limits of his jurisdiction, he shall record a proceeding stating the grounds of his being so satisfied, and shall call on all parties concerned in such dispute to attend his Court in person, or by agent, within a time to be fixed by the Magistrate or other Officer as aforesaid, and to give in a written statement of their respective claims, as respects the fact of actual possession of the subject of dispute. The Magistrate or other Officer as aforesaid shall, without reference to the merits of the claims of any party to a right of possession, proceed to enquire which party is in possession of the subject of dispute, and, after satisfying himself upon that point, shall record a proceeding, declaring the party whom he may decide to be in such possession to be entitled to retain possession until ousted by due course of law, and forbidding all disturbance of possession until such time.

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proceeding under s. 318 was founded upon the proceeding and the order in the proceeding under s. 282, which were themselves irregular; that Mr. Crowdy had not such possession as is required by s. 318, because, upon his own showing, he claimed plot C, as the jote of one Pochan Rai, who was alleged to be a ryot holding that plot under one Ram Charan Bhagat and others, the *kathinadars* (lessees) of Islampore under Crowdy and others; and that Pochan Rai was no party to the proceedings.

It appeared that the Magistrate, in addition to the statements made by the parties themselves, proceeded upon an office-memorandum which had been previously recorded, and which was in these terms:—

“Whereas, in the case of Government, first party, and Baboo Harda Narayan and Mr. Sutherland, second party, and Mr. Crowdy, third party, recognizances and security have been taken under s. 282, Act XXV. of 1861, by reason of there being a probability of a breach of the peace, and in those proceedings it became apparent that a likelihood of a breach of the peace arises from this cause, that, within the boundaries of the land which Mr. Sutherland alleges that he holds under a mokurarri lease from Harda Narayan as a part of mauza Komalpore, there are three plots, as described below, which Mr. Crowdy states to be held by himself of Pochan Rai. Since it is evident that, if an enquiry as to these lands be held under s. 318, the danger of a dispute may be avoided; and as there is a fear that, notwithstanding the taking of recognizances and security from each party, yet, on account of the quarrel, an affray may occur, therefore by this proceeding an enquiry under s. 318 is originated, and notice is to be served on Mr. Crowdy of the Majhole Factory, and Baboo Harda Narayan and Mr. Sutherland, his manager, calling upon them to appear on the 15th February 1872 at Begooserai in person or by mooktear with their proofs, and to file written statements respecting the property in dispute.”

The petitioners sought to have both the orders of the Magistrate set aside. The *Advocate-General (Offg.)* and Mr. *W. Sutherland* for the petitioners. Mr. *Woodroffe* (with him Mr. *R. E. Twidale*) for Crowdy.

The *Advocate-General (Offg.)* contended that s. 318 does not contemplate both remedies at the same time. Where the Magistrate makes an order that parties should enter into recognizances not to commit a breach of the peace in order to obtain possession of disputed land, it is not necessary that he should immediately afterwards proceed to try under s. 318 which of the parties is entitled to keep possession. There was no evidence before the Magistrate; therefore he could not proceed under s. 318 at all—*Abhaya Chowdhry v. Brae*<sup>1</sup> and *Mussamut Anundee Koor v. Rane Soonat Koor*.<sup>2</sup> Crowdy's possession is not such as would entitle him to be kept in possession under s. 318. Possession, according to that section, ought to be actual, not constructive—*Dewan Elahee Newaz Khan v. Suburunnissa*.<sup>3</sup> Plot C, upon Crowdy's own showing, is in the possession of one Pochan Rai, who holds under a third person, who is a lessee under Crowdy, and to whom he pays rents. There should be no adjudication therefore as to plot C in favour of Crowdy. The Magistrate's order against Harda Narayan is wholly *ultra vires*. There is no evidence at all that he took any part in the dispute regarding the lands in question.

<sup>1</sup> 6 B. L. R. App. 148 (see p. 355 of this book).

<sup>2</sup> 9 W. R. Cr. 64.

<sup>3</sup> 5 W. R. Cr. 14.

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Mr. W. Sutherland on the same side.—The whole of the proceedings before the Magistrate under s. 282 were irregular, because they were based upon police-reports and upon a report by the Assistant Magistrate. The Magistrate should hold a regular inquiry himself—*Mussamut Anundee Kooer v. Rane Soonet Kooer*.<sup>1</sup> Police-reports are not evidence, nor do they furnish “credible information.” There must be evidence, and the Magistrate must record a proceeding—*Abhaya Chowdhry v. Brae*<sup>2</sup> and *Kashi Kishor Roy v. Tarini Kant Lahori*.<sup>3</sup> The Magistrate was bound to take evidence, and decide judicially—*Behari Patak v. Mahomed Hyat Khan*.<sup>4</sup> Sutherland’s answer to the Magistrate does not convey any admission of an intention to break the peace, and he has nowhere said that he will not have recourse to law to settle the dispute. The omission by a Magistrate to record a proceeding in a case of disputed possession renders his proceeding void—*Harvey v. Brice*.<sup>5</sup> Whatever order may be given against Sutherland, nothing is shown against Harda Narayan, and he should not be required to give the recognizance, merely because Sutherland is his manager. In criminal cases the master is not bound by the acts of his servants, unless done by his orders.

Mr. Woodroffe for the respondent.—Crowdy was sufficiently in possession within the meaning of the section to claim the protection of that law. He was on the spot with his servants and with the consent of his lessee for the purpose of protecting the crops on the lands, &c. His ryots were in actual possession. By “actual possession” is not meant direct manual possession; such possession none but the cultivator himself could have; but merely present possession is meant. The view taken by Phear, J., in *Dewan Elahee Newoz Khan v. Suburunnissa*,<sup>6</sup> that the possession must be actual, and not constructive, cannot be supported. The Act of a Magistrate under s. 318 in recording reasons for being satisfied that a breach of the peace is likely to occur, and, in issuing notices, is not a judicial proceeding, and therefore cannot come under s. 404. It afterwards becomes judicial when the parties come before him and satisfy him as to possession. The Magistrate is fully justified in acting promptly when there are reasonable apprehensions of a breach of the peace; and, particularly, where the accused party admits that he is going to commit a breach of the peace—*Behari Patak v. Mahomed Hayat Khan*.<sup>4</sup> The law was correctly laid down by Glover, J., in that case. See also *Mussamut Zuhoorun v. Mussamut Begum*.<sup>7</sup> The view taken by Phear, J., as to the proceedings referred by a Magistrate in *Dewan Elahee Newoz Khan v. Suburunnissa*<sup>6</sup> already cited, and afterwards in *Mussamut Anundee Kooer v. Rane Soonet Kooer*,<sup>1</sup> is not a correct view.

The Advocate-General in reply.

Couch, C.J.—In the first of these cases, an application was made to the Court to set aside an order which had been made by the Magistrate of Monghyr under s. 282 of the Code of Criminal Procedure. The order was dated the 6th of February 1872, and ordered the applicants Harda Narayan and Sutherland

<sup>1</sup> 9 W. R. Cr. 64.

<sup>2</sup> 6 B. L. R. App. 148 (see p. 355 of this book).

<sup>3</sup> 3 B. L. R. App. Cr. 76 (see p. 136 of this book).

<sup>4</sup> 4 B. L. R. F. B. 46 (see p. 147 of this book).

<sup>5</sup> 4 W. R. Cr. 26.

<sup>6</sup> 5 W. R. Cr. 14.

<sup>7</sup> 6 W. R. Cr. 4.



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to enter into recognizances to keep the peace for six months. It appeared that Sutherland was the manager for Harda Narayan, and it was objected that there was no reason for Harda Narayan being compelled to enter into recognizances. Certainly, there does not seem to be any reason that the order should extend to him, and we may say at once that, as regards him, it is one which the Magistrate was not authorized to make; and that portion of it must be set aside. We have then to consider the order as it applies to Sutherland. It was objected by the Advocate-General, who appeared for him, that no evidence was taken by the Magistrate, and that consequently the order was not authorized by the Code of Criminal Procedure, and ought to be set aside. Now the order is stated by the Magistrate to be founded upon the statements which were made before him by Sutherland, the petitioner, and by Crowdy, the opposite party, both of whom had been summoned to appear before him. These statements must be regarded as evidence upon which the Magistrate might act if he thought it sufficient. They were admissions, I will not call them confessions, but admissions made by the parties who had been summoned to appear; and if, upon their own statements, there appeared to be sufficient grounds for the order being made, it would be superfluous for the Magistrate to take further evidence upon that subject. The Magistrate states that his order was founded upon these statements. (His Lordship read the portion of the Magistrate's order given above, and continued): It is not for us, as we often have to state in cases of this kind, to consider whether the Magistrate was right or not in being satisfied with this evidence. The only question is, was there before him evidence upon which he might be satisfied? We think that there was. If he came to the conclusion, upon the parties being summoned before him and making their statements, that it was necessary for the preservation of the peace to take a bond from them, he had full authority to do so, and there is nothing which would authorize or justify this Court in setting aside that order. So that, with regard to Sutherland, the order of the Magistrate will remain in force.

The second of these cases is also an application on behalf of Sutherland to set aside an order of the same Magistrate, dated the 15th of February, and made under s. 318 of the Criminal Procedure Code, and it was objected by the Advocate-General first that it was improper that an order should be made under this section, as well as an order under s. 282. With regard to this objection, I see no reason that, if the Magistrate is satisfied that the circumstances require it, he should not make an order under both sections. There may be cases in which it would be necessary to do so. In this case, if the Magistrate thought that the circumstances required it, he was justified in doing it. But the principal question which was discussed was whether the decision of the Magistrate, that the possession of one of the plots, namely, the plot marked C on the plan, the principal one in dispute, was to remain with Crowdy, was one which could, in point of law, be supported, or whether the facts were not such that the Magistrate had exceeded his power, or made an error for which this Court ought to set aside his order. Now, the circumstances with regard to the land, the possession of which is in dispute, and which dispute was considered by the Magistrate to be likely to lead to a breach of the peace, are stated in his finding, which we must take to be correct, and which appears to be supported by the evidence before him. The principal plot of land C is said to have been, up to the present time, or, rather, when this matter was before the Magistrate, cultivated by Pochan Rai, an Islampore ryot, whose evidence was taken in the case, and he stated that "the land where Crowdy's tent is now standing is mine. It is three bighas in four plots;" and, after giving the boundaries, he said: "I have had this land from my father's time, 25 years ago. I pay rent since 1274 (1866-67)

to Ram Charan Bhagat and Jola Bhagat, *katkinadars* of Islampore. Before 1274, I paid to Majhole *koti*" (office); and then he gave other particulars as to his getting receipts for the rent, which are not material. The other plots, A and B, appear by the evidence to have been taken possession of by Crowdy, shortly before the matter came before the Magistrate for decision, under sub-leases from ryots of Komalpore; the sub-lease of A being made on the 27th of January, and the sub-lease of B on the 29th of January. The Magistrate has found, and I think correctly, that the mere putting up a tent by Crowdy on the land, which was what he was shown to have done, was not a possession within s. 318. He says that the possession must be substantial and practical, but then he holds, upon the evidence, that, as to A and B, Crowdy was in possession, having obtained the sub-leases from the ryots, and having taken possession under them, although a very short time before the matter came before him for decision. With regard to the plot C, which is, as I understand, the piece of land really in dispute between the parties, the Magistrate says that he accepts the account which was given by Pochan Rai as being the correct statement of the facts of the case, and upon that he considered that Crowdy was in possession, and made an order that he should be retained in it.

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Now, there appear to have been several decisions of this Court which it is necessary to notice. In *Dewan Elahee Nawaz Khan v. Suburunnissa*,<sup>1</sup> a question of this kind came before a Court composed of three Judges, and Phear, J., said (Glover, J., having previously given his judgment): "Had it not been for the strongly expressed opinion of Glover, J., I certainly should have been disposed to think that the 'possession of land,' &c., contemplated in s. 318 of the Criminal Procedure Code, was (as the section itself expresses it) 'actual' possession, and not constructive possession by the receipt of rents. It seems to me that the breach of the peace intended to be anticipated is something in the way of a personal struggle for the actual enjoyment of the immovable property described; and had I been unassisted, I should have considered that the primary sense of the words employed supported that view and no other." But the learned Judge, in the following paragraph, says that, whatever might be the conclusion to which further and mature consideration might lead him on this point, he thinks the Magistrate had no jurisdiction to enquire into the matter of possession at all, unless he was first satisfied that a breach of the peace was actually likely to occur in reference thereto; and the case was decided upon that point. This opinion, that the section must mean actual possession, and not constructive possession, was therefore not necessary for the decision of the case, and it appears to me, from the learned Judge's own words, to have been one which he thought might be altered by further and mature consideration. It was also opposed to the opinion of Glover, J., in the same case. Now, when we look at the terms of s. 318, it appears that actual possession there was not so much intended to mean manual possession, or, as Phear, J., seems to consider, as excluding a possession by the receipt of rent, but rather seems to have been used as distinguished from the right of possession. The Magistrate is to see who is the party in actual possession of the subject in dispute as distinguished from the person in whom the property or right to recover possession may be. The question is, what is to be considered as meant in this section by possession? I think that it cannot mean only the actual or bodily possession. There may be cases in which a person would properly be said to be in possession, although there was no bodily possession by him. There is the case of

<sup>1</sup> 5 W. R. Cr. 14.

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a servant being in possession, and it may be said that, when the servant is in possession, it is the possession of the master. So, also, if an occupier is paying rent, that is the possession of the landlord to whom he pays the rent. For some purposes, the occupier has a possession; he has a possession which would enable him to bring a suit against a person who wrongfully disturbed him in his occupation, but, still, his possession is the possession of him by whose permission either given by a lease or any other mode of letting he holds the land and to whom he pays the rent. And this view of what is meant by possession and the construction to be put upon it in this section is supported by a passage in Domat's Civil Law, where possession is treated of: it is in Bk. III., Tit. 7, and there, after quoting several authorities from the Institutes, the author says: "From all which it is necessary to conclude that the true possession is, properly speaking, only that of the master; and that, although others, besides the master, may have a right to detain the thing, such as the tenant, the farmer, the usufructuary, who, having a right to enjoy, ought by consequence to have the detention of the thing, which in them is only a borrowed possession, or rather the master's own possession who possesses through them, because the right of possession cannot be separated from the property." Here are three classes—the tenant, the farmer, and the usufructuary. Although they have what the author calls a borrowed possession, it is rather the possession of the master than their own; and it appears to me that the proper construction of this section is that, by "actual possession" is meant the possession of a master by his servant, the possession of a landlord by his immediate tenant, the person who pays rent to him, the possession of the person who has the property in the land by the usufructuary. These cases appear to me to come fairly within the meaning of the word "possession" in this section, and, with every respect to the opinion of Phear, J., it appears to me that this is the construction which should be put upon it, rather than to limit it to cases of bodily possession.

Then to apply it to the present case, Mr. Crowdy was not in that possession. According to the evidence on which the Magistrate founded his decision, the immediate landlords of Pochan Rai, the persons to whom he paid the rent, were the two persons whom he named. Crowdy appears to have been a superior landlord to them, but that would not come within the meaning of the section, and Crowdy could not be considered to be in possession of this land by reason of the possession of Pochan Rai, the occupier: nor was he in possession, as the Magistrate has properly found, by reason of his having put up the tent upon the land. I think the Magistrate was wrong in point of law in deciding that Crowdy was in possession, and ordering him to be retained in it.

But another objection was taken, namely, that there had not been such a proceeding recorded, stating the grounds upon which the Magistrate was satisfied that there was a dispute likely to induce a breach of the peace, as would render his proceedings legal. That a compliance with the provisions of s. 318 is requisite, and that an omission on the part of the Magistrate to record a proceeding such as is required by that section renders the proceedings illegal, was decided in *Harvey v. Brice*.<sup>1</sup> On this point we have in the same case in the 5th Weekly Reporter the judgment of Phear, J. After the passage which I before quoted, in which he states that he thought the Magistrate had no jurisdiction to enquire into the matter of possession at all, unless he was first satisfied that a breach of the peace was actually likely to occur in reference

<sup>1</sup> 4 W. R. Cr. 26.

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9 B. L. R. 299.

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thereto, he says: "It necessarily follows that he must adjudicate definitely upon this point, and the Legislature also adds that he must record his reasons for being so satisfied. In this case he does not appear to have done either of these things." In another case of *Mussamut Anundee Kooer v. Ranee Soonaet Kooer*,<sup>1</sup> the same learned Judge says: "I take the opportunity of adding that, even if there had been a proceeding in this case, and assuming that it was confined to the statement by the Magistrate that he had been directed by the Judge to hold the investigation, it would not be sufficient to satisfy the requirements of s. 318, for it is necessary that the Magistrate himself should enquire into the likelihood of a breach of the peace happening, and should come to a judicial decision upon it. It is that judicial decision which is the foundation of the subsequent investigation, and without it the investigation is void and inoperative." The words of the section being that, when the Magistrate shall be satisfied that a dispute likely to induce a breach of the peace exists, he shall record a proceeding stating the grounds of his being so satisfied, the learned Judge says, in the first case, that the Magistrate must adjudicate upon the matter, and then he seems to have gone a step further, and speaks of a judicial decision, whence it has been inferred that the Magistrate must take evidence, and proceed in the same way as in an ordinary judicial enquiry. Now, I must say that I am unable to agree in this view of the requirements of s. 318. All that it requires, in my opinion, is that the Magistrate is to be satisfied that a dispute exists, and he is to record the grounds of his being so satisfied. There is nothing which defines upon what grounds he shall be satisfied, or limits him to being satisfied by evidence taken before him. It is properly provided that he shall state the grounds of his being satisfied in order that the revising Court may be able to see that he has not arbitrarily instituted proceedings of this kind. But that is all that is required; and in this case the Magistrate has stated that the ground of his proceeding was the office memorandum which had been previously recorded. (His Lordship read the office memorandum, and proceeded). There is here a formal statement by the Magistrate of the grounds upon which he was satisfied that a breach of the peace was likely to be committed, and I do not think any one would say that he was not justified in coming to that conclusion. The facts were such as might fairly lead him to think that a breach of the peace was likely to ensue; and, being so satisfied, and having recorded the grounds thereof, he had jurisdiction to proceed in the matter. That objection to his proceedings therefore in my opinion fails. The grounds upon which it was sought to set aside this order, as regards the whole of it, fail; but for the reason that the Magistrate has taken upon himself erroneously to find that Crowdy was in possession, the order, so far as it relates to the piece of land C, must be set aside.

As to costs we think that each party should pay his own.

*Order modified.*

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<sup>1</sup> 9 W. R. Cr. 64.

*Before Mr. Justice Kemp and Mr. Justice Glover.*

1872.

March 28.

9 B. L. R. 337.  
[18W.R. 39N.]

IN THE MATTER OF THE PETITION OF H. P. CASPERSZ.<sup>1</sup>

*Criminal Procedure Code (Act XXV. of 1861), s. 435—Powers of a Court of Session—Remand—Meaning of words "without enquiry."*

Where an accused person has been discharged by a Magistrate under s. 250 of the Criminal Procedure Code, after enquiry into the case, the Court of Session cannot, under s. 435, remand the case for further enquiry.

ON the complaint of the Raneegunge Coal Association, one H. Caspersz was charged with criminal misappropriation of certain moneys belonging to that Association. The case was heard by the Deputy Magistrate of Raneegunge, who was vested with the full powers of a Magistrate. The Deputy Magistrate, after going into the whole of the evidence for the prosecution, came to the conclusion that no charge of misappropriation had been made out against the accused, and he dismissed the case. The Sessions Judge of Burdwan, acting under the provisions of s. 435 of the Code of Criminal Procedure, ordered the Deputy Magistrate to make further enquiry into the complaint. After the order of the Sessions Judge was passed, but before the day fixed by the Deputy Magistrate of Raneegunge for making the further enquiry ordered by the Sessions Judge, Dr. Mendes, for the accused, moved the High Court, under s. 404, to send for the record, and quash the order of the Sessions Judge, on the ground that the complaint was not dismissed "without enquiry" within the meaning of s. 435, since the accused was discharged under s. 250 after evidence had been given by the prosecution. He also urged that the order of the Deputy Magistrate discharging the accused was tantamount to an acquittal.

As Dr. Mendes produced authenticated copies of all the proceedings of the Courts below, the High Court, without sending for the record of the case, passed the following judgments:—

KEMP, J. (after briefly stating the facts).—The Judge did not think proper to order the commitment of the accused. There can be no doubt that, in this case, as the accused was not put on his defence, the order dismissing the case amounts only to a discharge of the accused, and that the Judge was competent under s. 435, if he thought proper, to order the commitment of the accused. Not having done so, and having acted under the alternative portion of s. 435, the Judge was bound to keep strictly within the terms of the section. Now, the terms of that section, in as far as the alternative portion of it are concerned, are that, in the case of such offences—that is to say, offences triable by the Court of Session, or by the Magistrate of the district, or by any officer exercising the full powers of a Magistrate—the Court of Session may order an enquiry to be made into any case which the Magistrate or other officer exercising the powers of a Magistrate may have dismissed without enquiry. Now, in this case, can it be said that the complaint has been dismissed without enquiry? We think that the contention of the learned Counsel in this case is correct. There can be no doubt that, not only has there been an enquiry in this case, but there has been a most elaborate enquiry. Witnesses for the Coal Association have been examined, their account books have been produced, and the whole case has, in our opinion, been thoroughly enquired into, and *prima facie* the decision

<sup>1</sup> Miscellaneous Criminal Case, No. 63 of 1872, against an order of the Sessions Judge of East Burdwan, dated the 3rd February 1872.

of the Deputy Magistrate appears to us, as far as we can judge of it from the evidence which he alludes to, a proper decision; but be that as it may, he has dismissed the case as against the accused after taking evidence and after due enquiry. We have not found any authority contrary to the learned Counsel's contention with the exception of a Criminal Letter.<sup>1</sup> In that case the Sessions Judge appears to have doubted whether he could proceed under the latter portion of s. 435 in a case where some enquiry had been made, and the letter referred to informed him that he was in error in supposing that he could not proceed under that section, because the words "without enquiry" mean without proper enquiry. We are not bound by this Criminal Letter; and, following the words of the law, we must hold that there has been an enquiry in this case; and it can hardly be said that the enquiry has not been a proper one. We, therefore, think that the order of the Judge ordering a further enquiry must be set aside.

GLOVER, J.—I wish to add one word (whilst entirely concurring in the order to be passed), to guard myself against giving any opinion as to the sufficiency or otherwise of the enquiry made by the Deputy Magistrate. We have had the evidence before us, and the Judge, on the other hand, says that he considers the enquiry not to have been a proper or sufficient one. I wish to avoid pledging myself to any opinion as to the sufficiency of the enquiry. It is enough for the purposes of this case that there was an enquiry.

*Order quashed.*

*Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Ainslie.*

IN THE MATTER OF THE PETITION OF JIAT SAHU.<sup>2</sup>

*Criminal Procedure Code (Act XXV. of 1861), ss. 250 and 435—Re-trial by a Magistrate—Powers of a Court of Session—Remand.*

Where a Magistrate had discharged an accused under s. 250 of the Criminal Procedure Code, and afterwards the Sessions Judge, having remanded the case for further enquiry, re-tried it, and convicted the accused, the High Court, while holding that the Sessions Judge had no power to make the order of remand, upheld the conviction.

ONE Jiat Sahu had been charged (under s. 405 of the Penal Code) before the Joint-Magistrate of Sarun with having committed criminal breach of trust with respect to a certain sum of money which had been placed in his custody by the complainant, who had taken shelter for the night in his shop. The Joint-Magistrate, after examining four witnesses for the prosecution, including the complainant, discharged the accused under s. 250 of the Criminal Procedure Code, holding that the evidence had not made out a *prima facie* case. On the motion of the complainant, the Sessions Judge, acting under s. 435 of the Criminal Procedure Code, remanded the case to the Joint-Magistrate to make a more searching enquiry. The Joint-Magistrate, in pursuance of the orders of the Judge, took further evidence for the prosecution, drew up a charge, took evidence for the defence, and eventually convicted the accused. The Sessions Judge on appeal upheld the conviction.

The High Court (Kemp and Glover, JJ.), on the application of the accused, sent for the record of the case under s. 404 of the Criminal Procedure Code.

<sup>1</sup> 3 W. R. Cr. Let. 21.

<sup>2</sup> Miscellaneous Criminal Case, No. 158 of 1872, against an order of the Officiating Joint-Magistrate of Sarun, dated the 9th October 1871.

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PERSZ,  
9 B. L. R. 337.  
[18 W. R. 39N.]

1872.  
Aug. 17.  
9 B. L. R. 339.  
[18 W. R. 39.]

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THE PETI-  
TION OF  
JIAT SANU,  
9 B. L. R. 339.  
[18 W. R. 39.]

Mr. Sandel for the accused.—S. 435 of the Criminal Procedure Code contemplates only two classes of cases in which the Sessions Court can interfere—*vis.*, cases triable exclusively by the Court of Session or by the Magistrate of the district, and not cases in which other Subordinate Courts have concurrent jurisdiction with the two superior Courts. But a Subordinate Magistrate of the first class has power to try such a case as this, and, therefore, it does not come within the provisions of s. 435. If it be assumed that the present case is governed by s. 435, still the Court of Session had no authority in this case to remand it to the lower Court for further investigation, because the lower Court had discharged the accused after taking evidence for the prosecution, and it cannot therefore be said that the complaint was dismissed “without enquiry.” In the case of *In the Matter of the Petition of H. P. Casperss*,<sup>1</sup> the words, “without enquiry,” in s. 435, were held to mean where no evidence whatever for the prosecution had been taken by the Magistrate before discharging an accused person; the order of the Sessions Judge under s. 435 being, therefore, erroneous, the subsequent proceedings of the Joint-Magistrate in pursuance of it are void. [AINSLIE, J.—The Magistrate has power, independently of the order of the Sessions Judge, to revive the prosecution against an accused person discharged under s. 250.] No doubt, the Joint-Magistrate has such power, but in the present case it is quite certain he acted in pursuance of the order of the Judge remanding the case. It is impossible to say that the Joint-Magistrate would, of his own accord, have revived the prosecution in this case. It is discretionary with a Magistrate to revive a prosecution against an accused who has been discharged under s. 250, and it cannot be said that, when a Court acts in obedience to the orders of a superior Court, it exercises its discretionary powers.

Baboo Taraknath Sen for the complainant was not called upon.

COUCH, C.J.—In this case, as the offence was one triable by a Subordinate Magistrate of the first class, the Sessions Judge had not power to make the order which he made, and the case coming up to us under s. 404, we decide that that order was an erroneous one, and ought to be set aside; but it does not follow from this that the subsequent proceedings before the Magistrate ought to be set aside. If the order of the Sessions Judge was essential to the action of the Magistrate in again taking up the case, and trying the accused, of course, the order being set aside, the other proceedings would also be set aside. But the Magistrate, after he had discharged the accused under s. 250, had power, if circumstances appeared to him to require it, to take up the case again, and to re-try the accused. He appears to have had before him on the second occasion some fresh evidence upon which he drew up a charge, and, having heard the defence of the accused, convicted him, which he had power to do. In whatever way the Magistrate was set in motion on the second occasion, there has been a proper conviction of the accused. The Magistrate might, and indeed ought to, have taken up the case again, and to have tried it as he has done. Therefore, I do not think that the circumstance that he was led to enter upon the second enquiry and second trial by the Sessions Judge having made his order, is a ground for setting aside his proceedings and the conviction. If that were now to be done, it would be the duty of the Magistrate, upon the facts with which he is now acquainted, to take up the case and investigate it. It would not be proper that a person, who appears upon the evidence taken to have committed an offence, should go entirely free and unpunished, because the Sessions Judge has made this order erroneously.

<sup>1</sup> *Ante*, p. 337 (see p. 522 of this book).

A decision of Kemp and Glover, JJ., dated the 28th of March 1872, in the case of *In the Matter of the Petition of H. P. Caspersz*,<sup>1</sup> has been read to us, but that decision is not in conflict with what we now decide. It set aside the order of the Sessions Judge; but nothing was said as to what the consequences of setting it aside would be, that question really not arising in the case.

*Appeal dismissed.*

*Before Mr. Justice Kemp and Mr. Justice Glover.*

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TION OF  
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9 B. L. R. 339.  
[18 W. R. 39.]

IN THE MATTER OF THE PETITION OF THE GOVERNMENT OF BENGAL.<sup>2</sup>

*Review of order in Criminal Case—Fraud—Forfeited Property—Criminal Procedure Code (Act XXV. of 1861), ss. 184, 185—Penal Code (Act XLV. of 1860), s. 174.*

1872.  
July 26.  
9 B. L. R. 342.  
[18 W. R. 33.]

Where property of an absconding offender had been attached and declared to be at the disposal of Government under s. 184 of the Criminal Procedure Code, and the offender was subsequently convicted under s. 174 of the Penal Code, and such conviction was upheld on appeal, *held*, the High Court had no power to make any order with respect to such property.

Where an order for the release of the property so attached had been obtained from the High Court on an *ex-parte* application, and on an incorrect statement of facts, the High Court, on the application of the Government, cancelled such order.

THIS was a petition to the High Court (Kemp and E. Jackson, JJ.), on behalf of one Mir Sarwar Jan, who had been convicted of riot and murder by the Sessions Judge of Dacca, but had been acquitted on appeal to the High Court. The present application had reference to the proceedings of the Magistrate against the petitioner under the provisions of s. 174 of the Penal Code. The Magistrate found that the petitioner intentionally omitted to attend his Court in person in obedience to a proclamation which had been duly served on the premises of the petitioner; and having intentionally omitted to attend in person before the Magistrate to answer the charge of riot and murder. The Magistrate sentenced the petitioner to the maximum punishment allowed for the offence—namely, six months' imprisonment and a fine of Rs. 1,000.

The judgment of the Court was delivered by

KEMP, J. (who, after stating the facts as above, continued).—There are three grounds taken by the pleader for the petitioner, Baboo Durga Mohun Das: First, that as the offence of which the petitioner has been convicted was an offence committed before the Magistrate, who has convicted the petitioner under s. 174 of the Criminal Procedure Code, the Magistrate ought to have sent the petitioner to be tried by some other Court. The pleader called our attention to several rulings of this Court, one of which applies to the case before us—namely, the case of *Queen v. Chandra Sekhar Roy*.<sup>3</sup> The second ground taken is that there is no evidence that the petitioner intentionally omitted to attend the Magistrate's Court. We have read the evidence of several witnesses, who depose to the due service of the proclamation, and to the fact that the petitioner and all his family had left the family dwelling-house; and reading that evidence, and looking to the surrounding circumstances of the case, we think that it cannot be said that the petitioner's absence

<sup>1</sup> *Ante*, p. 337 (see p. 522 of this book).

<sup>2</sup> Miscellaneous Criminal Case, No. 134 of 1872.

<sup>3</sup> 5 B. L. R. Cr. 100 (see p. 193 of this book).



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did not originate in a desire to evade the process. We think it clear that he was intentionally evading process. The last ground taken is that the sentence, taking the whole of the circumstances into consideration, is excessive. We find that the petitioner was sentenced on the 26th July 1871, and that he remained in jail up to the 1st December 1871, when he was enlarged on bail according to the orders of this Court. Looking, therefore, to the time that he was in jail, and to the fact that he was acquitted of the original charge of riot and murder, we direct that he be released, setting aside the remaining portion of the sentence not yet expired.

On the 27th March 1872 Sarwar Jan, by his pleader, again applied to the High Court (Kemp and Glover, JJ.) for the restoration of his property which had been confiscated by the Magistrate. He stated in his petition that the Magistrate of Furreedpore had, before sentencing him under s. 174 of the Penal Code, confiscated all his moveable property under s. 184 of the Criminal Procedure Code; that, after the High Court had remitted the remainder of the sentence passed by the Magistrate, the accused applied to the Magistrate, under s. 185 of the Code of Criminal Procedure, praying to be restored to the possession of his confiscated property, as the same had been released by the High Court; but the Magistrate, being of opinion that the High Court had passed no specific orders regarding it, rejected the application; that the accused next appealed to the Judge of Dacca, who directed the application to be made to the Additional Judge of Furreedpore, and that the latter officer, on being applied to, refused to interfere on the ground of want of authority, though he was of opinion that the High Court's order included the release of any property attached by the Magistrate. The petitioner prayed that, as the High Court had already released him "from the unjust sentence passed by the Magistrate," the Court would be further pleased to order the property confiscated to be released.

On the same day the Court passed an order directing the Magistrate to "restore all the moveable property of the petitioner which may be under attachment."

Mr. Bell, the Legal Remembrancer, subsequently applied on behalf of the Government to the Court (Kemp and Glover, JJ.), objecting to the order of the 27th March. His prayer was thus worded:—

Your Lordships, without calling upon the Government to show cause against the said Mir Sarwar Jan's application, directed the Magistrate to restore to the petitioner all the moveable property which was under attachment; that your petitioner submits that Your Lordships' order did not refer to the property of the said Sarwar Jan which had been declared to be at the disposal of Government, but only to such portion of the said Mir Sarwar Jan's property as was under attachment; but should your petitioner be in error in supposing that Your Lordships' order did not embrace the property which had been declared to be at the disposal of Government, your petitioner would solicit Your Lordships to cancel your *ex-parte* order of the 27th March, and allow your petitioner to be heard in the case.

The Court (Kemp and Glover, JJ.) ordered a notice to be served on Mir Sarwar Jan to show cause why the order of the 27th March 1872 should not be cancelled.

Mr. Bell for the Government.—The Court have not acquitted the accused of the offence under s. 174 of the Penal Code, of which he was convicted, but have merely remitted the fine and the remainder of the term of imprisonment, holding that the conviction was proper. The property referred to by the accused in his petition of the 27th March, and in the order of this Court of

the same date, was not property which had been attached for the realization of the fine, but property which had been attached under s. 184 of the Criminal Procedure Code previous to the passing of the sentence, at the time when the proclamation was issued, calling upon him to appear and answer to a charge of riot and murder; it had also before the conviction of the accused been declared to be at the disposal of Government. The property can only be restored in the way indicated in s. 185 of the Code; but the conviction under s. 174 of the Penal Code having been upheld by this Court, the accused cannot avail himself of the provisions of s. 185. The property is at the disposal of Government, and this Court has no control over it. The order of the 27th March was passed, it would seem, in ignorance of the real facts of the case, and is one which clearly this Court had no jurisdiction to make.

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Baboo *Durga Mohan Das* for the accused.—There is no section of the Act under which the Government can ask for a review of the order of the 27th March. *Queen v. Godai Roul*<sup>1</sup> decides that there can be no review of an order of this Court in a criminal case. If the order be really without jurisdiction, it is void *ab initio*, and the Magistrate need not obey it.

Mr. Bell in reply.

The judgment of the Court was delivered by

KEMP, J.—In this case Mr. Bell, the Legal Remembrancer, appeared on behalf of the Government of Bengal, and moved the Court to cancel an order passed on the 27th March 1872, on the *ex-parte* petition of one Sarwar Jan.

On the 8th July 1872 notice was issued to Sarwar Jan to appear in person or by pleader.

It appears that Sarwar Jan was committed by the Magistrate of Furreedpore to the Sessions to take his trial on a charge of riot with murder. Sarwar Jan was convicted by the Sessions Judge, but, on appeal, was acquitted by this Court.

Previous to the apprehension and commitment of Sarwar Jan, he had evaded process—*viz.*, a warrant—issued against him, and certain moveable property belonging to him, which had been attached, was declared to be at the disposal of the Government under s. 184 of the Code of Criminal Procedure. After the acquittal of Sarwar Jan by this Court, he was put on his trial under s. 174 of the Penal Code, and, being convicted, was sentenced to imprisonment for a term of six months, and a fine of Rs. 1,000, this being the maximum sentence which can be passed under that section.

Sarwar Jan then petitioned this Court, and, on the 22nd December 1871, Kemp and E. Jackson, JJ., were of opinion "that it could not be said that Sarwar Jan's absence did not originate in a desire to evade process;" but on the last ground of his petition, which contained a prayer for mitigation of punishment, those Judges held that, although they confirmed the conviction, they were of opinion that, as Sarwar Jan had been then some months in jail, and had been acquitted of the graver charge of riot with murder, the remaining portion of the sentence ought to be remitted. Nothing was said as to the remission of the fine, but, doubtless, it was the intention of the Judges to remit it.

Subsequently, on the 27th March 1872, Sarwar Jan presented a petition to this Court, praying that as he had been, as he states, "released by this Court

<sup>1</sup> B. L. R. Sup. Vol. 436.

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from the unjust sentence passed by the Magistrate," the Court would be pleased to direct the confiscated moveable property to be restored to him. On this petition we passed an order directing the Magistrate to restore all the moveable property of the petitioner which may be under attachment.

It is clear that the pleader who presented this petition did not place the true circumstances of the case before the Court; no mention of the fact that the property in question had been declared to be at the disposal of the Government was made;<sup>1</sup> the petitioner was also incorrect in stating that this Court had "released him from the unjust sentence passed by the Magistrate." What the Court did, was to mitigate the sentence, although they upheld the conviction.

It has been argued by the pleader for Sarwar Jan that this Court is not competent to review its order, and the case of *Queen v. Godai Rous*<sup>2</sup> was referred to. In that case it is laid down that a review of judgment will not lie from a sentence or judgment pronounced by the High Court, or by a Division Bench of the High Court, on appeal. But in this case our order was passed without notice to the Magistrate or the Government of Bengal, and the facts of the case were, to say the least, not correctly stated.

Being, therefore, of opinion that the property which has been declared to be at the disposal of the Government of Bengal can only be restored to Sarwar Jan by that Government, and that our order of the 27th March 1872, which, though it refers in terms to the property under attachment, clearly contemplated the property in question, was based upon an error in law caused by a misrepresentation of facts, we cancel it.

*Order cancelled.*



*Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Ainslie.*

1872.  
April 27.  
9 B. L. R. 354.  
[17 W. R. 55.]

IN THE MATTER OF THE PETITION OF MATHURANATH CHUCKER-  
BUTTY AND OTHERS.<sup>3</sup>

*Superintendence, power of, by High Court—24 & 25 Vic., c. 104—Adjournment—Enquiry by Magistrate—Criminal Procedure Code (Act XXV. of 1861), ss. 224 & 404.*

Where a Magistrate had adjourned an enquiry for a cause not contemplated by s. 224 of the Criminal Procedure Code, the High Court, in exercise of the power of superintendence conferred by s. 15 of 24 & 25 Vic., c. 104, set aside the order of remand.

IN this case an application was made to the High Court by the petitioners, praying that an order of the Magistrate of Malda, dated the 26th February 1872, postponing the case in which they were defendants, might be set aside, and that the defendants might be discharged or brought to trial at once without any further adjournments.

<sup>1</sup> See statement contained in petition, *ante*, p. 344 (see p. 526 of this book).

<sup>2</sup> B. L. R. Sup. Vol. 436.

<sup>3</sup> Criminal Miscellaneous Case, No. 43 of 1872, against the order of the Magistrate of Malda, dated the 26th of February 1872.

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The facts of the case, as stated by the Counsel for the petitioners, and in an affidavit of one Mahanand Gangooly in support of the application, were as follows: Iswar Chandra Roy, zemindar of Chanchul, died on or about the 8th October 1871, leaving two widows, Shideswari Chowdhrani, his first wife, and Bhuteswari Chowdhrani, his second wife. The Magistrate of Malda, on hearing of Iswar Chandra's death, ordered Bhagabati Charan Chuckerbutty, a police sub-inspector, to enquire whether the deceased had left any will. In obedience to this order, Bhagabati Charan went to Chanchul on the 21st November 1871, and reported that the deceased had executed an *anumatipatra* (a deed of adoption) long before his death, and had caused it to be registered in the Purneah Registry Office on the 4th January 1855; that the deceased had also submitted a petition to the Judge of Purneah, in which he informed the Judge of the execution of the deed of adoption; and, lastly, that he had executed a will on the 18th Aswin 1277 B. S. (3rd October 1870), a few days before his death. The affidavit also stated that the sub-inspector had reported that, when the will was produced before him, one Ramkrishna Bhattacharjee, the brother of Bhuteswari Chowdhrani, the younger widow of the deceased, was present; that along with his report, the sub-inspector sent in copies of all the three documents mentioned above for the perusal of the Magistrate; and that the Magistrate of Malda, while writing his final report, about bringing the estate left by the deceased under the Court of Wards, gave it as his opinion that the will was not a genuine document, and also made some remarks as to there being no criminal prosecution in respect of the forgery of the will. This report is dated the 18th April 1871.

On the following day, Hira Lal Das, representing himself to be the *karpardas* (manager) of Bhuteswari, petitioned the Magistrate of Malda to enquire into the forgery of the will. The Magistrate upon this, on the 21st April, took the deposition of Hira Lal Das, which was as follows: "I am gomasta of Bhuteswari Chowdhrani of Kurba. Shideswari Chowdhrani herself is charged that she forged the will, through whom I cannot say. When the will was forged, the accused was not present himself. She instigated the forgery of the will. Many people say that Shideswari forged the will. If Gabinda Das of Bachamari will tell about it." Upon this the Magistrate issued a summons against Gabinda Das, and ordered the police to make enquiries.

In the meantime the Magistrate, on behalf of the Court of Wards, took possession of the estate left by the deceased from the hands of Shideswari Chowdhrani. The affidavit continued: "And I am informed and believe that, owing to treatment which the said Srimati Shideswari considered as extremely harsh and oppressive, she left Chanchul on the 20th June, and many of her principal servants also left Chanchul at the same time."

After the police-enquiry was completed, the Magistrate took the deposition of the inspector, Mahim Chandra Ghose, who had made the enquiry, and who deposed as follows: "The evidence taken by me shows that the charges of forgery of a will for purposes of cheating is made out against the following persons: Bharat Chandra Sirkar, Ramkrishna Achari, Rammohan Khansama, Ramkishor Sen, and Mathuranath Chuckerbutty. The evidence will prove that they, on or about the 10th or 11th of Aughran 1277 B. S. (24th or 25th November 1870), at Chanchul, fabricated a document purporting to be a will executed by the late Baboo Iswar Chandra Roy of Chanchul on or about the 3rd October 1870. This will is a forgery; and those men intended to cheat the complainant Bhuteswari out of her half share in the property left by the late Iswar Chandra Roy, and to get possession of the whole estate. I apply for warrants against the above

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five accused, as I believe them to have absconded from this district. I searched for them, but they could not be found near Chanchul."

The Magistrate accordingly issued warrants against Ramkishor Sen, Mathuranath Chuckerbutty, Bharat Chandra Sirkar, Rammohan Khansama, and Ramkrishna Achari.

It was stated in the affidavit that the defendants were not at Malda when the warrants were issued, they having left Malda as stated above; the Magistrate therefore issued a proclamation for the defendants to appear on the 10th December 1871, and at the same time attached the properties, moveable and immovable, of all the defendants. The defendants Ramkishor, Mathuranath, and Bharat Chandra, in the meantime surrendered themselves, and the case was fixed to come on on the 3rd January 1872. The Magistrate refused to admit them to bail. On the 3rd January the Magistrate postponed the case to the 24th January, on the ground that he would not be able to remain in the station to complete the preliminary investigation. He further ordered summonses to be issued against eight new witnesses, without (it was stated) being at all satisfied that they were material witnesses. The case came on on the 24th January before the new Magistrate, who recorded the deposition of one police-inspector and of one Kailas Chandra Mookerjee, but did not take the deposition of the other witnesses who were present. The objection was taken before the Magistrate on behalf of the defendants that the preliminary investigation could not proceed, as the document was not forthcoming, and even the copy produced was not proved. The Magistrate upon this summoned Bhagabati Charan Chuckerbutty to give evidence, and made that the ground of postponement. Again, before the 15th February, the Magistrate postponed the case to the 26th February, on the ground that he would be in the mofussil on the 15th.

On the 26th February the case came on for hearing, and the defendants were again represented by Counsel. The Magistrate examined certain witnesses, among whom were Hiralal Das and Mukadacharan Mazumdar.

Hiralal said: "I knew the deceased, Iswar Chandra Roy. I was a servant of his. I was ameen of the Bagmara Kothi. I was appointed to his service in 1276 B. S. (1869-70). He died on the 22nd Aswin 1277 (7th October 1870). I know the three defendants now in Court, Mathuranath Chuckerbutty, Ramkishor Sen, and Bharat Chandra Sirkar. I heard that Shideswari Chowdhurani and Ramkishor Sen prepared a will purporting to be the will of Iswar Chandra Roy; that will was a forgery. I have never seen the said forged will. I learn that Iswar Chandra Roy never made any will. I used to get Rs. 6 a month as salary from Iswar Chandra Roy. He did not dismiss me. Rani Shideswari dismissed me. I was dismissed from Aghran 1277 (November 1870). I took service with Rani Bhuteswari from Baisakh 1278 (April 1871); and about ten days or so after I took service with her, I brought the complaint in this case regarding the forgery of the will."

Mukadacharan Mazumdar said: "I know the three defendants, Ramkishor Sen, Mathuranath Chuckerbutty, and Bharat Chandra Sirkar, now in Court. I did not see them forge any will on the 9th or 10th Aghran 1277. I saw Ramkishor Sen and Ram Tanu Das sitting in the veranda of the *diwan-khana* at Chanchul, and Bharat Chandra Sirkar, Mathuranath Chuckerbutty, Ramkrishna Achari, and Dindayal Mazumdar, afterwards joined them in the *diwan-khana*. Rammohan Khansama after that shut the door, and told Biseswar Sing, jemadar, to watch, and not to let any one come. This was before evening. I then went away. I afterwards asked Jagadis Mazumdar, servant of Shideswari

Rani, why they shut the door and kept watch? He said that some writing had been going on (what writing I did not know), and that one man was to watch, and that the estate would not come under the Court of Wards."

The evidence of the other witnesses was not important; two of them stated that they had heard that Iswar Chandra Roy had made a will before his death. The others stated that they knew nothing about the case.

The Magistrate then postponed the case to the 12th March in order to take the deposition of Bhagabati, and ordered a warrant to issue against him, although the summons issued against him had not been served upon him, and put the accused under recognizances.

The Counsel who defended the accused protested against the postponement, and objected to the prosecution proceeding any further, as there was no evidence at all against any of the prisoners, and the document said to have been forged was not produced.

The affidavit also stated that, every time the case came on for hearing, the defendants were obliged to take Counsel and a vakeel from the High Court at a great cost.

Upon the petition of the petitioners, an order had been issued by Bayley and Markby, JJ., that the prosecutor, Hiralal Das, should show cause why the orders of the Magistrate of Malda, dated respectively the 3rd January, 15th February, and 26th February 1872, should not be quashed upon the grounds stated in the petition.

Mr. *Woodroffe* for the petitioners.

Mr. *Fergusson* for Hiralal Das.

Baboo *Jagadanand Mookerjee* for the Government.

Mr. *Woodroffe*.—The Magistrate was wrong in issuing warrants against the petitioners under the circumstances of the case. It was wholly unwarranted and illegal to issue the warrants, and to refuse bail when the accused were arrested, when there was no evidence of a forgery having been committed. Before persons are arrested, there must be knowledge of the fact of an offence having been committed derived from legal testimony—*In the Matter of the Petition of Surendra Nath Roy*<sup>1</sup> and *In the Matter of Mahesh Chandra Bannerjee*.<sup>2</sup> [Couch, C.J.—Here there was a formal complaint on oath.] In the case last cited, it is laid down that a Magistrate must ascertain the charge before issuing a warrant. Evidence must be evidence of an offence. It is no evidence where a witness says he knows nothing. The force of a warrant is exhausted when the prisoners are brought before the Magistrate. Then the evidence must make out a reasonable case to justify further detention. These warrants must be set aside.

The repeated adjournments were upon insufficient grounds, because, from the evidence already taken, there does not seem to be any reasonable prospect of better evidence being obtained. They were also made in contravention of s. 224 of the Criminal Procedure Code, inasmuch as they were for a longer period than fifteen days.

<sup>1</sup> 5 B. L. R. 274 (see p. 199 of this book).

<sup>2</sup> 4 B. L. R. App. 1 (see p. 166 of this book).

1872.

IN THE  
MATTER OF  
THE PETI-  
TION OF  
MATHURA-  
NATH  
CHUCKER-  
BUTTY,

9 B. L. R. 354.  
[17 W. R. 55.]

1872.

IN THE  
MATTER OF  
THE PETI-  
TION OF  
MATMURA-  
NATH  
CHUCKER-  
BUTTY,

9 B. L. R. 334.

[17 W. R. 55.]

*Baboo Jagadanand Mookerjee*.—He would not object to any application for expediting the Magistrate's proceedings, or even for fixing a day for the trial. A Magistrate has the power to postpone a case from time to time, from motives best known to himself. [Couch C.J.]—A Magistrate cannot be allowed to go on postponing a case from time to time in an illegal manner without notice being taken of his conduct. A Magistrate being busy in the interior in his executive capacity is not a reasonable cause for such repeated postponements.] The Court cannot interfere in such a case under s. 404 of the Criminal Procedure Code, as there is no error in a decision, because there is no decision yet. This Court has no jurisdiction in such a case—*Queen v. Thomas Brae*.<sup>1</sup>

The language of s. 404 is there said to be hardly applicable to a preliminary enquiry by a Magistrate.

The last order adjourning the case to the 12th of March was in accordance with the law. It is too late now to object to the other postponements, by which the parties cannot be said to have been in any way prejudiced. The evidence is not complete now, but other evidence may be forthcoming. [Ainslie, J.]—The Magistrate in this case is also acting as Collector on behalf of the Court of Wards. Is it proper that he should be allowed to proceed in this manner, having an interest in the matter?

*Mr. Fergusson*.—The case did not really come before the Magistrate until the 16th December 1871, when the accused surrendered themselves. Then it was postponed from the 3rd to the 24th of January, and then again to the 15th February. I am not justifying the Magistrate's proceedings as to these adjournments; on the contrary, I must admit that his way of proceeding in this case so far is a scandal upon the administration of justice. On the 26th of February, however, there was a witness, supposed by the prosecution to be an important witness, absent, who had been served with a summons to appear. The absence of such witness was a good ground for postponing the case, and it is in consequence of this last postponement that the interference of this Court is invoked.

*Mr. Woodroffe* in reply.

Couch, C.J. (after stating briefly the facts of the case, and the purport of the petition, continued): Now, *Mr. Woodroffe* complained of the issuing of the warrant, and alleged that there was no evidence to justify its being issued. I think that we ought not to make any order now with respect to that. In the first place, the petition did not ask to have the warrant dealt with at all, nor did the order which was issued upon the petition direct cause to be shown with respect to the warrant. The warrant has long ago fulfilled all that it was required for, and it would be useless now to set it aside. Indeed, in the judgment of *Phear, J.*, upon which *Mr. Woodroffe* strongly relied, it is stated that the force of a warrant of arrest is at an end when the prisoner is brought before the Magistrate. So also with respect to the two orders of remand dated the 3rd of January and the 15th of February—they have come to an end; the petitioners have appeared in pursuance of them; and a further remand has been made; and the real question is whether the remand which was made on the 26th of February, by which the case was postponed until the 12th of March, and the petitioners were put under recognizances to appear on that day, ought to be allowed to stand. The power under which the order was made is contained in s. 224 of the Code of Criminal Procedure, which provides that "if,

<sup>1</sup> 3 W. R. Cr. 64 at p. 67.

from the absence of a witness, or from any other reasonable cause, it shall become necessary or advisable to defer the examination, or further examination, of witnesses, it shall be lawful for the Magistrate, by a written order, from time to time, to adjourn the enquiry, and to remand the accused person for such time as shall be deemed reasonable, not exceeding fifteen days."

Mr. Woodroffe relied very strongly, as it appeared to me, on a passage of the judgment of Phear, J., in the case of *In the Matter of the Petition of Surendra Nath Roy*,<sup>1</sup> in which the learned Judge said that a Magistrate cannot lawfully commit to prison or remand a prisoner who is before him without sufficient grounds; and in the complete absence of evidence, there can be no grounds. It appeared to me at the time that Phear, J., was there contemplating a case where there was no evidence at all, and that his language must be read with reference to such a case. On looking at the judgment, that seems to be so, because in a subsequent paragraph he says: "After the 2nd of November, the case changed. At that time evidence was produced before the Magistrate on which he could rightly, in the exercise of his judicial discretion, hold that the persons charged ought to be committed to prison, either to await trial, or for safe custody, during the adjournment of the enquiry." And when we refer to the statement of what took place in the case from time to time, it appears that, on the 2nd of November, a witness was partly examined. It is said "that, on the 2nd of November, after the first portion of the evidence of the said Nabin Roy was recorded, Mr. Munro directed that the witnesses who had then been sent by the police should be kept in custody in Mr. Munro's house." It would therefore seem that Phear, J., was of opinion that, if a witness had been even partly examined, the Magistrate would have power to remand; and the judgment does not support what it was quoted for by Mr. Woodroffe.

We have, however, to consider what is the power which is conferred upon the Magistrate by s. 224. It is said that if, from the absence of a witness, or from any other reasonable cause, it shall become necessary or advisable to defer the examination of witnesses, it shall be lawful for the Magistrate to adjourn the enquiry. It appears to me, looking at the language of this section, that, if there is not a proper cause—a cause such as is described—a Magistrate has not power to adjourn the enquiry; it is not lawful for him to do it. A Magistrate is not at liberty, arbitrarily, or for any reason which he may think sufficient, to adjourn the enquiry; it is only to be in the cases mentioned. And although an improper adjournment of the enquiry by a Magistrate—an adjournment on a ground which could not be said to show that it was either necessary or advisable—might scarcely be said to be an error in the decision upon a point of law, or to involve any question of law, and s. 404 of the Code of Criminal Procedure might possibly not enable this Court to interfere, we have, by the 15th section of the Act under which the Court is established, a power of superintendence which enables us to deal with such a case. I think it enables us, where a Magistrate has adjourned an enquiry when it was not lawful for him to do so under s. 224, to set aside the order. Here there was not the absence of a witness, or other reasonable cause, which made it necessary or advisable to adjourn the enquiry. The witness whose absence appears to have been given as a reason for the adjournment was the inspector who made the report. Assuming that, if called, he would have deposed to all the facts stated in that report, it appears that all that he could have proved would have been that the will was produced to him,

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IN THE  
MATTER OF  
THE PETI-  
TION OF  
MATHURA-  
NATH  
CHUCKER-  
BUTTY,

5 B. L. R. 384.  
[17 W. R. 55.]

<sup>1</sup> 5 B. L. R. 275, at p. 291 (see p. 211 of this book.)



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IN THE  
MATTER OF  
THE PETI-  
TION OF  
MATHURA-  
NATH  
CHUCKER-  
BUTTY,

9 B. L. R. 354.  
[17 W. R. 55.]

and was afterwards returned; and that evidence being taken, there really would have been no evidence to justify the detention of the parties upon a charge of forgery of the will; it would really have been just the same as if there had been no evidence whatever against them.

The case appears—and it seems to me it was admitted by the Government pleader, and also by Mr. Fergusson, who appeared for the prosecutor—to have been postponed in a manner which could hardly, even by them, be justified. There was not any evidence taken which could be made the foundation of a charge; and the Magistrate appears to have been influenced in the course which he took by the expectation that, after some time, and by dint of enquiry, some evidence might be obtained. But a Magistrate is not justified in keeping parties under recognizances in the way in which he did on this occasion, possibly from soon after the 5th of July when the warrant was issued, but certainly from the 3rd of January, the day first fixed for the hearing, until the 12th of March, with this charge hanging over them, and remanding them, from time to time, in an illegal manner, the two previous remands having exceeded fifteen days. This is a case, I think, in which the Court may well exercise its power of superintendence, and set aside the last order of remand; and it seems to me desirable that Magistrates should understand that the power conferred by s. 224 is a power which is only to be exercised in cases which come really within the terms of that section. It is not a power conferred upon them to be exercised in an arbitrary manner, and not according to rule, but a power which they ought to be careful in exercising.

Therefore, the order which we shall make is that the last order of remand, that of the 26th February, will be annulled, the consequence of which will be that the petitioners will not be liable to appear in accordance with the recognizances which they gave. If evidence is afterwards discovered, which would justify the charge of forgery being brought against them, the Magistrate is not precluded, by the order which we now make, from taking proceedings again.

*Order set aside.*

1872.

Aug. 24.

9 B. L. R. 417.

[18 W. R. 41.]

*Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Ainslie.*

ANGELO AND ANOTHER (DEFENDANTS) *v.* CARGILL AND ANOTHER  
(COMPLAINANTS).<sup>1</sup>

*Thoroughfare—Public Place—Nuisance—Obstruction—Magistrate—Jurisdiction—Criminal Procedure Code (Act XXV. of 1861), ss. 308, 404, 434—Right to begin.*

Where, in a proceeding before a Magistrate under s. 308 of the Code of Criminal Procedure, for the removal of an obstruction from a thoroughfare or public place, the accused appears and shows cause, it is the duty of the Magistrate to enquire whether there is a thoroughfare or public place, and whether there is an obstruction. If the Magistrate makes the enquiry upon evidence before him, he does not act without jurisdiction or in excess of jurisdiction. The High Court cannot set aside his order except for an error in law, or an excess of jurisdiction. It is not a ground for interference that the Magistrate has come to an erroneous decision upon the evidence.

<sup>1</sup> Reference to the High Court, under s. 434 of the Code of Criminal Procedure, by the Sessions Judge of the 24 Pergunnas.

THIS was a reference by the Sessions Judge of the 24-Pergunnas, under s. 434 of the Code of Criminal Procedure, of an order of the Joint-Magistrate made under s. 308<sup>1</sup> for the removal of certain obstructions from a thoroughfare.

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ANGELO

v.

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B. L. R. 417.

[18 W. R. 41.]

The complaint, which was instituted on the 26th April 1872, in the Court of the Deputy Magistrate in charge of the Sealdah Sub-Division, was that Messrs. Angelo Brothers had laid down a tramway in a public place or thoroughfare at Cossipore, and had thereby caused common injury, annoyance, and danger to the public or people in general who dwelt, or occupied property, in the vicinity.

On the 6th May 1872 the police forwarded a report and a map of the locality. An order was directed to be issued upon the defendants to remove the obstruction within three days, or to appear and show cause why they should not do so. The defendants appeared within three days to show cause. The case was then removed to the Court of the Joint-Magistrate of the 24-Pergunnas on the 14th May 1872, at the instance of the defendants. The defendants denied that the land was public land; they claimed it as their own property under a *maurusi patta* from the zamindar.

The Joint-Magistrate visited the spot, and, after receiving the evidence offered by both sides, came to the conclusion that the lane in which the tramway had been laid was a public thoroughfare, and, on the 4th June, ordered that the defendants should remove the obstructions within four days under pain of prosecution under s. 188 of the Indian Penal Code.

The Sessions Judge of the 24-Pergunnas, at the instance of the defendants, made a reference to the High Court, expressing his opinion that the Joint-Magistrate's proceedings in the case should be quashed as illegal, and made in excess of jurisdiction. He considered that the evidence showed that the lane was not a thoroughfare, and that the fact of Messrs. Angelo holding a *maurusi patta* of the land barred the Magistrate's interference under s. 308, and raised a question which the Civil Court alone could decide.

Mr. Lowe (with him Mr. Trotman) in support of the order of the Magistrate.

The *Advocate-General* (Offg.) *contra*.

Couch, C.J.—Is there any practice in this Court in references under s. 434 when Counsel appear, as to which side should begin?<sup>2</sup>

<sup>1</sup> S. 308.—"Whenever the Magistrate of a district or of a division of a district may consider that any unlawful obstruction or nuisance should be removed from any thoroughfare or public place, or that any trade or occupation, by reason of its being injurious to the health or comfort of the community, should be suppressed, or should be removed to a different place, or that the construction of any building, or the disposal of any combustible substance, as likely to occasion conflagration, should be prevented, or that any building is in such a state of weakness that it is likely to fall, and thereby cause injury to persons passing by, and that its removal in consequence is necessary, or that any tank or well adjacent to any public thoroughfare should be fenced in such a manner as to prevent danger arising to the public, he may issue an order to the person causing such obstruction or nuisance, or carrying on such trade or occupation, or being the owner or in possession of, or having control over, such building, substance, tank, or well as aforesaid, calling on such person, within a time to be fixed in the order, to remove such obstruction or nuisance, or to suppress or remove such trade or occupation, or to stop the construction of, or to remove, such building, or to alter the disposal of such substance, or to fence such tank or well (as the case may be), or to appear before such Magistrate within the time mentioned in the order, and show cause why such order should not be enforced."

<sup>2</sup> See s. 297, Act X. of 1872.

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 v.  
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 9 B. L. R. 417.  
 [18 W. R. 41.]

The *Advocate-General*.—So far as I know, the practice is not settled. I believe it is usual to lay the reference before the Court; the Court reads it, and, if it thinks proper, it quashes the order of the Magistrate at once; but if there be any matter upon which the Court requires information, or if it thinks that the matter is arguable, Counsel are allowed to address the Court. I believe Counsel are not heard as a matter of right, but of indulgence.

COUCH, C.J.—That is so. Counsel do not appear as of right. The reference from the Judge impeaches the order of the Magistrate. I think we should give some effect to the opinion of the Judge, and call upon Mr. Lowe to support the order.

Mr. *Lowe* contended that the Magistrate's order was in accordance with the law, and that his estimate of the evidence was quite correct. Where the defendants, in showing cause, claim any right in the land which is said to be a thoroughfare, the Magistrate must enquire whether they have such right or not; otherwise a man, by claiming a right of property, even in a public road, might stop the action of the Criminal Courts, and continue the nuisance. Where, as in this case, the public generally and the villagers pass over a way as of right, using it continuously without interruption for many years, that way is a public thoroughfare. The evidence, both oral and documentary, showed that the lane was a public road thirty years ago. The Magistrate's conclusion from the evidence is correct; but supposing it is not, it does not constitute such an error in law, or an acting in excess of jurisdiction, as would enable this Court to set it aside under the provisions of s. 404 of the Code of Criminal Procedure, or under its general power of supervision—*Queen v. Ala Baksh*.<sup>1</sup>

The *Advocate-General*.—The Judge's view is correct, that, where the land is claimed as private property, as in this case, it is for the Civil Court to decide whether the claim is groundless or not. It could not be the intention of the Legislature to leave it to the Magistrate to determine the title to property. The defendants here have put forward, not an imaginary, but a substantial, claim, and have filed the deed, a *maurusi patta*, under which they claim the land as their own property. Under these circumstances, is it proper for a Magistrate to try, first, to whom the land belongs, and then to order the removal of a nuisance at the instance of a private individual or of a private firm? S. 308 only says that, whenever the Magistrate "may consider that any unlawful obstruction or nuisance should be removed from any thoroughfare or public place," &c. The language of this section clearly indicates that the place must be indisputably a public place, and not private property. If this were a public place, it would be under the care of the Suburban Municipality; but no claim is made here on their behalf.

It may be a question too whether, supposing the lane to be a public road, the rails that have been put down are a nuisance and obstruction within the meaning of the law. The obstruction is certainly not one that would prevent either men or horses from using the road for the purposes for which they have, according to the evidence, been hitherto used.

Mr. *Lowe* in reply.

The judgment of the Court was delivered by

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<sup>1</sup> B. L. R. 482, in note (see p. 411 of this book).

Couch, C.J.—In this case, which was referred to this Court under s. 434 of the Code of Criminal Procedure by the Judge of the 24-Pergunnas, the Magistrate had proceeded under s. 308 of the Code of Criminal Procedure, and had made an order which the Sessions Judge says he is of opinion was in excess of his jurisdiction, and ought to be quashed. S. 308 gives power to the Magistrate, whenever he considers that there is any unlawful obstruction or nuisance which should be removed from any thoroughfare, to make an order calling upon the person causing the obstruction or nuisance to remove it, or to show cause to the contrary. In this case, cause was shown by the persons upon whom the order was made, Messrs. Angelo Brothers, and the Magistrate entered upon the enquiry. Now, when cause is shown, it is the duty of the Magistrate to, and he must, enquire whether there is a thoroughfare within the meaning of the section, and whether there is an obstruction. It cannot be said that, in entering upon that inquiry, he is not acting within his jurisdiction. If, in the course of the enquiry, he decides any point of law erroneously, the case may be taken up by this Court under s. 404 of the Code of Criminal Procedure; but if there is evidence before him, and he decides upon it, although his decision upon the evidence may be an erroneous one, yet, if there is no error in law, the case does not come within s. 404; nor is an erroneous decision upon the evidence an excess of jurisdiction which would enable this Court to interfere under its general power of superintendence.

With reference to what is an excess of jurisdiction in cases of this kind, or a want of jurisdiction, the language of Lord Denman, in a leading case upon questions of this description, may be usefully quoted. It is in the case of *The Queen v. Bolton*.<sup>1</sup> There an order had been made by Magistrates under an Act of Parliament, which gave power to them in certain cases to make orders for giving up possession of land to the church-wardens and overseers of a parish, and the case being brought before the Court of Queen's Bench by a *certiorari*, Lord Denman, in his judgment, having stated that there were two points made, first, that the proceedings all being regular upon the face of them, and disclosing a case within the jurisdiction of the Magistrates, the Court could not look at affidavits for the purpose of impeaching their decision; and the second that, even if the affidavits were looked at, the case would be found to be one of conflicting evidence in which there was much to support the conclusion to which the Magistrates had come, says: "The first of these is a point of much importance, because of very general application, but the principle on which it turns is very simple; the difficulty is always found in applying it. The case to be supposed is one like the present, in which the Legislature has trusted the original, it may be (as here) the final, jurisdiction on the merits to the Magistrates below; in which this Court has no jurisdiction, as to the merits either originally or on appeal. All that we can then do, when their decision is complained of, is to see that the case was one within their jurisdiction, and that their proceedings on the face of them are regular and according to law. Even if their decision should upon the merits be unwise or unjust, on these grounds we cannot reverse it." And then, in the subsequent paragraph, with regard to the objection of want of jurisdiction, he says: "But where a charge has been well laid before a Magistrate, on its face bringing itself within his jurisdiction, he is bound to commence the enquiry. In so doing he undoubtedly acts within his jurisdiction; but in the course of the enquiry, evidence being offered for and against the charge, the proper, or it may be the irresistible, conclusion to be

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<sup>1</sup> O. B. 66.

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drawn, may be that the offence has not been committed, and so, that the case in one sense was not within the jurisdiction. Now, to receive affidavits for the purpose of showing this is clearly in effect to show that the Magistrate's decision was wrong if he affirms the charge, and not to show that he acted without jurisdiction; for they would admit that, in every stage of the enquiry up to the conclusion, he could not but have proceeded, and that, if he had come to a different conclusion, his judgment of acquittal would have been a binding judgment, and barred another proceeding for the same offence. Upon principle, therefore, affidavits cannot be received under such circumstances. The question of jurisdiction does not depend on the truth or falsehood of the charge, but upon its nature; it is determinable on the commencement, not at the conclusion, of the enquiry; and affidavits, to be receivable, must be directed to what appears at the former stage, and not to the facts disclosed in the progress of the enquiry."

Here, if the Magistrate has come to a wrong conclusion upon the evidence, it does not affect his jurisdiction. He had jurisdiction to enquire, and if there was, as in this case, evidence before him, he cannot be said to have exceeded his jurisdiction, although his conclusion may not be the conclusion that ought, in the opinion of the Sessions Judge, or of us, to be drawn from the evidence. The Magistrate had to decide whether there was a thoroughfare, and whether there was an obstruction. It was not necessary to determine what is meant by thoroughfare, whether a public way along which all persons have a right to pass and re-pass, or a way along which only some persons have a right to pass and re-pass. In either case there was evidence upon which the Magistrate might find that there was a thoroughfare. There was evidence, especially what Mr. Lowe referred to, *viz.*, the statements of the parties themselves, that it was a public thoroughfare, and there certainly was abundant evidence that it was a way which was used by a considerable number of persons. The Magistrate, therefore, had evidence before him; and there has not been in this case, either an erroneous decision upon a point of law, or an acting without jurisdiction or in excess of jurisdiction.

The proceedings must be returned; the Court makes no order under s. 409.

## APPENDIX.

*Before Mr. Justice Kemp and Mr. Justice Glover.*QUEEN *v.* RAM PANDA AND ANOTHER.<sup>1</sup>*Royal Code (Act XLV. of 1860), ss. 108, 109, and 211—Giving Evidence in support of a False Charge—Abetment of such Charge.*1878.  
July 21.  
9 B. L. R.  
Ap. 16.  
[18 W. R. 26.]

A person cannot be convicted of abetment of a false charge, solely on the ground of his having given evidence in support of such charge.

THE Assistant Magistrate of Bhuddruck convicted two persons, Ram Panda and Dutt Hari Ghose, as abettors of a false charge, solely on the ground that they gave evidence in support of a charge brought by one Sharaswati against her husband which the (the Assistant Magistrate) had found in a prosecution against Sharaswati and others, under s. 211 of the Penal Code, to be false, and sentenced them under s. 109 of that Code to periods of imprisonment below one month.

The Sessions Judge of Cuttack referred the proceedings of the Assistant Magistrate to the High Court, under s. 434 of the Criminal Procedure Code, for the purpose of having the sentence and conviction quashed as being illegal. The Sessions Judge, in his letter of reference, made the following observations:—

"After careful consideration, I hold that s. 108 does not contemplate any acts of subsequent abetment, and that the Code does not provide for the punishment of such offences, except when they are such as are defined in ss. 212 to 218 of Ch. XI. of the Indian Penal Code.

"Many very excellent reasons could be assigned for this apparent, though not real, omission. It will, however, suffice for the purposes of this reference to point out that, if the inferior and theoretically less experienced Criminal Courts were allowed to punish as abettors persons who gave evidence in support of false charges, or rather charges found by the said Courts to be false, the provisions of the Procedure Code by which the punishment of the crime of false evidence can only be inflicted by the Sessions Court would be practically neutralized and set at nought. It is, I think, obvious that this was never intended, and that the framers of the Criminal Procedure Code, although they allowed the lower Criminal Courts to punish for false charges, never vested them with authority to punish those who supported such charges, not by previous acts, but by evidence merely."

The judgment of the High Court was delivered by

KEMP, J.—We concur with the Sessions Judge. The convictions and sentences are set aside.

*Before Mr. Justice Kemp and Mr. Justice Glover.*In re KALI CHARAN CHUND (PETITIONER).<sup>2</sup>*Act XX. of 1865, ss. 11 and 13—Meaning of the word "Practise"—Mookhtar.*1872.  
July 5.

The writing a petition for a party who presents it in Court is not acting as a Mookhtar within the meaning of s. 11, Act XX. of 1865, and the writer is not liable to punishment under s. 13 for practising as a mookhtar without a certificate.

9 B. L. R.  
Ap. 18.  
[18 W. R. 27.]

ONE Kali Charan Chund drew and wrote out a petition of complaint for one Kumaraddin, which the complainant, Kumaraddin, personally presented in

<sup>1</sup>Reference to the High Court, under s. 434 of the Code of Criminal Procedure, by the Sessions Judge of Cuttack.

<sup>2</sup>Reference to the High Court, under s. 434 of the Code of Criminal Procedure, by the Sessions Judge of Backergunge, dated the 17th June 1872.

1872. the Joint-Magistrate's Court. The Joint-Magistrate construed this act of Kali Charan Chund's to be "practising" as a mookhtar within the meaning of the word as used in s. 13 of Act XX. of 1865, and, finding that Kali Charan had not a properly stamped certificate authorizing him to practise as mookhtar, convicted him of having committed an offence punishable under s. 13 of the Act. The Sessions Judge, being of opinion that the conviction was illegal, referred the proceedings of the Joint-Magistrate to the High Court under s. 434, Code of Criminal Procedure (Act XXV. of 1861), for the purpose of having the conviction quashed. The Sessions Judge, in making the reference, observed: "By s. 11 of Act XX. of 1865, mookhtars duly admitted and enrolled may appear, plead, and act in any Criminal Court subject to certain conditions of their certificate, and these words embrace the whole of what constitutes the more general term 'practise.' In the present instance Kali Charan neither appeared nor pleaded. Did he then act? It seems to me that he can only be said to have acted in a private capacity, not in the sense contemplated by the Act (XX. of 1865) in a public capacity, as a medium between the complainant and the Court. The law does not forbid one person from giving advice to another, or from drawing up a petition for another on any matter out of Court, and so long as the adviser or writer abstains from dealing with the Court itself in any way in connexion with the matter, he must be considered to be absolved from all consequences under Act XX. of 1865."

The judgment of the High Court was delivered by

GLOVER, J.—There can be no doubt, we think, that the Judge is right, and that the mere writing of a petition for a party who afterwards presents that petition himself is not "acting" in the sense of s. 11, Act XX. of 1865.

We therefore set aside the order of the Joint-Magistrate, and remit the fine imposed upon Kali Charan Chund.

—♦—

*Before Mr. Justice Kemp and Mr. Justice Glover.*

1872. IN THE MATTER OF THE PETITIONS OF SHISTIDHUR PARUI AND OTHERS.<sup>1</sup>  
*July 3.* Penal Code (Act XLV. of 1860), s. 441—Criminal Trespass—Intention.  
 9 B. L. R. An act does not amount to criminal trespass under s. 441 of the Penal Code, unless  
 Ap. 19. it was committed with an intention of committing some offence, or of intimidating, insulting, or annoying some one. Where a party had been exercising a right of fishery for  
 [18 W. R. 25.] a considerable time, alleging a prescriptive right, the mere fact of continuing to do so after a notice of prohibition is not a criminal trespass.

THE accused in this case fished in a lake or Bhowur. This lake was once resumed by Government, and subsequently released in favour of the zemindar. The izardar under the zemindar instituted against the accused a suit in the Deputy Collector's Court for rent, which was dismissed. In appeal the Judge upheld the decision of the lower Court, on the ground that the relationship of landlord and tenant did not exist between the parties, adding that, "if the defendants continue in possession, and do not pay rent to the landlord, they may be sued for trespass."

The izardar next preferred a charge of criminal trespass against the accused before the Deputy Magistrate, alleging that notice had been served on the defendants prohibiting them from fishing in the lake, and that, notwithstanding it, they persisted in doing so. The defence of the accused was that they had

<sup>1</sup> Miscellaneous Criminal Case, No. 102 of 1872, against the order of the Sessions Judge of 24-Pergunnas, dated the 6th May 1872, affirming that of the Deputy Magistrate of that district, dated the 26th February 1872.

prescriptive right to fish in the lake free of rent, which they had been exercising for a long time. The Deputy Magistrate convicted them of criminal trespass under ss. 441 and 447 of the Penal Code. The Sessions Judge in appeal upheld the conviction. The accused applied to the High Court under s. 404 of the Criminal Procedure Code to have the records sent for, and the conviction quashed as being illegal.

*Baboo Bama Charan Banerjee* for the petitioners.—No conviction can be had under s. 441 of the Penal Code without proof of an intention of committing any offence, or of intimidating, insulting, or annoying any person. The accused had been accustomed to fish in this lake for a considerable time, which is not denied by the complainant. There was an attempt made by the complainant to assess rent for the *jalkar* (right of fishery), which was unsuccessful, and instead of going to the Civil Court to establish their right either to receive rent, or to eject the defendants, preferred the present criminal charge. The defendants have been fishing under colour of a right, which has been supported by actual use for a considerable length of time.

The presumption of a criminal intention entirely fails, and the conviction ought therefore to be set aside, there being no other evidence except the admitted act of fishing.

*Mr. Allan* for the complainant.—Before the complaint was preferred, notice had been served on the defendants to restrain them from fishing, and their conduct in continuing to do so, notwithstanding the prohibition of the proprietor, is clearly criminal trespass according to the definition given in s. 441, Indian Penal Code (Act XLV. of 1860). Assuming that their former acts of fishing were not acts of criminal trespass, their continuing to fish after notice to desist is unlawful. No other proof of intention is necessary. The continuance of the act complained of in disregard of the notice is sufficient to raise the *prima facie* presumption of a criminal intention. It is for the defendants to establish that they have the right which they allege. The zamindar is not bound to bring a suit in the Civil Court to establish his title.

The judgment of the High Court was delivered as follows:—

GLOVER, J.—I have felt some difficulty about this case, but after consideration I think that the petitioners should succeed, and the order of the Courts below be set aside.

I do not think it necessary to go into the question as to how far the release of the “bhowur” or lake by the Collector settled the rights of the complainant, Indrobbhusan Chuckerbutty, as the action of the defendants (petitioners before us) does not seem to bring them within the purview of s. 441 of the Penal Code. To convict under this section, it must be shown that the defendants entered upon property in the possession of another with “intent to commit an offence,” and I think that in this case the element of “intention” is wanting.

The defendants asserted, and had all along asserted, a prescriptive right to fish in the bhowur without payment of rent, and the zamindar had already failed in a suit brought under Act X. of 1859 to get rent from them, not having been able to prove that they were his tenants, or had ever paid rent to him. It may therefore be reasonably concluded that the defendants thought that they had vindicated their claims, and had a right to fish as they had done heretofore. It cannot, I think, be presumed that they continued to fish with any intent to “commit an offence;” they considered themselves possessed of a right, to which the decision in the Act X. suit had given some colour, and determined to exercise it. They seem to have acted *bona fide*, and not to have exceeded their supposed privileges.

1872.  
IN THE  
MATTER OF  
THE PETI-  
TION OF  
SHISTI-  
DHUR  
PARUI,  
9 B. L. R.  
Ap. 19.  
[18 W. R. 25.]



1871.  
IN THE  
MATTER OF  
THE PETI-  
TION OF  
SHISTI-  
DHUR  
PARUI,  
9 B. L. R.  
Ap. 19.  
[18 W. R. 25.]

The zemindar's notice, warning them not to fish, did not change the state of things so far as s. 441 is concerned; and after what has occurred between the parties, no conviction for criminal trespass can possibly be had. The zemindar must establish his rights by a suit in the Civil Court to eject the defendants, or sue to have the defendants declared liable to pay him rent for the future.

KEMP, J.—I quite concur in this view of the case. In the definition of criminal trespass, the entry and the intention with which a party enters are the essentials. In this case it appears to me clear that the petitioners have exercised a supposed right in a *bona fide* manner. They have all along asserted their right to fish in the lake free of payment of rent, and the attempt of the opposite party to establish the relationship of landlord and tenant has signally failed. It was found that the jumma-wasil-bakis filed by the zemindar to establish tenancy and payment of rent were false. It is for the zemindar to take steps to establish his right to receive rent from the petitioners, or (if he treats them as trespassers, which he has hitherto not done) to eject them.

1872.  
Aug. 29.  
9 B. L. R.  
Ap. 30.  
[18 W. R. 44.]

*Before Mr. Justice Bayley and Mr. Justice Mitter.*

**QUEEN v. KUMODINIKANT BANERJEE CHOWDHRY.<sup>1</sup>**

*Recognizance—Criminal Procedure Code (Act XXV. of 1861), s. 290.*

Under s. 290 of the Criminal Procedure Code, an order to execute a second recognizance during the time the first recognizance is in force is illegal.

The following reference was made by the Officiating Sessions Judge of Dacca:—

"During the pendency of one recognizance for a time of one year, the Deputy Magistrate has called on the applicant to execute a second engagement for a similar period.

"Now, the form of recognizance prescribed by the Code is perfectly general and seems simply to declare that the recognizant is a turbulent character, and must be subjected to special restraint. So that if, at the suit of A, a recognizance were taken from B, and he broke the peace ultimately against C, and not A, I have no doubt that his recognizance might be forfeited. I do not think, therefore, that it can, in any way, be urged correctly that the recognizances were required in reference to separate transactions.

"Under these circumstances it appears to me that the Deputy Magistrate's order of the 15th June last, requiring the applicant to execute a recognizance for a term of one year, during the pendency of a similar recognizance, was illegal under s. 290, and I beg to refer it to the Court, in order that it may be quashed, and the Deputy Magistrate may be directed to proceed according to law."

The judgment of the Court was delivered by

MITTER, J.—We concur with the Officiating Sessions Judge in holding that the second recognizance was illegal. The first recognizance was general and unlimited in its terms according to the form given in the law, and it is therefore clear that, to take a second recognizance before the period fixed in the first recognizance had elapsed, would be a virtual interference with the provisions of s. 290, Criminal Procedure Code.

<sup>1</sup> Reference to the High Court, under s. 434 of the Code of Criminal Procedure, by the Officiating Sessions Judge of Dacca.

Before Mr. Justice Kemp and Mr. Justice Glover.

IN THE MATTER OF THE PETITION OF UDAI CHAND MUKHOPADHYA.<sup>1</sup>  
Criminal Procedure Code (Act XXV. of 1861), s. 422—Penal Code (Act XLV.  
of 1860), s. 202.

1892.  
July 22.  
9 B. L. R.  
Ap. 31.  
[18 W. R. 31.]

Where a person had been found guilty by a Magistrate of the offence of intentional, ly omitting to give information of an offence which he was bound to give, and on appeal the Judge found that there had been no evidence given of the omission, *held, per Kemp, J.* (Glover, J., *contra*), the Judge could not remand the case for additional enquiry under s. 422 of the Criminal Procedure Code.<sup>2</sup>

THE accused in this case was charged under s. 202 of the Penal Code with having committed the offence of neglecting to give information to the police or Magistrate of a dacoity said to have taken place on the 7th March 1872 in Mauza Ghaugni, Thanna Kristomanagoree, he being the gomasta of the zemindar of the village, and as such bound, by s. 4 of Regulation III. of 1812, to give early information of certain offences committed in the village. The Magistrate convicted him of the offence charged, and sentenced him to suffer six months' rigorous imprisonment and to pay a fine of Rs. 200, and in default of payment to a further rigorous imprisonment of one month.

The accused appealed against the Magistrate's conviction and sentence to the Sessions Judge of Hooghly.

The Sessions Judge said: "There is no evidence as to the main point in the charge—the omission to give information. The case must accordingly be sent to the Magistrate to have evidence taken on this point under s. 422 of the Code of Criminal Procedure." The accused was undergoing rigorous imprisonment under the Magistrate's sentence pending this enquiry.

On application to the High Court, Kemp and Glover, JJ., called for the record of the case under s. 404 of the Criminal Procedure Code, and admitted the accused to bail pending the decision of the High Court.

Baboo Hemchandra Banerjee and Durgamohun Das for the petitioner.

The gist of the offence is the omission to give information; and when there is no evidence of this omission, as admitted by the Judge, the conviction and sentence are illegal. The Judge was bound on this state of the evidence, under s. 426 of the Criminal Procedure Code, to reverse the Magistrate's finding and sentence. The Judge is in error in remanding this case to the lower Court for additional enquiry under s. 422 of the Criminal Procedure Code. This section contemplates a further enquiry by taking additional evidence to be directed by an Appellate Court when the conviction by the lower Court has been based upon some evidence which might legally support it, but which, in the opinion of the Appellate Court, is not quite satisfactory. This section does not empower an Appellate Court so to act in a case where there is no evidence legally capable of sustaining the charge. There is no finding as to whether the alleged dacoity ever took place. The accused, as soon as he himself heard of the alleged offence, did give information to the police; and the prosecution is bound to show that there was not simply an omission, but an intentional omission, to give the information at the earliest opportunity.

<sup>1</sup> Miscellaneous Criminal Case, No. 141 of 1872, against an order of the Sessions Judge of Hooghly, dated the 22d July 1872, reversing that of the Magistrate of that district, dated the 18th June 1872.

<sup>2</sup> See Act X. of 1872, s. 282.

1872.

IN THE  
MATTER OF  
THE PETI-  
TION OF  
UDAI  
CHAND

MUKHO-  
PADHYA,

9 B. L. R.

Ap. 31.

[18 W. R. 31.]

GLOVER, J.—The Magistrate convicted the accused under s. 202, Penal Code, holding that he knew of the commission of the dacoity in Mussamat Arjila's house, and, so knowing, intentionally omitted to give information to the authorities. The Sessions Judge on appeal found that a dacoity had taken place, and that the accused was well aware of the fact, but that there was no evidence on the record to prove the "omission." He, therefore, ordered the Magistrate, under s. 422, Code of Criminal Procedure, to supply the necessary evidence, and to return the case to his Court for final disposal.

It is not quite clear to me, from the wording of the Sessions Judge's order, whether the evidence required was on the point of simple "omission" or of "intentional omission;" and if I were trying the case as a regular appeal, I am not sure that I should agree with the Sessions Judge as to there being no evidence as to the fact of "omission." I think that there is some evidence as to the "intention" also; but, however that may be, I do not, after much consideration, find anything illegal in the Sessions Judge's order. S. 422, Code of Criminal Procedure, gives the Appellate Court power to direct further enquiry to be made, and additional evidence to be taken, whenever it thinks such enquiry and evidence necessary "upon any point bearing upon the guilt or innocence of the appellant." The words are exceedingly large, and give an almost unlimited discretion. In the present case, the Sessions Judge considered it proved that a person, who was bound by law to give certain information, was possessed of that information, but that there was not on the record evidence of his "omission" to supply the information in question to the police. No doubt, proof of the omission was absolutely necessary, and without it there was no case against the accused. But s. 422 gave the Sessions Judge the power, as it seems to me, of ordering the deficiency to be supplied. If an Appellate Court is bound under all circumstances to decide on the guilt or innocence of an accused person on the evidence taken in the Court of first instance, and has no power to supplement it in any way, then I cannot understand the object of s. 422, Code of Criminal Procedure. That object I take to be the prevention of a guilty person's escape through some careless or ignorant proceedings of a Magistrate, or the vindication of a wrongfully accused person's innocence, where the same carelessness or ignorance has omitted to record circumstances essential to the elucidation of truth. The words of the section are, as I said before, "any point bearing upon the guilt or innocence of the appellant," and the Judge's action appears to me to have been perfectly justified.

KEMP, J.—I regret that I am unable to concur with Glover, J. Apart from the fact that the Magistrate omitted in the case to record any finding, I am of opinion that, before a person can be convicted of an offence under s. 202 of the Indian Penal Code, there must be legal evidence, first, that he has knowledge or reason to believe that some offence has been committed; second, an "intentional" omission to give "any" information respecting that offence; and, third, that he is legally bound to give that information.

The petitioner Uday Chand Mukhopadhyaya, as the village-gomasta, was legally bound to report crimes. An offence, in this case of dacoity, was committed. Of this there appears to be evidence, which, though discredited in the first instance by the Deputy Magistrate, was believed by the Magistrate and, on appeal, by the Sessions Judge. It may also, I think, be conceded that the petitioner had knowledge, though not immediate, of the offence; but the Sessions Judge finds, and I quote his own words, "there is no evidence as to the main point in the charge—the omission to give information. The case," says the Judge, "must accordingly be sent to the Magistrate to have evidence taken

on this point under s. 422 of the Code of Criminal Procedure." The accused, be it remembered, remained in jail, and there he would have remained, but for the action of this Court which released him on bail, while the police were hunting up evidence to convict him.

It appears to me that the "main" point under s. 202 is whether the omission was intentional. There may be knowledge or reason to believe that an offence has been committed; there may be an omission to give any information; but it is clear, at least to me, that the gist of the offence is the intention. Now, the Sessions Judge finds, not that the evidence is insufficient, though there may be some evidence, but that there is no evidence at all. S. 422, in my opinion, does not apply to such a state of things. Where there is some *prima facie* evidence bearing upon the guilt or innocence of the accused, the Appellate Court may, under s. 422 of the Code of Criminal Procedure, direct additional evidence to be taken; but in the case before us, the Sessions Judge finds that there is no evidence at all. What, then, was there to add to, and how does the necessity for additional evidence arise? I am of opinion that the accused ought to have been acquitted, as there is no evidence of an intentional omission, or, according to the Judge's finding, of any omission at all.

I therefore quash the conviction and sentence, and direct the immediate release of the petitioner.

1872.  
IN THE  
MATTER OF  
THE PETI-  
TION OF  
UDAI  
CHAND  
MUKHO-  
PADHYA,  
9 B. L. R.  
Ap. 31.  
[18 W. R. 31.]

Before Mr. Justice Bayley and Mr. Justice Mitter.

IN THE MATTER OF THE PETITION OF BABOO RAMESHAR PRASAD NARAYAN SING.<sup>1</sup>

1872.  
May 11.  
9 B. L. R.  
Ap. 34.  
[18 W. R. 1.]

Act XXXI. of 1860, ss. 25, 26, and 32—Carrying or possessing Arms without a License—Issue of Summons or Warrant without specifying the Charge.

BABOO RAMESHAR PRASAD NARAYAN SING applied to the Magistrate of Gya, on the 13th April 1872, for a license to carry arms. He had held one previously entitling him to carry ten swords, but had mislaid it, and it was not until he found it again that he came forward for a new license. Between the date of the expiry of the old license and the application for a new one a period of one year and nine months had passed, during which the applicant had carried and possessed arms without any license, a fact which was known to the Magistrate. When the application for a fresh license was made, the Magistrate ordered the mooktear, who presented it, to tell his client to appear in person. At the same time a written order to the same effect was issued to the Court Inspector, who caused it to be served on the Baboo in the usual way, taking receipt of the service from his *karpardas* (manager). This written order was issued without the knowledge or authority of the Magistrate. On being served with this written order, the Baboo, through his pleader, applied to the Magistrate to be excused from personal attendance, at the same time objecting to the indefinite nature of the order, which cited no reason for the personal appearance, nor fixed any date for so doing. The Magistrate on this issued a summons to the Baboo to appear in person at 6 A.M. the following morning to answer to an alleged offence (the particulars of which were not stated in the writ) against the provisions of Act XXXI. of 1860. At 6 A.M. the ensuing morning, the Baboo repeated his request to be heard through a pleader, which was rejected, and a warrant issued for his arrest.

<sup>1</sup> Reference, under s. 434 of the Code of Criminal Procedure, by the Officiating Sessions Judge of Gya.

1872.

IN THE  
MATTER OF  
THE PETI-  
TION OF  
BABOO  
RAMNATH  
PRASAD  
NARAYAN  
SINGH  
9 B. L. R.  
Ap. 34.

[18 W. R. 1.]

The Sessions Judge of Gya was then moved to send up the proceedings of the Magistrate to the High Court, under s. 434 of the Code of Criminal Procedure, to have the same quashed as being illegal. The Sessions Judge submitted the proceedings to the High Court. In his order of reference the Judge observed:—

"In my opinion, these proceedings, *i.e.*, the issue of the summons and warrant, are illegal; for, so far as I can see, the Baboo, at the time of presenting his petition, was guilty of no offence whatever under the Arms Act.

"Ss. 25 and 26 of Act XXXI. of 1860 clearly contemplate those cases only where persons are caught in the act of carrying arms; and action under them is warranted only when the offender is caught *in flagrante delicto*. S. 31 again refers to search and seizure of arms under certain other circumstances, none of which are applicable to the present case.

"The most, then, that can be said against the petitioner is that he has in his possession certain arms without a license, but this would be an offence only if the provisions of s. 32 of the Act had been extended to, and were still in operation in, this district. The petitioner states that no order was ever issued for the disarming of the district. To ascertain this, I wrote to the Magistrate; requesting him at the same time to let me know under what section of the Arms Act he had taken proceedings against the petitioner; but on the first point he states that he can give no answer 'at present,' and on the other he has practically refused to give any answer at all. In the meantime, however, I have caused a search to be made through all the Government notifications in my office since 1857, and I am unable to find any order for the disarming of Gya; while from the Government notification of 1st October 1860 it is clear that, since that year at all events, s. 32 of Act XXXI. of 1860 has not been in operation in the Lower Provinces of Bengal.

"If the view I have taken of the law be correct, it seems clear that the petitioner has committed no offence that would warrant the issue of a summons or warrant for his personal appearance before the Magistrate. For the foregoing reasons I am of opinion that the proceedings of the Magistrate are illegal, and should be quashed.

"I am therefore, under the circumstances, compelled to transmit the record for the consideration and orders of the High Court."

Mr. Allen for the petitioner.

The following was the judgment of the Court:—

Taking the facts as disclosed by the record, we are of opinion that the Sessions Judge is quite right, and we accordingly set aside the proceedings of the Magistrate as contrary to law.<sup>1</sup>

*Before Mr. Justice Bayley and Mr. Justice Mitter.*

IN THE MATTER OF THE PETITION OF W. N. LOVE.<sup>2</sup>

*Infringement of Municipal Bye-laws—Daily Fine illegal.*

1872.

Aug. 29.

9 B. L. R.

Ap. 35.

[18 W. R. 44.]

The following reference was made by the Officiating Sessions Judge of Hooghly:—

<sup>1</sup> In *In re Madnarain Pari*, decided on 5th July 1872, Kemp and Glover, JJ., following the ruling in this case, held that mere possession of arms was no offence under Act XXXI. of 1860 in districts where s. 32 of the Act is not in force.

<sup>2</sup> Reference to the High Court, under s. 434 of the Code of Criminal Procedure, by the Officiating Sessions Judge of Hooghly.

"The petitioner W. N. Love has been convicted under s. 18, of the Howrah Municipal Bye-laws,<sup>1</sup> and fined Re. 1 for infringement thereof, as well as ordered to pay a daily fine of Rs. 2 (I presume until he complies with the bye-law).

"An order of this description has been held, not only to be contrary to law, but to vitiate the entire conviction—*In re Sagar Dutt*;<sup>2</sup> and, following that rule, I feel bound, on the petitioner's application, to submit the proceedings under s. 434 of the Code of Criminal Procedure to have that order set aside."

The judgment of the Court was delivered by

MITTER, J.—We think that the daily fine of Rs. 2 was illegal, and ought to be set aside. But, under the circumstances of this case, we do not think it necessary to exercise our special powers of discretion by setting aside the fine of Re. 1 which was inflicted upon the prisoner for an offence actually committed. The conviction on that offence is not bad in law, and we do not see any reason for exercising our extraordinary powers by setting aside that conviction.

1872.  
IN THE  
MATTER OF  
THE PETI-  
TION OF  
W. N.  
LOVE.  
B. L. R.  
Ap. 35.  
[18 W. R. 44.]

*Before Mr. Justice Kemp and Mr. Justice Glaser.*

QUEEN v. MOZAFAR KHALIFA.<sup>3</sup>

1872.  
July 26.

*Criminal Procedure Code (Act XXV. of 1861), s. 62—Order by a Magistrate prohibiting the straying of Cattle—Conviction for Breach of such Order.*

9 B. L. R.  
Ap. 36.

An order by a Magistrate, prohibiting the straying of cattle within certain local limits, is not an order within the meaning of s. 62 of the Code of Criminal Procedure. There can be no conviction for disobedience of such order under s. 289 of the Penal Code. [18 W. R. 21.]

THE Deputy Magistrate of Jamalpore, purporting to act under s. 62 of the Code of Criminal Procedure, promulgated an order on the 27th August 1869 in general terms, prohibiting the owners of cattle, calves, goats, sheep, and ponies from allowing such animals to stray loose within and about the town and station of Jamalpore, and prescribing the limits within which the said order should have effect.

On the 6th May 1872, one Mozafar Khalifa was convicted, under s. 289 of the Penal Code, for permitting his pony to stray about loose, and sentenced to pay a fine.

The Sessions Judge of Mymensing, being of opinion that the Deputy Magistrate had no authority, under s. 62 of the Criminal Procedure Code, to pass the order of the 27th August 1869, sent the proceedings in the above case to the High Court, under s. 434 of the Criminal Procedure Code, to have the conviction under s. 289 of the Penal Code quashed. He was also of opinion that the conviction was not warranted by anything within the meaning of s. 289 of the Code. The Sessions Judge, in making the reference, relied on the case of *Queen v. Amiruddin*.<sup>4</sup>

<sup>1</sup> The external roofs and walls of any hut or any other building whatever about to be erected or renewed, in or near any large bazar or main road, shall not be made of grass, leaves, or any other inflammable materials. The Commissioners may, from time to time, notify what bazars and roads come under the above denomination.

<sup>2</sup> 1 B. L. R. O. Cr. 41 (see p. 40 of this book).

<sup>3</sup> Reference to the High Court, under s. 434 of the Code of Criminal Procedure, by the Officiating Sessions Judge of Mymensing, dated the 12th June 1872.

<sup>4</sup> 6 B. L. R. 78 (see p. 241 of this book).

1872.

QUEEN  
v.MOZAFAR  
KHALIFA,  
9 B. L. R.

Ap. 36.

[18 W. R. 21.]

The Deputy Magistrate was called upon by the Sessions Judge to support his order, and he cited the case of *Queen v. Abbas Ali Chowdhry*.<sup>1</sup>

The judgment of the High Court was as follows:—

We concur with the Sessions Judge in the view he has taken of this case. The order of the Deputy Magistrate must be quashed, and the fine, if paid, refunded.

—♦—

*Before Mr. Justice Glover and Mr. Justice Mitter.*

IN THE MATTER OF THE PETITIONS OF GABINDA CHANDRA GHOSE  
AND ANOTHER.<sup>2</sup>

1872.

Sep. 17.

9 B. L. R.

Ap. 39.

[18 W. R. 54.]

*Code of Criminal Procedure (Act XXV. of 1861), s. 318—Parties to Proceedings under s. 318—Who are to be served with Notices under s. 318—Right of a Party in Proceedings under s. 318 to summon Witnesses—Discretion of the Magistrate.*

THE Deputy Magistrate of Khoorna had instituted proceedings under s. 318 of the Code of Criminal Procedure with respect to 350 bighas of land called Ghineerabad, possession of which was claimed by Ananda Chandra Sirkar and Benimohan Biswas on one side, and Gabinda Chandra Ghose and Shamasundari Dasi on the other. Upon the complaint of one Tamizuddin, gomasta of Ananda Chandra Sirkar and Benimohan Biswas, notice was ordered to be served on Gabinda Chandra Ghose. After the Deputy Magistrate had taken evidence as to actual possession from both parties, Shamasundari Dasi presented a petition at the last moment, praying to be made a party, as she was a co-sharer with Gabinda Chandra Ghose and others, and was in possession, and for summonses against certain persons to appear to give evidence in support of her claim. The Deputy Magistrate examined one witness, who was present in Court, on her behalf, and refused to postpone the case for the examination of the other witnesses named in her petition. The Deputy Magistrate held that Ananda Chandra Sirkar and Benimohan Biswas were in possession, and passed an order retaining them in possession.

Gabinda Chandra Ghose and Shamasundari Dasi moved the Sessions Judge to refer the proceedings of the Deputy Magistrate to the High Court, under s. 434 of the Code of Criminal Procedure, to have the order passed by the Deputy Magistrate quashed for various reasons. The Sessions Judge, however, referred the proceedings to the High Court on only two points. He was of opinion that, as Ananda Chandra Sirkar and Benimohan Biswas claimed to hold the land under a lease from several parties as co-proprietors, one of whom was Gabinda Chandra Ghose, who had appeared and denied the genuineness of such lease, and of possession under it, the Deputy Magistrate was wrong in passing a decision in the matter without giving notice to the other co-proprietors, as required by s. 318 of the Code. He was also of opinion that the Deputy Magistrate ought not to have refused to summon the witnesses named by Shamasundari, on the ground that her application was made at the last moment.

Mr. *Rochfort* for Gabinda Chandra Ghose and Shamasundari Dasi in support of the reference.

Mr. *Sandel* and Baboo *Jagabind Shaw* for Ananda Chandra Sirkar and Benimohan Biswas were not called upon.

The judgment of the High Court was delivered by—

<sup>1</sup> 6 B. L. R. F. B. 74 (see p. 239 of this book).

<sup>2</sup> Reference to the High Court, under s. 434 of the Code of Criminal Procedure, by the Sessions Judge of Jessore.

GLOVER, J.—This is a reference made by the Sessions Judge of Jessore to have a certain order passed under s. 318 of Act XXV. of 1861 by the Deputy Magistrate of that district quashed.

The only substantial ground on which the Judge thinks the Deputy Magistrate's order illegal is that, whereas the *patta* under which one of the parties in this case claims was signed by a great number of co-sharers of the land in question, and all of those co-sharers have not been served with notice, but only one of them, this is a sufficient ground for invalidating the whole of the Deputy Magistrate's proceedings.

There is nothing in the law which enjoins the serving of notice upon all the co-sharers in an estate which may, in some shape or other, form the subject of a litigation under s. 318. That section says that, after a Magistrate is satisfied that a dispute likely to induce a breach of the peace is about to take place within his jurisdiction, he shall record a proceeding stating the grounds of his being so satisfied, and shall call on all parties concerned in such dispute to give in written statements of their respective claims. It is quite clear that the other co-sharers who, Mr. Rochfort contends, have not been served, were not concerned in the dispute, for in that case they would have undoubtedly appeared in the Court below and taken steps to support the reference made by the Judge. The only parties concerned were those who did appear before the Deputy Magistrate: and although it may be technically said that Shamasundari got no notice, it is clear that she was all along aware as to what was going on, for she appeared in Court, and prayed to have witnesses examined on her behalf. That her case was not thoroughly gone into was her own fault, for the petition asking for the examination of the witnesses was made, as the Deputy Magistrate says, at the last moment; and, in the exercise of the discretion allowed him by the law, he refused to grant any further postponement of the case.

Under the circumstances it appears to us that there is no ground on which to support the Judge's recommendation, and we accordingly decline to interfere with the order of the Deputy Magistrate.

*Before Mr. Justice Macpherson.*

THE QUEEN *v.* TARINICHARAN DEY AND OTHERS.

*Evidence Act (I. of 1872), s. 32, cl. 2—Letter of Advice.*

THE prisoner, Tarinicharan, was charged with forging for the purpose of cheating and using as genuine a forged railway receipt or bill of lading, for the purpose of obtaining from the East Indian Railway Company certain goods which had been entrusted to the Company to be carried from Delhi to Calcutta. The *Standing Counsel* for the prosecution sought to prove the delivery of the goods to the Railway Company by putting in a letter from the consignor at Delhi to his partner in Calcutta, advising the despatch of the goods. He submitted that the letter was a "document used in commerce, written or signed" by a person "whose attendance could not be procured without an amount of delay and expense which, under the circumstances of the case," would be unreasonable, and therefore that it was revelant under s. 32, cl. 2 of the Indian Evidence Act (I. of 1872). The Court refused to receive the evidence, and intimated a doubt whether such a letter would, under any circumstances, be receivable, since it was beyond the instances specified in the section.

1872.

GABINDA

CHANDRA

GHOSE

v.

ANANDA

CHANDRA

SIRKAR,

9 B. L. R.

Ap. 39.

[18 W. R. 54.]

1872.

Sep. 21.

9 B. L. R.

Ap. 42.



1872.

Nov. 13.

9 B. L. R.

Ap. 44.

[18 W. R. 61.]

*Before Mr. Justice Glover and Mr. Justice Pontifex.***THE QUEEN v. ISREE PERSHAD SINGH<sup>1</sup>***Power of a Magistrate—Recognizance to keep the Peace.*

THE following case was submitted by the Sessions Judge of Gya for the opinion of the High Court:—

The party (Isree Pershad Singh) was called upon by the summons to show cause why he should not be required to enter into his own recognizances to keep the peace for six months, the amount specified being Rs. 200. Subsequently, on appearing before the Magistrate, he was required to enter into his own recognizances to the amount of Rs. 4,000, and to find two sureties in Rs. 1,000 each, the period being at the same time extended to one year. It has been contended before me that the Magistrate was not authorized by law in either increasing the amount, altering the nature of the security, or extending the period for which it was required, but was bound to observe, in all respects, the wording of the summons. I should be glad to be favoured with the opinion of the High Court upon the point.

The judgment of the High Court was delivered by—

GLOVER, J.—We think that the Sessions Judge is correct in his view of the law, and that the Magistrate was not justified in increasing the amount of security and in demanding sureties on a summons which provided only for a recognizance of much smaller amount, and made no mention of sureties at all.

The order of the Magistrate, directing recognizances to the amount of Rs. 4,000, and sureties to that of Rs. 1,000, to be taken, is quashed. If the Magistrate still thinks that heavier security should be taken than that first determined upon, he should issue a fresh summons, setting forth the amount intended to be taken, so that the party concerned may have full opportunity of showing cause against the order, if he wishes to do so.

*Before Mr. Justice Kemp and Mr. Justice Pontifex.***IN THE MATTER OF THE PETITION OF SHAMASANKAR MAZUMDAR.<sup>2</sup>***Code of Criminal Procedure (Act XXV. of 1861), s. 318—Summoning Witnesses.*

1872.

Nov. 29.

9 B. L. R.

Ap. 45.

[18 W. R. 64.]

THE Assistant Magistrate of Goalundo, on perusal of a police-report and the evidence in certain other cases, held that there was a likelihood of a breach of the peace taking place with regard to a piece of land, and issued notices on Baboo Shamasankar Mazumdar and Rani Anandamayi Dasi, as parties concerned in the dispute likely to give rise to a breach of the peace, to file written statements of their respective claims to actual possession. Both sides filed written statements. Shamasankar Mazumdar then petitioned the Court to summon witnesses on his behalf, alleging that he was unable by his own efforts to procure the attendance of his witnesses. The Assistant Magistrate merely or-

<sup>1</sup> Reference No. 132, dated the 3rd October 1872, from the Sessions Judge of Gya.

<sup>2</sup> Miscellaneous Criminal Case, No. 194 of 1872, against an order of the Assistant Magistrate of Goalundo, dated the 4th September 1872.

dered the petition to be placed on the record (*nathi shamil pash*), and proceeded to examine witnesses tendered by Rani Anandamayi, and upon their evidence held that she was in possession, and passed an order retaining her in possession. In his judgment, the Assistant Magistrate remarked, with reference to the petition of Shamasankar Mazumdar, praying the Court to procure the attendance of his witnesses, that, in cases coming under Ch. XXII. of the Criminal Procedure Code, he had no power to summon any witnesses.

Baboo *Nalitchandra Sen*, on behalf of Shamasankar Mazumdar, moved the High Court (BAYLEY and MITTER, JJ.), under s. 404 of the Code of Criminal Procedure, and obtained an order calling for the proceedings of the Assistant Magistrate of Goalundo, that the order passed by him might be quashed, on, among others, the following grounds, that the initiation of the proceedings was not based upon any legal evidence, and that the Assistant Magistrate ought to have summoned any witnesses required by the parties who were concerned in the dispute.

Baboo *Nalitchandra Sen* and *Girijasankar Mazumdar* for the petitioner.  
 Baboo *Durgadas Dutt* for Anandamayi Dasi.

Baboo *Nalitchandra Sen* contended that there was no evidence before the Magistrate; that Ch. XXII. of the Procedure Code must be read with the other parts of the Code, not inconsistent with any of the special provisions in that chapter.

Baboo *Durgadas Dutt*, who was directed to confine his arguments to the second point, contended that the petitioner was not entitled to complain of the refusal to summon his witnesses, he did nothing to press his application except filing a petition.

The judgment of the High Court was delivered by—

KEMP, J.—The first point taken in this case is that the proceeding of the Magistrate under s. 318 of the Criminal Procedure Code is based upon the report of the police-officer alone, and such report not being legal evidence, all the proceedings subsequently taken by the Magistrate are without jurisdiction. On referring to the record, we find that the Magistrate did not proceed upon the report of the police-officer alone, in which case, perhaps, under the rulings of this Court, the objection might avail;<sup>1</sup> but we find that the Magistrate refers to evidence taken in other cases, which we must assume he inspected, and he goes on to state that he is satisfied upon that evidence that there was a likelihood of a breach of the peace. This objection is therefore overruled.

The next objection is, that the petitioner has not had a proper hearing, inasmuch as the Magistrate held that the law did not confer upon him the power to summon witnesses in cases of this description, and when the petitioner prayed the Magistrate to summon his witnesses, no order, beyond placing his petition on the record, was passed. On referring to the judgment of the Magistrate, we find that he states that he can find no provisions in Ch. XXII. for the summoning of witnesses. No doubt, there is no mention in that chapter of any particular provisions under which witnesses are to be summoned; but in cases coming under s. 318, oral evidence as to the fact of possession is always adduced; and it is the duty of the Court, if the parties cannot produce their witnesses, to issue summonses for their attendance. Now, in this case, it is

<sup>1</sup> See *In the Matter of the Petition of F. D. Sutherland*, ante, p. 229 (p. 514 of this book).

1879:  
 IN THE  
 MATTER OF  
 THE PETI-  
 TION OF  
 SHAMA-  
 SANKAR  
 MAZUM-  
 DAR,  
 vs. L. R.  
 AN. DASI  
 (1879 R. 46.)

1872.

IN THE  
MATTER OF  
THE PETI-  
TION OF  
SHAMA-  
SANKAR  
MAZUM-

DAR,

9 B. L. R.

Ap. 45.

[18 W. R. 64.]

clear that the petitioner petitioned the Magistrate, urging his inability to produce his witnesses, and asking for the assistance of the Court to summon these witnesses. It does not appear that any proper order was passed upon this application, and therefore it amounts to this, that the petitioner has not had a proper hearing.

We therefore send back the case. The Magistrate will summon the witnesses for the petitioner, and, after hearing and considering their evidence, pass a fresh decision.



## BENGAL LAW REPORTS.

## [APPELLATE CRIMINAL.]

*Before Mr. Justice Phear and Mr. Justice Ainslie.*THE QUEEN v. TARUCKNATH MOOKERJEE.<sup>1</sup>*Criminal Procedure Code (Act X. of 1872), s. 296—Powers of a Sessions Court to order Committal of Accused discharged by a Magistrate.*

1873.  
 Jan. 20.  
 10 B. L. R.<sup>1</sup>  
 285.  
 [19 W. R. 304.]

An order by a Judge, under s. 296 of Act X. of 1872, directing a Magistrate to commit an accused person, who has been discharged at a preliminary enquiry, to take his trial in a Court of Session, must specify the particular act constituting the offence charged. The Judge cannot direct a committal for offences with which the accused was in no way charged before the Magistrate.

ONE Tarucknath Mookerjee was charged before the Magistrate of Howrah with having committed an offence punishable under s. 200 of the Indian Penal Code. The warrant of arrest only specified this offence. One Allabux, in a suit under Act X. of 1859 before the Deputy Collector of Howrah, executed an instrument called an agentnamah, which was filed in that case. In this document the accused was described as "a mookhtear and attorney of the High Court," and on the reverse side were the initials of the accused. There was another document likewise called an agentnamah filed by the said Allabux in the appeal before the Collector. In this second document, the accused was described simply as "vakeel," and on the reverse side was the accused's signature in full below the words "we acknowledge and accept the power conveyed by this agentnamah." Both these documents were tendered in evidence for the prosecution at the preliminary enquiry. Evidence was given to show that the accused employed Counsel to conduct the Act X. case for Allabux. The evidence also showed that neither the plaintiff Allabux, in the Act X. case, who had instituted his suit as *paik*<sup>2</sup> of his master, Issurchunder Ghose, zemindar, nor his master, were ever induced by the accused to consider him (accused) to be an attorney of the High Court or a vakeel, or to pay the accused any sum of money for his services as an attorney of the High Court or a vakeel. The Magistrate, on the 17th December 1872, discharged the accused, holding that the evidence was not sufficient *prima facie* to establish an offence either under s. 200 or any other section of the Penal Code. In the same month a person, whom the Sessions Judge described as one "who had no apparent interest in the matter, but was evidently actuated by some private ill-will," through a vakeel moved the Court of Session in December 1872, under s. 435 of Act XXV. of 1861, to consider the case which had been dismissed, and order a committal of the accused. The case came on for hearing before the Judge in January 1873 after Act X. of 1872 came into operation. The Judge, acting under s. 296, ordered the Magistrate to commit the accused to the Court of Session, to take his trial for having committed offences punishable under ss. 465, 468, and 471 of the Penal Code, without specifying wherein the forgery lay.

He agreed with the Magistrate that there was no offence made out upon the evidence already on the record punishable under s. 200, but he thought

<sup>1</sup> Miscellaneous Criminal Case, No. 17 of 1873.

<sup>2</sup> Subordinate collector of rents.

1873.  
 QUEEN  
 v.  
 TARUCK-  
 NATH;  
 MOOKERJEE,  
 10 B. L. R.,  
 285.  
 [19 W. R. 30.]

"that the evidence on the record, together with other facts not disputed, but which are not but should be made legal evidence, raise a strong *prima facie* case, such as would justify any Magistrate in committing a case for trial at the Court of Sessions."

Mr. *Sandel* for the accused applied to the High Court (Phear and Ainslie, JJ.) for, and obtained, a rule calling on the Government Prosecutor to show cause why the order of the Sessions Judge should not be set aside.

Mr. *Sandel* contended that the High Court, under s. 297 of Act X. of 1872, had power to revise orders passed by any Subordinate Criminal Court in any judicial proceeding for any "material errors," whether of law or fact. S. 294 did not apply to the present matter, as it referred to "any case tried." "Trial" is defined in s. 3. The Judge could not pass such an order under s. 296, because, first, the charge on which he committed the accused for trial was different from that in respect of which the preliminary enquiry had been held; secondly, there was no evidence on the record of the offences described by the Judge; and, thirdly, because the Judge must act upon the evidence received by the Magistrate at the preliminary enquiry, and not be influenced by facts not upon record, and therefore not evidence in the cause.

The *Junior Government Pleader* (Baboo *Juggadanund Mookerjee*) showed cause. He contended that the High Court had no jurisdiction under Act X. of 1872 to entertain the present application: s. 294 did not apply to the present case, as the order of the Judge was not passed in a case "tried." The words, "material error in any judicial proceeding," in s. 297, were not used in a general way, but were limited to particular proceedings enumerated in the latter part of the same section. The order of the Judge in the present case did not come within any of the proceedings mentioned in that section.

He further contended that the two documents described as agentnamahs, and filed in the Act X. case, were forgeries, for the accused, by endorsing his name on the back of the documents, had adopted the description of himself in the body of the documents, which was false, and had thereby committed a fraud on the public generally and on the Court.

Mr. *Sandel* was not called upon to reply.

The judgment of the Court was delivered by

PHEAR, J.—It appears that, in this case, Tarucknath Mookerjee was, in consequence of some knowledge or information obtained by the Magistrate, brought before the Magistrate under a warrant to answer a charge therein specified as a charge made under s. 200 of the Indian Penal Code. After taking evidence, the Magistrate was of opinion that that charge was not made out, and that the evidence did not justify his framing any other charge against the accused. Accordingly he discharged him from custody.

The Judge, exercising the powers given to him by s. 296 of the new Criminal Procedure Code, has directed the Magistrate to commit Tarucknath Mookerjee for trial for forgery. I think that this order of the Judge is bad for two reasons:—

In the first place, it is too vague and indefinite for the Magistrate to act upon. It should have specified the document which the Judge considered to have been forged, and also the particular in regard to which it was forged; otherwise I do not understand how the Magistrate, who in this matter will have to act in a ministerial capacity only, can properly frame his commitment upon any specific charge at all; and I must further say that, having regard to the

evidence which was before the Magistrate, and which has come up to us on this occasion, I cannot perceive in what way any charge of forgery of a document can be made out at all.

And, secondly, I think the order is bad, because it directs that Tarucknath Mookerjee be committed for trial for having committed the offence of forgery, that being an offence of which he had not been in any form accused before the Magistrate. The section, or that portion of the section (296) which is applicable to the present matter, runs thus: "Provided that, in Session cases, if a Court of Session or Magistrate of the district considers that a complaint has been improperly dismissed, or that an accused person has been improperly discharged, by a Subordinate Court, such Court or Magistrate may direct the accused person to be committed for trial." I read this to mean, may be committed for trial upon that matter of which he has been, in the opinion of the Judge, wrongfully discharged by the Magistrate; in other words, committed for trial for some offence with which he was substantially charged in the complaint, or which was specified in the warrant, or which was framed as a formal charge by the Magistrate at the preliminary hearing. Unless the powers of the Judge under this section to commit for trial be thus limited, it seems to me that a very strange result would follow, namely, that a man might be committed by the Judge for trial of an offence of which he had never been accused, or never even heard a word, as indeed would have happened here, until he was apprehended under the Judge's commitment. And as the Criminal Procedure Code seems to have been carefully framed with a view to provide that no one shall be committed for trial without having previously had a fair opportunity of meeting the charge upon which he is to be committed, I think this result I have mentioned can hardly have been contemplated by the Legislature; and I do not think the words, when reasonably read with the context, do give the Judge so extensive a power as that which is now sought for him.

For these two reasons I think the order of the Judge should be set aside.

*Rule absolute.*

*Before Mr. Justice Phear and Mr. Justice Ainslie.*

THE QUEEN v. SOOBIAN.<sup>1</sup>

*Evidence—Confession of Guilt—Credibility of Confession—Documents not in Evidence before Sessions Judge.*

The words actually used by an accused, who is said to have confessed, ought to be ascertained. The Court should not accept merely the conclusions at which the witnesses, deposing to a confession, themselves arrived, from the answers which the accused gave to questions put by them.

Where an accused makes two distinct statements—the one amounting to a confession of guilt, the other repudiating guilt—if the one statement is taken against the accused, the other also must be taken, for what it is worth, in his favour. The Court ought to weigh well the relative credibility of the two statements before it accepts the one in preference to the other.

Documents which were in the record sent up by the Magistrate, but which were not put in evidence before the Sessions Judge, were looked at because they told in favour of the prisoner.

<sup>1</sup> Criminal Case, No. 977 of 1872, referred to the High Court for confirmation of the capital sentence by the Sessions Judge of Dinagepore.

1873.

QUEEN

v.

TARUCK-

NATH

MOOKERJEE,

10 B. L. R.

285.

[19 W. R. 30.]

1873.

Jan. 14.

10 B. L. R.

332.

1873.

DUREN

v.

SOORJAN,

10 B. L. R.

332.

THE prisoner in this case was charged, under s. 302 of the Indian Penal Code, with culpable homicide amounting to murder, by causing the death of Gani, her husband, and was tried before the Judge of Dinagepore with the aid of assessors.

The evidence against the prisoner was that of two witnesses, and her own statement before the Magistrate.

The first witness, Mahashun, said :—

"My brother Gani is dead. He died from poison given him by his wife, the prisoner present, on a Tuesday evening. I lived in the same house with my brother. I ate that night rice and vegetable prepared by the prisoner; my brother Gani ate after me. He said after eating that he was burning inside, and his tongue dry. He was in perfect health before; he shortly after vomited, and died at midnight. He took his food about 9 P.M. I asked the prisoner after his death what she had done, and she said she had given him poison in his rice. She said that Majnoo had enticed her to poison her husband as she had an intrigue with him. She pointed out the small piece of cloth present, and said she had received the poison in that cloth. The body was sent into the station in charge of the police and my brother Halal, Raiaboolah, and Jeetoo and others. I sent the chowkedar to the thannah 18 miles off. The police came on the Thursday, and the body was sent in on Friday. The prisoner confessed to the police as she did to us. I knew nothing of any intrigue between the prisoner and Majnoo. He lives near prisoner's mother, in the Purneah district. My brother was a strong, healthy man. Halal and other villagers saw my brother in the dying state; he was rolling about in great pain. He said he believed his wife had poisoned him. She was then in the house, and said nothing."

Halal, the second witness, said :—

"Gani was my brother. He is dead; he was poisoned by his wife Soobjan on Tuesday night. The prisoner present is the wife of Gani. I and my brother ate first. The food was cooked by the prisoner. My brother Gani ate after us. He shortly after said he had a bad taste, and his throat and stomach were burning. He fell down and rolled about, and died in great pain at midnight, having eaten about 9 P.M. His wife confessed to us that she had given him poison which Majnoo had given her, as she had an intrigue with him, and would marry him when her husband was dead. She said she had the poison in the piece of cloth now present. Majnoo lives across the river. The deceased was healthy and strong; he had not eaten anything before the rice. He believed his wife had poisoned him. The police came on the Thursday. The chowkedar went to the thannah on Wednesday morning, 7 kos distant. The prisoner confessed to having poisoned her husband before the police. His wife was present when Gani accused her, and she made no reply. The prisoner during Falgoon and Magh was at her mother's house, 3 musis from Majnoo. The body was sent in in charge of the police. Raiaboolah and 8 men took it in. Gani has no other wife."

The prisoner's statement before the Magistrate was then read to her. It was as follows :—

"Majnoo is my brother-in-law's brother. Since last Falgoon there has been an intrigue existing between us. One Monday, 10 or 15 days ago, he gave me some white powder poison, and said that he would keep me if I would give the poison to my husband with rice, which, if he takes it, will cause his death. This led me to give poison to my husband on Tuesday with rice; he took it, and said that his tongue was very bad. So saying, he vomited and fell down,

and died at midnight. I gave the rice at one *pahar* of night. Very little quantity of powder poison was given in a piece of rag (produced in the Court). The powder was wrapped in this rag, not tied."

The prisoner was asked if her "confession" was true. She answered as follows:—

The confession is not true. My elder brother-in-law induced me to say what I did. My husband was ill with venereal disease, and Majnoo gave me medicine for him: this I gave him. I had no intrigue with Majnoo. I gave the medicine to cure and not to kill him. I have no more to say and no witnesses.

It appeared that no *post-mortem* examination had been made, but the stomach, which had been sent to Calcutta, had been examined, and was found not to contain any poison. With the documents sent up with the record there was a report by the Civil Surgeon of Dinagepore, who had apparently, at the Magistrate's request, examined Majnoo and Soobjan, both prisoners at the time, stating that Majnoo was free from both venereal disease and gonorrhoea, but that the prisoner was suffering from gonorrhoea, that she had been under treatment from the time of her admission, and that she was not yet quite cured. The Doctor, however, was not examined as a witness, nor was his report produced before the Sessions Court, or mentioned by the Judge in his judgment.

The assessors were of opinion that the evidence was not sufficient for a conviction, the body having been examined, and no poison having been found in the stomach. They both thought it possible that the prisoner had been induced to confess to the Magistrate by others, and they found her not guilty. The Judge considered that the evidence was supported by her voluntary confession, and convicted the prisoner, and sentenced her to death.

On the case coming up to the High Court for confirmation of the sentence under s. 287 of the Criminal Procedure Code, no one appeared for the prisoner.

The following judgments were delivered:—

PHEAR, J.—In this case the prisoner has been convicted of murder by the Sessions Judge differing from the assessors, and the prisoner has been sentenced to death.

The assessors are of opinion that the evidence is not sufficient to support a conviction; and the Judge himself states that the case has been sent up in rather a meagre form. And truly the materials upon which the conviction has been come to are about the very scantiest that I have ever before seen in a capital case. Apart from statements which the prisoner herself on different occasions made, the whole of the evidence directly bearing upon the charge is as follows: [His Lordship, after reading portions of the evidence of the two witnesses, continued:]—This is the whole of the material evidence in the case, exclusive of the prisoner's confessions. But both these witnesses no doubt stated that the prisoner confessed to having poisoned her husband. The words are these: Mahashim says: "I asked the prisoner after his death what she had done, and she said she had given him poison in his rice. She said that Majnoo had induced her to poison her husband, as she had an intrigue with him." Halal said: "His wife confessed to us that she had given him poison which Majnoo had given her, as she had an intrigue with him, and would marry him when her husband was dead."

1873.

QUEEN

S60RJA, W,  
10 B. L. R.

332.



1873.

QUEEN

v.

SOORJAN,

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Now, it is to be observed that these statements are in general terms, and so are merely statements of a conclusion at which the witnesses themselves arrived from the answers given by the prisoner to their questions. Halal says, "she confessed," but it is all important in matters of this kind to know what were the words which the person who is said to have confessed actually used: nothing short of the actual words given in detail in the first person, so far as it is possible to obtain them, ought ever to be relied upon as a foundation for the opinion formed by the Court; because it may turn out that the words, taken together with the questions and the circumstances under which the questions were put, do not, in truth, amount to a confession of guilt, such as the witness chose to represent it. Neither of these witnesses are asked to detail their questions, or even to give the actual words of the prisoner; and I must say that I should like very much indeed to have on the record even the vernacular expressions which were used, and which the Judge has translated by saying, "She said she had given him poison in his rice." It is quite certain, I think, that all which passed between these brothers of the deceased and the wife cannot possibly be given in these depositions, assuming anything passed at all, because I feel confident that, if the woman had deliberately poisoned her husband with the motive attributed to her, she would not, immediately upon his death, without anything more than that which appears in these depositions, have voluntarily made a clean breast of it, saying openly that she poisoned him because she had an intrigue with another man, and that other man had promised to keep her. It seems to me quite beyond belief that these depositions do represent all that passed, if anything passed, in this respect. I have also reason for thinking that these depositions do not even represent all that the witnesses stated in Court, for I find that the Judge in his judgment, while stating the facts as he understood them, says: "The two witnesses, Mahashun and Halal, were two of his brothers, and came home before him on the night in question, and ate their food as usual that had been cooked by the prisoner. Their brother Gani, deceased, came in after them." In the depositions, as they stand on the record, there is nothing from which I can get these particulars, though they are certainly material to the case of the prosecution; and I suppose the Judge did not invent them. Again, somewhat later he says: "The occurrence happened at a great distance, 16 or 18 miles from the thannah; and the thannah itself, 36 miles from the station. The consequence was that the body was too decomposed to admit of examination, and the stomach that was secured, and sent to Calcutta, for examination, failed to give signs of any poison." There is nothing in the depositions of the two witnesses—the only two witnesses who have given evidence in the case—from which I can gather the material portion of this statement of fact. Therefore, again, I suppose that they must have said more in Court than the deposition on the record represents. I find also that the Judge says: "The husband accused his wife of having poisoned him, but she remained silent." Now, the only thing that I find in these two depositions bearing upon this is, first, in the deposition of Mahashun this sentence: "He" (*i. e.*, the deceased) "said he believed his wife had poisoned him; she was then in the house, but she said nothing;" and, secondly, in the deposition of Halal, who says in one place: "The deceased believed his wife had poisoned him." And then afterwards he says: "His wife was present when Gani accused her, and she made no reply." But I find no statement that Gani did, in fact, accuse her, or what words he used if he did accuse her.

I am afraid, therefore, that not only was the case meagre in consequence of the fault of the prosecution, but further that the record which has come up

to us does not even give the whole of that little which actually was before the Court of Session. However, we must judge the matter by the record as we have it, and it seems to me that that which I have read and referred to falls very far short of constituting a foundation upon which a Court could sufficiently come to the conclusion that the person accused before it has committed murder. There are, however, in addition to this material, two statements deliberately made by the prisoner and taken down in writing at the time: one is the statement which she made before the committing Magistrate, and is as follows (*reads*). The second statement is that which the prisoner made before the Sessions Court. She was there asked whether the confession before the Magistrate, and which was read in Court, was true. [His Lordship here read the prisoner's answer to the Judge.] It will be observed that, if the first of these statements amounts to a confession of guilt, the second, at any rate, repudiates it, and gives an entirely different version of the transaction. If the one statement is to be taken against the prisoner, the other ought also to be taken for as much as it is worth in her favour. And then comes the question whether either of these statements is to be believed, and, if either of them, which of them in preference to the other, or whether any inference can be drawn from them relative to the prisoner's guilt on the present charge.

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All lawyers, who have any experience in criminal practice, well know how dangerous it is to take any prisoner's confession of guilt against himself, even though it appear to have been made voluntarily; and certainly, if this be so in England, as it is, I think I may venture to say it is not less so in this country. At any rate, inasmuch as in this case the only foundation upon which the verdict of guilty can stand at all is that which is furnished by the words of the prisoner herself, and as the prisoner has made two perfectly distinct statements with regard to the matter of the crime with which she is charged, it is especially incumbent upon the Court to weigh well the relative credibility of these two statements before it takes one in preference to the other, and, on the footing of it, passes that sentence of the law, which, if once carried out, admits of no possible record. I am by no means myself prepared to say that, if I had been called upon to judge of the facts of this case in the first instance on the materials only which are on record, I should not have taken the second statement of the prisoner as being probably more near the truth than the first one. I have already given reasons for thinking that the evidence of the two brothers, with regard to the original confession as it stands on the record, does not disclose, at any rate, all the real facts. It appears to me that the statements of these men on this point ought to have been scrutinized with the greatest care, and the confession made before the Magistrate in accordance with them received with great suspicion. But, however this may be, I find from documents, which were not produced before the Court of Session (and which I look at because they tell in favour of the accused), materials which go very far indeed, as it seems to me, to render it probable that the prisoner, in administering to her husband some ingredient in the rice, may have done so without the intention of poisoning him. There is among the documents which have come up to us a letter from the Civil Surgeon of Dinagepore, in which he states that he had examined the persons of both the prisoner and of Majnoo, and that he found that the prisoner herself was suffering from venereal disease in a severe form, while Majnoo was entirely free from any trace of it. I cannot myself understand why in the interest of justice the evidence of the medical gentleman, who was able to depose to such facts as these, was not taken at the trial in the Sessions Court. It goes to my mind almost conclusively to show that there was no such thing as an intrigue

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going on between the prisoner and Mainoo; and if so, as there is no other suggestion made as to the source from which the prisoner could have contracted her disease, the inference is not very far to reach that it had been inflicted upon her by her husband. Then, I think, when we come so far as this, we find very good reason for preferring the statement which the prisoner made in Court as to the reasons for her administering something to her husband in the rice, to the confession which she made before the Magistrate. The Judge says that: "Before this Court the prisoner admits mixing some medicine with her husband's food, but qualifies her confession so far as to say she gave it to him to cure his venereal disease. If she gave him the medicine for such a purpose, she would not have administered it in a secret way with her husband's food, and without his will and permission." It seems to me that it was rather hard upon the prisoner to say that she "qualified her confession so far," and so on; when in truth this was no confession at all, but merely a statement, which avoided the guilt if it was to be believed. And I do not feel, with the same force as the Sessions Judge seems to have done, the improbability of the wife, under the circumstances which she mentions, administering the medicine in secret, that is, to say, secretly as regards her husband. There might, I think, be conceived very many reasons why she should be disposed to make him try a remedy which she believed in, and which she might know he would not himself voluntarily take. We do not, at this moment, know what was the ingredient, the article actually administered. I suppose that, taking the evidence of the two brothers as to the phenomena exhibited by the sufferer after eating the food, any one might reasonably come to the conclusion that the man had died in consequence of something which had acted as an irritant poison to him. But I think it is very unfortunate that, where even the very first step which is to be taken in the case is a step of this kind, the Court was not aided by the evidence of an expert, namely, of the medical man who seemingly was accessible, and whose evidence might have been taken. There is not even any proof on the record that the reason why no poison was found was that which was given by the Judge. The whole of that part of the case is left in perfect obscurity as far as the record indicates, and the consequence, no doubt, is, as the Judge admits, that the Sessions Court had to determine this momentous issue of life and death upon about the most meagre materials that could be well conceived. It appears to me that in this state of things it was clearly a just course to pursue that the Court should give the unfortunate prisoner the benefit of the uncertainty, and acquit her.

The case now comes up to us under the provisions of the Criminal Procedure Code for confirmation of the capital sentence, and we therefore have the power of passing that sentence which we think ought to have been passed by the Sessions Court. It seems to me that the prisoner ought to have been acquitted, and I think, therefore, that the sentence and the conviction must be set aside, and the prisoner acquitted.

AMSLIE, J.—I concur in acquitting the prisoner. There is no doubt that, shortly before the death of Gani, she administered to him some drug which had the effect of causing his death, but it does not appear that she administered the drug with any guilty intention or knowledge that administering drug was imminently dangerous. If we are to believe the first confession before the Magistrate, no doubt there was guilty intention; but the second statement which she made before the Judge, that she administered the drug to cure her husband, is probably the true one. In saying this, I rely on the report of the medical officer, who, as has been pointed out by my learned brother, should have been examined

in this case. The circumstances that he describes are entirely consistent with the second statement made by the prisoner, and I do not think that the evidence of the brothers as to her confession immediately after the death of her husband is to be taken as of any weight. It is not probable that she would administer poison, and then the moment that her intention had been carried out, and her scheme for freeing herself from the husband and enabling herself to carry on the intrigue with Majnoo had become successful, that she would expose the whole matter to the brothers, unless some very cogent means of compulsion were applied to her. They say nothing about the means employed to induce her confession, and it is very probable that they have amplified any admission that was made. As the matter stands, I am by no means prepared to accept the statement which was made before the committing officer in the first instance as sufficient to warrant a conviction for murder.

*Conviction set aside.*

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[FULL BENCH.]

*Before Sir Richard Couch, Kt., Chief Justice, Mr. Justice Bayley, Mr. Justice Kemp, Mr. Justice Mitter, and Mr. Justice Ainslie.*

1872.  
Sep. 9.

IN THE MATTER OF THE PETITION OF BYKUNTRAM SHAHA ROY AND OTHERS.<sup>1</sup>

10 B. L. R.

*Code of Criminal Procedure (Act XXV. of 1861), s. 62—Rival Hâts—Power of Magistrate—Riot—Affray.*

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[18 W. R. 47.]

A Magistrate has power, under s. 62 of Act XXV. of 1861,<sup>2</sup> to prohibit a particular landholder from holding a *hât* on a particular spot, on a particular day, at least for a temporary period, if he is satisfied, upon reasonable grounds, that the order is likely to prevent, or tends to prevent, a riot or an affray.

THIS case arose out of a dispute between two neighbouring zemindars, Bykuntram Shaha, one of the petitioners, and one Bipin Behary. The petitioner Bykuntram, with a view to annoy the respondent it was said, established a new *hât* (market) close to an old established *hât* belonging to Bipin Behary. This was said to have caused unlawful assemblies to take place, and to have raised an apprehension of a breach of the peace. On the 8th of November 1871 both the parties, with some of their followers, were bound over in the sum of Rs. 200 to keep the peace for one year. On the 3rd of May 1872 the Magistrate, apprehending that the amount of the recognizance was not sufficient, sum-

<sup>1</sup> Reference to the High Court under s. 434 of the Code of Criminal Procedure.

<sup>2</sup> Act XXV. of 1861, s. 62.—"It shall be lawful for any Magistrate by a written order to direct any person to abstain from a certain act, or to take certain order with certain property in his possession or under his management, whenever such Magistrate shall consider that such direction is likely to prevent, or tends to prevent, obstruction, annoyance, or injury, or risk of obstruction, annoyance, or injury, to any persons lawfully employed, or is likely to prevent, or tends to prevent, danger to human life, health, or safety, or is likely to prevent, or tends to prevent, a riot or an affray."

Act X. of 1872, s. 518.—"A Magistrate of the district, or a Magistrate of a division of a district, or any Magistrate specially empowered, may, by a written order, direct any person to abstain from a certain act, or to take certain order with certain property in his possession or under his management, whenever such Magistrate considers that such direction is likely to prevent, or tends to prevent, obstruction, annoyance, or injury, or risk of obstruction, annoyance, or injury, to any persons lawfully employed, or danger to human life, health, or safety, or a riot or an affray."

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moned the parties, and caused Bykuntram and Bipin Behary to enter into recognizances of Rs. 3,000 each, with two sureties in Rs. 1,000 each, to keep the peace for one year from that date. The Magistrate also took smaller recognizances from the servants of both parties, and made an order under s. 62 of the Code of Criminal Procedure that Bykuntram was not to hold his market at the same time as Bipin Behary did. At the instance of the parties affected, the Officiating Sessions Judge of Dacca made a reference to the High Court under s. 434 of the Code of Criminal Procedure, recommending that the order in question be set aside. There was also an order under s. 404 made by the High Court on the motion of Madhub Chunder Roy, one of the parties concerned, calling up the record of the case.

The case was argued before Kemp and Glover, JJ., who, in consequence of conflicting decisions in *Shibchunder Bhattacharjee v. Sadut Ali Khan*<sup>1</sup> and *The Queen v. Kalika Pershad*,<sup>2</sup> referred the following question to a Full Bench: "Whether a Magistrate is legally competent to issue an order under s. 62, Aft XXV. of 1861, prohibiting a landholder from holding a *hát* on any particular spot on his estate on particular days, on the ground that such order is likely to prevent a riot or affray, or because a riot or affray has already occurred?"

Mr. Woodroffe (with him Baboos *Mahinimohan Roy* and *Ramesh Chunder Mitter*), in support of the Magistrate's order.

The *Advocate-General*, Offg. (Mr. Paul), (with him Baboos *Kalimohan Doss*, *Doorgamohan Doss*, and *Kalikanth Sein*) for the petitioners.

Mr. Woodroffe.—It is a question whether there can be a reference to this Court in this matter; in other words, can this Court, under s. 434 of Aft XXV. of 1861, deal with a matter under s. 62 which is not a judicial proceeding. [The *Advocate-General*.—This point is not referred to the Full Bench. KEMP, J.—The point was not before us.] It is open to the parties now to raise the question whether the Court has the power to hear and determine the question referred. [COUCH, C.J.—Have you any authority for that proposition? I think that matters not referred cannot be decided.] Whether the parties are entitled to raise the point or not, Counsel out of courtesy are heard upon points which may seem to them worthy of consideration. [COUCH, C.J.—I think you must be limited.] In *The Queen v. Abbas Ali Chowdhry*<sup>4</sup> it was decided that a matter under s. 62 is not a judicial proceeding, and therefore could not be interfered with under s. 434. It is there said that the object of s. 62 was to provide for cases where it would be necessary to act speedily, probably at once, in order that the danger might be prevented. [KEMP, J.—This is not only a reference by the Officiating Sessions Judge, but we sent for the record.] From the language of s. 62, it is clear that the Legislature intended to give Magistrates power to place restrictions like the one in question upon the enjoyment of a right, even where nothing unlawful is done, but where the exercise of that right may lead to mischief, or cause inconvenience to others. The intention of the Legislature could hardly have been to deal with an unlawful exercise or enjoyment of a right only, as unlawful acts could be put down by the Magistrate without a special

<sup>1</sup> 4 W. R. Cr. 12.

<sup>2</sup> 5 B. L. R. App. 82, note (see p. 235 of this book).

<sup>3</sup> See *The Queen v. Gorachand Gope*, B. L. R. Sup. Vol. p. 443.

<sup>4</sup> 6 B. L. R. 74 (see p. 239 of this book).

legislation, like s. 62. So, where a man does even a lawful act, but with an intention of annoying others, the Magistrate may interfere so as to prevent mischief. The words, "to take order with his property," clearly show that the Magistrate may pass an order regulating the exercise of one's personal and private rights. A comparison of this section with other provisions of the law will make its meaning clear; s. 68, for instance, speaks of unlawful obstructions; but s. 62 does not speak of anything unlawful. The Magistrate may interfere, whether the act be lawful or unlawful. I rely upon the decision in the case of *The Queen v. Kalika Pershad*<sup>1</sup> in support of my argument.

Baboo Mohinimohan Roy followed on the same side.

The *Advocate-General*.—There is a wide distinction between an injury in the legal sense and a mere loss or inconvenience to others. The former can be repressed because it involves a violation of some body's rights. The latter is not actionable, because it does not infringe any body's right. If a rival *hāt* may be repressed because it causes inconvenience to others, a rival shop or business of any kind may be put down in an absolute manner on the same ground. The true meaning of the section, therefore, is that there must be an unlawful act. [Couch, C.J.—Is there any authority for that?] Annoyance to others is not by itself a sufficient ground for stopping a lawful act, otherwise a man may be told not to have music at his house if it caused annoyance to his neighbours. Act XXV. of 1861 is simply a Code of Procedure. It does not profess to deal with rights of property—it provides remedies against wrongs known to the law. A substantive law may cut down the rights of persons, or qualify the mode of enjoying the same, but this law does not do so. The closing of one of the *hāts* is not the only way of preventing the mischief, if mischief there be. The offenders can be apprehended and punished. The action of the Magistrate in this case is an interference with the rights of private property. The Magistrate might as well, according to his own views and discretion, put down an old *hāt*. He may be of opinion that the new *hāt* is more advantageous to the neighbourhood; and, if his action is not limited to wrongful acts, he might as well stop an old *hāt* in favour of a new one. The Code gives him ample powers to deal with a case of this description in a lawful manner instead of resorting to an arbitrary measure which, not being a judicial act, will leave the party affected without the remedy of revision by this Court. It may be said that there is a remedy by personal action against a Magistrate for an arbitrary act; it is, however, submitted that the powers of supervision vested in the High Court are wide enough to afford an aggrieved party relief without driving him to an action. The natives of this country are most unwilling to bring actions against the authorities, and the remedy by action, though open to them, is one which is, for these reasons, impracticable. The ruling in *Sibchunder Bhuttacharjee v. Sadul Ali Khan*<sup>2</sup> is correct, and should be followed.

The opinion of the Full Bench was delivered by

Couch, C.J.—The question referred to the Full Bench is (*reads*).

We are of opinion that this question ought to be answered in the affirmative. S. 62 of Act XXV. of 1861 runs as follows (*reads*). The above provisions clearly show that it is lawful for a Magistrate to issue a written order to any person, directing him to abstain from any particular act, or to hold any property in

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<sup>1</sup> 5 B. L. R. App. 82, note (see p. 235 of this book).

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his possession or under his management subject to any particular condition, if such Magistrate shall be satisfied that such direction is likely to prevent a riot or an affray. The word "certain" placed before the word act, and afterwards repeated twice in the expression, "to take certain order with certain property in his possession," leaves no reasonable doubt in our minds that the Legislature intended to give full and ample powers to the Magistrate, the chief officer entrusted with the duty of preserving the peace of the district, to restrain any person from doing any act, or to command him to hold any property in his possession subject to any condition, whenever such Magistrate shall consider that such a course of procedure is likely to prevent, or even tends to prevent, a riot or an affray. No doubt, the powers conferred upon the Magistrate by this section ought, like all other powers of discretion created by law, to be exercised in a reasonable manner, and it may further be admitted that the Magistrate is bound, before he issues the order, to satisfy himself upon reasonable grounds that that order is likely to prevent, or tends to prevent, a riot or an affray. But if a Magistrate, after exercising the necessary discretion, issues an order directing a particular landholder not to hold a *hdt* on a particular spot on a particular day, upon the ground that the holding of the *hdt* at that particular place and time by that particular individual is likely to lead to a serious breach of the peace, we cannot, upon a proper construction of s. 62, say that the order is null and void for want of jurisdiction or power. The law gives a very wide discretion to the Magistrate in matters affecting the public tranquillity, and it is not for us to curtail that discretion by construing the Act in a manner contrary to the plain and obvious meaning of the words in which it is expressed.

It has been argued that the powers vested in the Magistrate by s. 62 must be confined to those acts and modes of enjoyment of property only which are in themselves unlawful; and that, as there is nothing inherently illegal in a man holding a *hdt* on his own land on any particular day he chooses, the order passed by the Magistrate in this case must be set aside as void for want of power. But not only is this restricted construction not supported by the actual words of the section, but its adoption might, in many cases, lead to the most dangerous consequences. A particular act or a particular mode of enjoyment of property might be perfectly innocent and lawful in itself. But the act may be done, or the property enjoyed, in that particular mode under circumstances calculated to lead to a serious breach of the peace, attended even with loss of human life; and it would be by no means proper or desirable to hold that even in such cases the chief peace-officer of the district has no power to issue an order such as that contemplated by s. 62.

Whether a zemindar is in all cases entitled to establish a *hdt* on his own land, but in close proximity to a previously established *hdt* belonging to another zemindar, is a question upon which we need not express any opinion. Nor is it necessary for us to determine the question whether the Magistrate has, in this particular case, exercised his discretion in a proper manner, or whether his order, as it stands, requires any amendment either as to the duration of the injunction or otherwise; for these questions have not been referred to us by the Division Bench. Assuming, however, that there is nothing unlawful in a zemindar holding a *hdt* on his own land on any day he chooses, and assuming also that the mere fact of his holding a *hdt* on such a spot and on such a day would not be sufficient to warrant a Magistrate in coming to the conclusion that a breach of the peace is likely to take place, it seems to us clear that there may be other circumstances connected with the holding of the *hdt* at that particular place and time which would fully justify a Magistrate in issuing an order under s. 62, at

least for a limited period of time, if the Magistrate is satisfied, after a reasonable exercise of the discretion vested in him by that section, that such an order is necessary for the preservation of the public peace.

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It is stated in one of the cases mentioned in the order of reference that a Magistrate has no power under s. 62 to issue an order that would interfere with any one's right to enjoy his own property in any lawful manner he pleases. Whether a Magistrate can, under that section, issue such an order as would be utterly destructive of a man's right of property, is not a question which we are called upon, in this case, to determine one way or the other. It is sufficient for us, for the purposes of this reference, to say that it is quite within the power of the Magistrate under s. 62 to modify the enjoyment of such rights, at least for a temporary period, by imposing upon the owner of the property such conditions as the Magistrate, after taking into consideration all the facts and surrounding circumstances of each particular case, shall consider necessary to prevent a riot or an affray. Every individual right is, to a certain extent, subject to the general interests of society; and after giving our best consideration to the question referred to us, we feel ourselves bound to come to the conclusion that the Legislature has purposely vested the Magistrate with powers sufficient to cover a case like the one mentioned in the order of reference. It is notorious that in this country rival *hâts* are frequent sources of riot and affray; and there is something in the nature of such *hâts*, namely, the assemblage of large crowds of men on both sides, which may be said to have a certain tendency to lead to a breach of the peace. We do not mean to say that such general facts alone are sufficient to justify the exercise of the discretion vested in the Magistrate by s. 62. But we think that there may be other circumstances connected with those general facts, as, for instance, the existence of bitter hostility between the owners of the rival *hâts*, the preparations already made by them for the commission of a breach of the peace, &c., which might render it absolutely necessary to exercise that discretion for the preservation of public tranquillity.

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[APPELLATE CRIMINAL.]

*Before Mr. Justice Kemp and Mr. Justice Phear.*

THE QUEEN v. BELAT ALI AND OTHERS.<sup>1</sup>

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April 24.  
10 B. L. R.  
453.  
[19 W. R. 67.]

*Evidence Act (I. of 1872), s. 30—Confession of a Prisoner when admissible against Co-prisoner—Trial by Jury.*

To render the confession of one prisoner jointly tried with another admissible in evidence against the latter, it must appear that that confession implicates the confessing person substantially to the same extent as it implicates the person against whom it is to be used, in the commission of the offence for which the prisoners are being jointly tried.

In this case the appellants, together with Kassim Mundul, Budden Mundul, Moniruddin Mundul, and Ahad Sheikh, were charged before the Deputy Magistrate of Bongong, under s. 325 of the Indian Penal Code, with having caused grievous hurt to one Mandari Mundul, and were sentenced to imprisonment for one year. From this sentence several of the prisoners appealed to the Judge

<sup>1</sup> Criminal Appeal, No. 277 of 1873, from an order of the Sessions Judge of Nuddea, dated the 12th February 1873.



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of the district, who was of opinion that, if any offence had been committed, it was one triable by a Court of Session only, and accordingly ordered the prisoners to be committed for trial before the Sessions Court on the charge of the culpable homicide of Mandari Mundul, punishable under s. 304 of the Indian Penal Code. On the trial before the Deputy Magistrate, Kassim Mundul made a statement to the effect that Mandari Mundul was in the habit of telling stories to Brindabun Baboo, the zemindar, and that he (Kassim) and the other villagers held a committee, and resolved to thrash Mandari; that afterwards Belat Ali took him to a musjeed, and there they both swore to give the thrashing; that a few days afterwards they ordered the villagers to thrash Mandari; that, after doing so, the villagers came and told them, and that they had ordered them to take Mandari to his own village; that he was at a distance and saw what the other did, but that he was not near the beating; and that he did not know when Mandari died. Budden Mundul also deposed before the Magistrate that Belat Ali, Setabdi Mundul, Kassim, Chowdhur, Nassim, and others, held a committee, and that they ordered the others to beat Mandari, and that, during the beating, they remonstrated; that they saw the beating; that Setabdi, Belat Ali, and Kubeer Biswas, ordered Mandari to be removed to his own village, and that Mandari was beaten because he used to tell tales to Brindabun Baboo. Moniruddin also stated to the Magistrate that he did not kill Mandari, but that he and others were ordered to give Mandari a beating; that Belat Ali, Budden, Kassim, Kubeer, and Setabdi, told them that they were to give Mandari such a beating as not to kill him, and that they would pay any expenses which would be incurred; that he saw Mandari being beaten, and that he himself had given him three or four slaps.

On the trial of this case in the Sessions Court, the Judge admitted these statements in evidence, and with respect to such evidence he charged the jury as follows: "These are the statements of the prisoners, Kassim, Budden, and Moniruddin, taken by the Deputy Magistrate, and which give us the reasons for the beating inflicted. These statements are evidence against the persons making them, and, if true, they show the part that the three confessing prisoners had in planning the assault in which Moniruddin took an active part, Budden being present, and Kassim close by. These prisoners now say that they made these statements at the instance of the darogah, but you will remark that, when punished by the Deputy Magistrate, these prisoners did not appeal, nor urge that their confessions had been extorted, a very good ground of appeal had it been the case. No reason is apparent why, if not true, these statements should have been made, nor as to how the story as to the conspiracy against Mandari, in which we are told the whole village joined, could have arisen if absolutely without foundation. Under s. 30 of the Indian Evidence Act, the confession of one person affecting himself and others concerning an offence for the committing of which the confessing person and the others are being jointly tried 'may be taken into consideration,' i. e., the confessions may be used as evidence against the persons not making them. You will therefore take the statements of Kassim, Budden, and Moniruddin into your careful consideration, and you will weigh the evidence they afford as you would any other evidence." In addition to these statements there was also the evidence of one Jakur Ali, who was a servant of Brindabun Baboo. The jury found the prisoners guilty, and the Sessions Judge sentenced them to three years' rigorous imprisonment. From that sentence, Belat Ali, Sonatun Porooie, Setabdi Mundul, Kubeer Biswas, Soneer Sheikh, and Chowdhur Sheikh, appealed to the High Court.

Mr. Ghose (with him Baboo Biprodass Mookerjee) for the appellants.—A confession, to be evidence against a co-prisoner, must implicate both the prisoner

confessing as well as the co-prisoner—*The Queen v. Mohesh Biswas*.<sup>1</sup> Here neither Kassim Mundul nor Budden Mundul were in any way affected by the statements made by themselves before the Deputy Magistrate, therefore the Judge misdirected the jury when he told them to consider those statements as evidence against the appellants. Those statements might perhaps have been admissible if the charge had been one of conspiracy, but the charge against the prisoners before the Magistrate was grievous hurt. Again, to make a confession of a prisoner admissible in evidence against a co-prisoner, the offence charged against both

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<sup>1</sup> Before Mr. Justice Phear and Mr. Justice Ainslie.

THE QUEEN v. MOHESH BISWAS AND OTHERS.\*

The 23rd January 1873.

*Evidence Act (I. of 1872), ss. 30 & 133—Confession of one Prisoner when admissible against another—Accomplice—Corroborative Evidence.*

Mr. Ghose (with him Mr. Rochfort) for the appellants.

THE judgment of the Court was delivered by

PHEAR, J.—In this case, four prisoners, Mohesh Biswas, Prilhad Doss, Goggun Sikdar, and Dwarki Joardar, have been convicted of murdering one Tincourie Karigur, and of making away with his dead body; and a fifth person, Ram Indro Doss, has been found guilty of abetting the four first named persons in the commission of the offence of murder. All five have been sentenced to transportation for life. Putting on one side for a moment the testimony of Soorut Ally, and the statement made by Ram Indro Doss, one of the convicted persons, the evidence in the case is very slight, and may be shortly stated as follows (The learned Judge proceeded to read and comment on the evidence, and having read the following passage: "I searched Mohesh's house, and found the *dao* with marks of blood on it," continued): This is the whole of the evidence with the exception I first made, and it is at once remarkable that, until we come to the last passage which I have just now recited, there is not a single word or fact which implicates any one of the five prisoners in the commission of any offence or act whatever, and I will go further and say that this evidence leaves it certainly doubtful whether even any trace of the missing man has yet been discovered. (The learned Judge, after reading the principal portions of the evidence except that of Soorut Ally and Ram Indro, continued): Clearly I think, for some reason or other, the principal witnesses to the preliminary facts in this case have very materially varied their testimony in the Sessions Court, as compared with the statements which they made at first when it may be supposed that they made them unbiassed. The result then is that, taking the evidence on the record all together, other than the deposition of Soorut Ally and the statement of Ram Indro, which I shall notice in detail presently, it may be almost said that the case of the prosecution is scarcely even started, and certainly that evidence does not in any degree tend to implicate any one of the prisoners in the commission of the offence with which they were charged. But Soorut Ally's evidence, as far as it can be depended upon, entirely alters the complexion of the case. I will read it at length. (The learned Judge read the evidence, and continued): I have said that this deposition entirely changes the complexion of the case. Manifestly, if it can be relied upon, it clearly establishes the charge of murder against the first four prisoners at least. But then this is the evidence of an accomplice. If the story which he gives is true, he went and fetched the man, was present when his master twisted the cloth round the man's neck, stood by while the man was dragged into the hut, accompanied the prisoners when they carried off the body, and put it down in the indigo-field; there stood looking on while every man, excepting himself and Ram Indro, as he says, took the *dao* by turns, hacked the skull, and cut the body into pieces, and then went away with them, when the remains of the body were put into the sack, and were pitched into the river. Clearly the part he admits that he took in the whole of this transaction is such a partici-

\* Criminal Appeal, No. 956 of 1872, from an order of the Sessions Judge of Jessore, dated the 26th September 1872.

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must be the same, and they must both be on their trial for that identical offence—Act I. of 1872, s. 30, illust. *b*. Moniruddin, no doubt, stated that he had given Mandari a few slaps, but this does not amount to a confession of having caused grievous hurt.

No one appeared on behalf of the Crown.

The judgment of the Court was delivered by

PHEAR, J.—We think that the verdict of the jury must be set aside on the ground that the Judge wrongly directed them with regard to the reception of the so-called confessions of two at least of the prisoners who were jointly tried with the appellants, namely, Kassim Mundul and Budden Mundul. I have, on a former occasion, in the case of *The Queen v. Mohesh Biswas*,<sup>1</sup> already explained the view which I take as to the proper application of s. 30 of the new Evidence Act. That view is shortly this, namely, that, before a confession of a person jointly tried with the prisoner can be taken into consideration against him, it must appear that that confession implicates the confessing person sub-

pation in the principal acts of the murderers as constitutes him an accomplice, and it is well understood now that the evidence of an accomplice cannot be safely acted upon as against persons accused by him excepting when it is corroborated in regard to the particulars which implicate them. This principle has been enunciated many times by this Court, and inasmuch as a reported case, *Queen v. Baikanthanath Banerjee*,\* has been referred to, in which the judgment of the Division Bench, dealing with this very matter, was delivered by myself, I will read from the note in *Queen v. Baikanthanath Banerjee*\* what was then said, because it still represents my views. (The learned Judge read that judgment and continued): The case I have now read is not precisely, so to speak, on all fours with the present one, but the remarks there made do almost to their full extent apply to the question which is now before us. The corroboration which is needed to make Soorut Ally's testimony against the prisoners trustworthy should be corroboration derived from evidence which is independent of accomplices, which is not vitiated by the accomplice character of the witness not affected, namely, by the disposition on the part of one whose guilt is disclosed to purchase impunity or advantage by falsely accusing others; and further should be such as to support that portion of the accomplice's testimony which makes out that the prisoner was present at the time when the crime was committed, and participated in the acts of commission. The Judge has found corroboration in more than one particular. But it appears to me that that corroboration does not bear the character which I have endeavoured to describe as that which it is necessary it should bear in order to render the accomplice's evidence trustworthy against the prisoner. (The learned Judge read the evidence which the Judge of the lower Court relied on as being corroborative of the deposition made by Soorut Ally, and proceeded). The Judge says: "And finally there is the confession of Ram Indro Doss, which, under s. 30 of the new Evidence Act, may be taken into consideration against all the prisoners." With regard to this I shall proceed now to say a few words. But first I will remark that up to this point Soorut Ally's evidence has certainly not received that amount of corroboration which would justify a Court of Criminal Justice in coming to the conclusion that the persons who are affected by it were guilty of the offence with which he accused them. Ram Indro, the fifth prisoner, when before the Magistrate, made a long statement of that which he knew of the case. Of course, it may be every word of it taken and acted upon as against himself, but it is only admissible against the others, whether for the purpose of corroboration of an accomplice's testimony, or otherwise, so far as it is made available by s. 30 of the new Evidence Act, which says: "When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting him.

<sup>1</sup> *Ante*, p. 455 (or p. 567 of this book).

\* 3 B. L. R., F. B. 2 (see foot-note case, p. 80 of this book).

stantially to the same extent as it implicates the person against whom it is to be used, in the commission of the offence for which the prisoners are being jointly tried. It seems to me that it is this implication of himself by the confessing person which is intended by the Legislature to take the place as it were of the sanction of an oath, or rather which is supposed to serve as some guarantee for the truth of the accusation against the other. In the case before us neither Kassim Mundul nor Budden Mundul say anything which amounts to a confession of their own individual guilt upon the charge whereon they were tried jointly with the petitioners, appellants. Both these men distinctly keep themselves out of all complicity in the actual facts which are charged against all the prisoners jointly, and upon which the appellants have been convicted with the others : so that it appears to my judgment that the statements which these men make against the appellants are simply, so far as the charge upon which they

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self and some other of such persons is proved, the Court may take into consideration such confession as against such other person, as well as against the person who makes such confession." It appears to me that this section must be interpreted to mean that the statement of fact made by the prisoner which amounts to a confession of guilt on his part may be taken into consideration, so far and so far only as that particular statement of fact itself extends against the other prisoners who are being tried as well as himself for the offence which is thus confessed. I think the illustrations which are given to this section bear out this view. If this be so, we must be careful, not to apply statements made by Ram Indro Dass before the Magistrate against other prisoners than himself further than those same statements amount in themselves to a confession of guilt on his part. The remainder of the prisoners besides Ram Indro, I think without exception, both before the Magistrate and in the Sessions Court, denied having had any knowledge or any participation in the murder, and Ram Indro himself in the Sessions Court stated that whatever he had said before the Magistrate was untrue. I will proceed to the statement he made before the Magistrate (the learned Judge read the statement and continued) : It is obvious on the first perusal of this statement that the prisoner keeps carefully clear of confessing any participation in the murder. The most that the statement as a whole amounts to is an admission on the part of Ram Indro of aiding and abetting by his presence all the other persons mentioned by him who were engaged in cutting and making away with the dead body of the man who had already been murdered. The statement, so far as it is a confession only, is, I think, limited to this, namely, the statement of facts which amount to a criminal participation in making away with the body, and consequently this is all which can be taken into consideration under s. 30 against the other prisoners. But this statement, so limited, undoubtedly does bring Mohesh Biswas, Prilhad Doss, Goggun Sikdar, and Dwarki Joardar to the indigo-field, and represents them as engaged there in cutting up and making away with the dead body. It, therefore, corroborates the statement of Soorut Ally in these particulars. The question is, does this amount to a sufficient corroboration, such as will justify us in accepting as true, and acting upon, Soorut Ally's testimony. On the whole, I think not ; shortly for this reason, that if, instead of being the statement of a fellow-prisoner, it had been the evidence given on oath of Ram Indro Doss examined as a witness in the case, it would not have been anything other than the evidence of an accomplice, and, as such, I think, it does not (I may say generally, cannot) constitute satisfactory corroboration of the other accomplice's testimony : certainly in this particular instance, I think it is in itself extremely unsatisfactory. . . . . The result, then, of the best consideration which I have been able to give to the record in this case is that the evidence is altogether insufficient to support the convictions which have been come to of the first four prisoners, Mohesh Biswas, Prilhad Doss, Goggun Sikdar, and Dwarki Joardar. As to Ram Indro the case is different. His own statement before the Magistrate, if it can be believed, is most distinctly a confession of having knowingly and designedly taken part in the making away with and concealment of a dead body which he knew was the body of a murdered man . . . . I have already stated the grounds upon which I think it cannot be trusted as evidence against the other prisoners, but I am not prepared to say that it ought not to be trusted so far as it amounts to an admission of guilt in himself . . . The four first prisoners must be therefore acquitted, and the sentence passed upon them set aside. The appeal of Ram Indro is dismissed.

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have been convicted is concerned, statements made without either the sanction of an oath, or of that substitute for that sanction to which I have already referred, namely, the implication of themselves on the charge upon which they have been tried with the appellants,—in short, without the application of any test of truth whatever. There may be some doubt whether these remarks are applicable to the confession of Moniruddin. Moniruddin, no doubt, does state facts against himself which amount to a confession of guilt upon the charge on which he and the other prisoners have been convicted : at the same time the statements which he makes in this confession against the appellants, if they amount to anything material, seem to me to be statements which make them accessories before the fact if at all, and not actual actors in the transaction which constitutes the foundation of the charge. But, however this may be, it is sufficient for me to say that, in my opinion, in so far as the Sessions Judge has directed that the statements of Kassim Mundul and Budden Mundul against the prisoners can in this trial be treated as evidence against the appellants, this is a wrong direction on a point most material to the fate of the trial, and therefore I think the verdict must be set aside. I further think that we ought not in this case to direct a fresh trial, because upon the best consideration which I have been able to give to the evidence upon the record, the only evidence which there appears to affect the appellants, in addition to the statements of these so-called confessing prisoners, is the testimony of one Jakur, and I feel that, if I had to try the case as a juror upon this man's testimony, taken with even the statement of Moniruddin supposing this statement to be admissible, I could not convict the appellants of the charges upon which they have been convicted in the Court below. It, therefore, appears to me that we ought not to send back this case for a new trial, simply because I am of opinion that the evidence on the record would not be sufficient upon such new trial to convict the prisoners. I would, therefore, set aside the verdict, and direct that the prisoners be discharged.

*Conviction set aside.*

APPENDIX.

Before Mr. Justice Phear.

THE QUEEN v. HICKS.

*Evidence Act (I. of 1872), s. 24—Confession under threat made for purpose other than to extort Confession.*

THE prisoner Hicks was tried for wounding one Lynch with intent to murder him, and wounding him with intent to do grievous bodily harm. The crime was committed on the high seas on a ship called the *Peruvian Congress*, on which the prisoner was a seaman.

The *Standing Counsel* (Mr. Kennedy) having proved that the master of the *Peruvian Congress* had sailed from Calcutta, and could not be found, tendered, under ss. 33 and 80 of the Evidence Act (I. of 1872), his deposition before the committing Magistrate. The deposition contained the following statement of an admission alleged to have been made to the deponent by the prisoner when in custody :

"I said to the prisoner, 'Is this the knife you stabbed him with?' He said, 'Yes, sir.' I said, 'This beats anything I ever saw!' He said, 'Well, I intended to kill him, as I know d—d well that I shall be hanged for it.'"

The alleged admission was made under the following circumstances as stated in the master's deposition :

"At this time," *i. e.*, immediately after the commission of the crime, "I was making preparations to resist any mutiny. I went up on the poop, where I had sent the carpenter, the boatswain's mate, the painter, and the carpenter's mate, with muskets. I took with me my rifle. The men were all in the fore-castle at this time. I called them to come out, saying that I would fire upon them if they did not do so. They all came aft on the starboard side. I saw the prisoner with them. I said to him, 'Do you surrender yourself as a prisoner?' He said, 'Yes, sir.' I had him placed in irons."

The *Standing Counsel* asked that the portion of the deposition containing the alleged admission by the prisoner might be read ; but

PEAR, J., refused to allow this, as the admission was stated to have been made immediately after the prisoner with others had been threatened by the witness, to whom the statement was made, with a loaded rifle. It was immaterial that the threat was not for the purpose of extorting the confession, but in order to suppress an attempt at mutiny.

Before Mr. Justice Phear.

THE QUEEN v. J. MACDONALD.

*Evidence Act (I. of 1872), s. 8, Illustration b—Admission—Confession.*

THE prisoner was indicted for theft and dishonestly receiving stolen property. The prosecutor, while travelling by train to Calcutta, discovered that his courier bag, containing his watch, chain, and a sum of money, had been stolen. He reported his loss to a railway police-inspector at the first station at which the train stopped after he became aware of the theft, the prisoner not then being present.

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Dec. 7.

10 B. L. R.

Ap. 1.

1872.  
Dec. 3.

10 B. L. R.

Ap. 2.

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Ap. 2.

The *Standing Counsel* (Mr. *Kennedy*) tendered evidence of this report.

PHEAR, J., held it to be admissible under s. 8, illustration *k*, of the Evidence Act (I. of 1872).

The *Standing Counsel* next tendered evidence of a statement made by the prisoner to the constable who arrested him, to the effect that the watch and Rs. 1,000 had been given to him by his sister, and that he had bought the chain.

PHEAR, J., observing that there is a distinction in the Evidence Act between admissions and confessions, admitted the evidence,

1872.

Nov. 29.

10 B. L. R.

Ap. 4.

[18 W. R. 67.]

*Before Mr. Justice Kemp and Mr. Justice Glover.*

IN THE MATTER OF THE PETITION OF ROHOMAN SIRKAR AND ANOTHER,<sup>1</sup>

Act V. of 1871, s. 17—Order of executive nature.

The High Court, while considering that an order by a Magistrate professing to act under s. 17 of Act V. of 1861 was illegal, refused to interfere, on the ground that the order was one of an executive nature.

REFERENCE to the High Court by the Sessions Judge of Rajshahye.—In February 1872, a traveller passing along a foot-path, opposite the village of Chobari, was set upon in open day by two men, who murdered and robbed him. The Assistant Magistrate of Serajgunge obtained sufficient evidence against two of the inhabitants of Chobari on which to commit them for trial before the Sessions Court for the aforesaid murder, but the principal witnesses, on whose evidence he so committed those two persons, retracted before the Sessions Court the statements they had made before the Assistant Magistrate, and the case consequently broke down in the Sessions Court, and the accused persons were discharged on the 22nd of April last. On the 10th of May the Assistant Magistrate drew up a proceeding, in which, after remarking that there had been a serious murder in Chobari, and that many *budmashes* lived in that village, he called upon the police-inspector to report whether it was necessary to appoint special constables for the security of the lives and property of people passing by or through Chobari during the then approaching rainy season, and, if such a measure were necessary, to submit a list of five of the principal residents of that village.

The report of the inspector being in favour of the appointment of such special constables, the Assistant Magistrate, on the 27th of May, appointed Rohoman Sirkar, Moonshee Akhoond, and three other inhabitants of Chobari, as special constables under the provisions of s. 17, Act V. of 1861, directing them to state within ten days any objections they might have to being so appointed. No objections having been made by any of those five persons by the 8th of June, the Assistant Magistrate, on that date, declared them duly appointed special constables, and bound to perform the duties of officers of police under the provisions of ss. 17, 18, and 19 of Act V. of 1861. On the 6th of July Rohoman Sirkar and Moonshee Akhoond petitioned the Assistant Magistrate to withdraw his order with regard to them, complaining at the same time of the hardship and pecuniary loss entailed upon them by the operation of that order, they being mahajuns and traders, and their profits and success in business depending in a great measure on their travelling about the country, and being free to leave

<sup>1</sup> Reference to the High Court, under s. 434 of the Code of Criminal Procedure, by the Sessions Judge of Rajshahye.

Chobari whenever, and for as long as, it was to their interest to do so, a freedom of which they were deprived under the Assistant Magistrate's order. The Assistant Magistrate did not comply with their prayer, and they petitioned this Court under s. 434 of the Code of Criminal Procedure.

I consider the Assistant Magistrate's order is illegal, because the circumstances which could alone render such order legal did not exist, nor was any one of those circumstances reasonably to be apprehended at the time of the passing of that order.

The judgment of the High Court was delivered by

GLOVER, J.—The order of the Assistant Magistrate appears to us to be one of a purely executive nature, and one with which this Court has no power to interfere.

We may say, however, that we agree with the Sessions Judge in thinking the order illegal, inasmuch as s. 17, Act V. of 1861, refers to cases of unlawful assembly, riot, or disturbance of the peace only, and not to crimes of the nature referred to in this proceeding.

If the Assistant Magistrate considered the police force already entertained insufficient to prevent crime in the village of Chobari, he should have applied for sanction to an increase under s. 15 of the Act.

1872.

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MATTER OF  
THE PETI-  
TION OF  
ROHOMAN  
SIRKAR,  
10 B. L. R.

Ap. 4.

[18 W. R. 67.]

*Before Mr. Justice Phear and Mr. Justice Ainslie.*

THE QUEEN v. BHEEKOO KALWAR *alias* BHEK SHA.<sup>1</sup>

*Criminal Procedure Code (Act X. of 1872), s. 425—Trial of Fact of Unsoundness of Mind.*

1873.

Jan. 21.

10 B. L. R.

Ap. 10.

[19 W. R. 15.]

The facts of this case appear sufficiently in the judgment of

PHEAR, J.—In this case the prisoner has been convicted of murder and sentenced to death, and the record has come before us in due course for the confirmation of that sentence. The Judge reports that, under s. 271 of the Criminal Procedure Code, he enquired of the accused whether he wished to appeal, and he signified his intention of not doing so.

On referring to the record we find at the outset a statement written by the Judge to this effect: "The demeanour of the accused when called on to plead to the charges was so peculiar that I entertained doubts as to his sanity. I therefore thought it necessary to try the question of the accused's unsoundness of mind." The Judge then states that he took the evidence of the Civil Surgeon, and concludes in these words: "On the evidence of the Civil Surgeon, I cannot hesitate to pronounce that the accused is of sound mind and capable of making his defence." Thereupon the trial proceeded before the jury.

S. 425 of the Criminal Procedure Code enacts that, "if any person committed for trial before a Court of Session shall, at his trial, appear to the Court to be of unsound mind and incapable of making his defence, the Court shall, in the first instance, try the fact of such unsoundness of mind, and, if satisfied of the fact, shall give a special judgment that the accused person is of unsound mind and incapable of making his defence; and thereupon the trial shall be postponed." It appears to us from the use of the words "in the first instance"

<sup>1</sup> Criminal Referred Case, No. 48 of 1873, from an order of the Additional Sessions Judge of Howrah, dated the 8th January 1873.



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clear that the Legislature intended the trial of this issue of insanity to be considered as part of the trial of the accused person before the Court; and then we find, upon referring back to s. 232, that "all trials before the Court of Session shall be either by jury, or conducted with the aid of two or more assessors." Here the trial was to be by jury; and reading the two sections together, we think that the preliminary issue which the Sessions Judge tried ought to have been tried by the jury, and not by himself personally.

On that ground we think that the whole of the trial has been vitiated, and that the conviction and sentence must be set aside, and a new trial directed.

*Before Mr. Justice Phear and Mr. Justice Ainslie.*

1873.  
**Jan. 17.**  
**10 B. L. R.**  
**Ap. 14.**  
**[19 W. R. 12.]**

**IN THE MATTER OF THE PETITION OF RAMKISHORE SEIN.<sup>1</sup>**

*Criminal Procedure Code (Act XXV. of 1861), ss. 183 & 184—Time for Appearance of Person against whom Proclamation issued—Appearance after Time fixed—Confiscation after Appearance.*

THE Magistrate of Maldah had issued a warrant of arrest upon a charge of forgery against the petitioner which proved infructuous. On the 8th November the Magistrate issued a proclamation under s. 183 of the Criminal Procedure Code for his appearance on the 10th December, and at the same time attached his property under s. 184. The proclamation was read at Khurba, at which place the petitioner did not reside; he surrendered, however, on the 19th December. He was then committed to *hajut*, and remanded from time to time without further evidence being adduced in support of the charge against him. On appeal, the High Court, on the 27th April, annulled the last order of remand declaring that "there was not any evidence taken which could be made the foundation of a charge, and the petitioner was accordingly discharged on the 18th May. He then applied to the Magistrate for the removal of the order of attachment against his property, but his application was refused, and the attached property declared to be at the disposal of Government. The present appeal was then brought. The facts of the case appear fully in the judgment of Phear, J.

Mr. Woodroffe (with him Baboo Ishur Chunder Chuckerbutty) for the petitioner contended that there was no legal evidence of his having absconded, or concealed himself for the purpose of avoiding the service of the warrant, and, even if there was, it did not appear that the Magistrate had satisfied himself that such was the fact—see *Shewdyal Sing v. Griban Sing*.<sup>2</sup> The proceedings show that, if there was any service, it was in a village other than that in which the accused resided. The proclamation was made neither in the proper place, nor with the formalities required by s. 183 of the Criminal Procedure Code. Even if the proclamation had been duly made, sufficient time was not given to the accused for appearance: the thirty days must count from the time when the proclamation was notified, and not from the date of issue of the order. Moreover, the whole procedure provided by s. 183 being simply to obtain the attendance of the accused, in whatever way the thirty days are to be counted, the petitioner having surrendered, the procedure could no longer be put in force—*In the Matter of the Petition of Jhundoo Singh*.<sup>3</sup> No order having been made putting

<sup>1</sup> Miscellaneous Criminal Case, No. 220 of 1872.

<sup>2</sup> 6 W. R. Cr. R. 73.

<sup>3</sup> 5 W. R. Cr. R. 8.

the property at the disposal of Government at the time when the proclamation was made, the subsequent order was illegal. Lastly, the Magistrate ought to have taken evidence before attaching the property—*Queen v. Abdul Sitar*.<sup>1</sup>

Baboo Juggodanund Mookerjee, the Junior Government Pleader, on behalf of Government, contended that the Court ought not to interfere. The petitioner should have applied under s. 185 of the Criminal Procedure Code for the restoration of his property.

The judgment of the Court was delivered by

PHEAR, J.—It appears to me that the matter brought before us on this petition has been a most unfortunate one at every stage. Irregularity is apparent on the proceedings at almost every step in the case.

In April 1871 the Magistrate of Maldah, after taking the deposition of one Heera Lall Dass, issued a warrant of arrest, upon a charge of forgery, against five persons, including Ramkishore Sein, the present petitioner. This warrant was infructuous; and on the 8th November, six months afterwards, the police-officer charged with its execution made a deposition before the Magistrate, upon which the Magistrate passed this order: "It is ordered under ss. 183 and 184 of Act VIII. of 1869 that proclamation be issued, calling on these five persons above-mentioned to appear in my Court on or before 18th December 1871, and that all their moveable and immoveable property be attached under s. 184." On the same day a proclamation was drawn up by the mohurrir of the Court, and signed by the Magistrate, requiring Ramkishore Sein amongst others to appear in the Magistrate's Court on the 10th December. There is an endorsement on the proclamation to this effect: "This proclamation is forwarded to the police-officer of Division Khurba for service." This is dated the 10th November 1871, and signed "Kally Dass Biswas, Court sub-inspector." Then comes a second endorsement: "Forwarded to head-constable Tincowry Khan for service. Dated 13th November 1871, signed Madhub Chunder Sanyal, head-constable, Station Khurba." A third endorsement is received in the mofussil on the 14th November 1871, signed A. Woodeen, head-constable. A fourth endorsement runs thus: "Honoured Sir,—On receipt of this proclamation, your humble servant proceeded to the spot, affixed the duplicate at a conspicuous place, and informed the heirs of the defendants. The three *kysuts* of the neighbours regarding the same are herewith submitted. Dated the 23rd November 1871, signed by Tincowry Khan, head-constable, Station Khurba." The fifth, and I believe last, endorsement is: "Honoured Sir,—I beg to submit the accompanying papers sent in by head-constable Tincowry Khan, signed Madhub Chunder Sanyal, head-constable."

This somewhat remarkable set of endorsements constitutes all the existing evidence relative to the fact of publication of the proclamation. It refers, as far as I can gather, to publication at Khurba only; and is silent as to any sort of publication at Raipore, the place where the petitioner resides, and the place to which the proclamation itself described him as belonging.

The petitioner did not surrender himself before the 10th December. But he did, in fact, surrender himself, together with two others of the five accused persons, on the 10th December. He was then committed to *hajut*. Afterwards, from time to time, the petitioner was brought up before the Magistrate, and as often remanded, although no evidence had been taken since the date

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<sup>1</sup> 3 W. R. Cr. R. 35.

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on which the Magistrate originally issued the warrant of arrest. And this continued until the 27th April 1872, when the petitioner and the two other prisoners applied to the High Court for relief. A Division Bench, consisting of the Chief Justice and Ainslie, J., heard the matter, and the Chief Justice, in giving judgment, stated : " There was not any evidence taken which could be made the foundation of a charge ; and the Magistrate appears to have been influenced in the course which he took by the expectation that, after some time and by dint of enquiry, some evidence might be obtained." The High Court, therefore, made the order that the last order of remand, namely, that of the 26th February, should be annulled. The consequence of this order was, I believe, that the petitioner and the others were discharged on the 18th May.

In the July following the petitioner applied to the Magistrate to have the order of attachment, which had been put upon his property, simultaneously with the issue of the proclamation on the 8th November, removed. On that application the Magistrate said : " Under all these circumstances I see no reason why the provision of the law as to this attached property being at the disposal of Government should not be carried out, and I order accordingly."

It thus appears that, while the petitioner is a free man, with no charge in fact hanging over his head, simply because, as the Chief Justice phrased it, no evidence has been found to support the original charge made against him, yet as much of his property as could be got at by the Magistrate is, by an order passed by the Magistrate since the petitioner's own release, forfeited to Government. It seems to me that this certainly is a startling state of things, to say the least, and very strong grounds are needed in my judgment to prove that it is right.

The Government pleader has urged upon us that we should not at this stage interfere in the matter, because it is still open to the petitioner to apply under s. 185 of the Criminal Procedure Code to have the property restored to him. But, as far as I understand the proceedings which have been taken, the application which he made in July last to the Magistrate was, in fact, an application to have the benefit of the provisions of that very section, and that application has been refused.

Now, on turning back to the commencement of these proceedings, I may take it as being at this time beyond contest that, in order to lay a sufficient foundation for the issue of a proclamation under s. 183, and the accompanying order of attachment under s. 184, the Magistrate must, upon some sufficient materials, find judicially (that is, by an exercise of judicial discretion applied to the consideration of that material) that the person against whom the proclamation is to be issued has absconded or concealed himself for the purpose of avoiding the service of the warrant of arrest previously issued against him. But in this case, according to the record which has been sent up to us, the Magistrate ordered the proclamation to issue without having previously come to any such finding at all. We have in the official copy of documents laid before us merely a deposition of a certain Mohima Chunder Ghose, Court-inspector, followed immediately on the same paper by this order : " It is ordered, under ss. 183 and 184 of Act VIII. of 1869, that proclamation be issued, calling on these five persons above-mentioned (that is, I suppose, mentioned in the deposition) to appear in my Court on or before," &c. It was distinctly held by Norman, J., in *Sheudyal Sing v. Griban Sing*,<sup>1</sup> that, " before the Magistrate can issue the

<sup>1</sup> 6 W. R. Cr. 73.

written proclamation under s. 183, and order the attachment of the property of an accused party who cannot be found, he must be satisfied that such person is absconding or concealing himself for the purpose of avoiding the service of the warrant. The Magistrate should have recorded in his proceedings whether or not he was so satisfied." I entirely take this view, and I think that, until the Magistrate had judicially found as a fact upon sufficient information that the person against whom the proclamation is to issue had absconded or concealed himself for the purpose of avoiding apprehension under the warrant, he had no authority to issue that proclamation. Not only is it the case that no such finding appears to have been come to by the Magistrate so far as this record speaks, but it seems to me that the deposition of the Court inspector, if stretched to the utmost, could not possibly in reason be made the ground of a conclusion that Ramkishore Sein was in fact evading the service of the warrant. And the recital with which the proclamation commences, assuming that it might properly be taken as evidence of the formal finding of the Magistrate, does not carry the matter further, for it merely says: "Whereas it has appeared from the deposition on oath of the head-constable, Baboo Mohima Chunder, that the above-named defendants have absconded, this proclamation is issued," &c., and it stops short of stating that the persons named had absconded for the purpose of evading the Magistrate's warrant.

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Thus it appears to me that in this case the whole foundation for the attachment and confiscation of the property fails. It is therefore not, strictly speaking, necessary that I should express an opinion on the other points which have been mooted in this application. I think, however, it is right that I should throw out as my own opinion that the period of 30 days, which is prescribed in s. 183 as the minimum period within which the person is to be required by the proclamation to appear, was intended by the Legislature to run from the date on which the publication in the mode prescribed by the same section should be effected, namely, by reading the proclamation publicly in some conspicuous place of the town or village in which such person usually resides, and by affixing it on some conspicuous part of the ordinary place of abode of such person, or on some conspicuous place of such town or village. If this view be correct, then, inasmuch as we have certainly no evidence at all in this case as to when the proclamation was read in the town or village of Raipore, where, according to the proclamation itself, the petitioner usually resided, or when it was affixed on some conspicuous part of his ordinary place of abode, it would be impossible for us to infer that he did not, by coming in on the 19th December, come in within 30 days from the date of publication of the proclamation if duly effected in that manner, *i.e.*, within the 30 days as limited by the Act. The Magistrate seems to think that the 30 days should be counted from the date of issuing the proclamation. If this were so, then, as Mr. Woodroffe very rightly pointed out, the proclamation might get into the hands of some subordinate Court-officer, or, even going further than this, into the hands of some local officer for the purpose of being published according to the terms of s. 183, and yet might not, in fact, become published at all within the period of 30 days. It is manifest that even such a delay as has undoubtedly occurred in this case, namely, the delay involved in the fact that the proclamation was not published anywhere according to the endorsed returns until some day between the 14th and 23rd November, might be a very serious diminution of the period of 30 days, so far as regards the opportunity for learning of the proclamation and returning, which the Legislature professed to afford to the absconding person.

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I will further add that the inclination of my opinion is that the declaration of forfeiture directed to be made in s. 184 was intended to be in furtherance of a matter of procedure, and not simply as a mode of punishment for contempt of process; and in this view I think that, if it is not made before the person affected by the proclamation has come in, or has been brought in, it ought not to be made at all. Because by that time its purpose has been effected, though even possibly by other means than that of the process which was evaded.

It certainly does seem to me that it was a harsh proceeding on the part of the Magistrate to take the opportunity afforded to him by the application made by the petitioner in July for the release of his property, for passing, long after all real occasion for it had gone by, that order of forfeiture which had not been made before during the time when it possibly might have been expected to serve some purpose.

What is the meaning of the proceeding by which the Magistrate bound the petitioner, on the occasion of his making this application in his own behalf, by recognizance to appear from time to time, I have not yet been able to understand. On the face of it, the recognizance does not bind him to meet any criminal charge, and the Government pleader is unable to say whether in fact at that time any criminal charge had been preferred against him or not. The papers which are before us ought to contain all that is pending in the Magistrate's Court upon this matter, and they do not disclose a trace of any other criminal charge having been made against the petitioner, than that which was made in April 1871, and which had fallen to the ground in consequence of the order passed by this Court in April 1872, and the petitioner's subsequent release from custody. It seems to me very clear, however, that the attachment and order under s. 184 have been made without sufficient ground in law, and must be set aside.

I regret very much that the proceedings should have shown a continued series of irregularities such as they certainly do show, because I cannot avoid perceiving that these are likely to be interpreted as indicative of personal feeling in an officer, who ought to be looked upon by all, and who no doubt is, free from any such bias.

AINSLIE, J.—I think that the order of forfeiture and attachment of the property in this case ought to be set aside on the ground that it has not been shown that the petitioner failed to attend within 30 days of the service of the proclamation issued by the Magistrate under s. 183. The procedure laid down in s. 183 by publicly reading the proclamation in some conspicuous place of the town or village in which the accused person usually resides, and by affixing it on a conspicuous part of the ordinary place of abode of such person, or on some conspicuous place of such town or village, seems to me to indicate that it was the intention of the Legislature that the accused person should have the means of deriving information through his family or friends, or in some other indirect way, when the warrant or the direct order to attend the Court cannot be served upon him; and that the Legislature has distinctly determined what shall be considered a sufficient time to allow such indirect notice to reach him and for him to attend the Court in consequence of that notice, that time being 30 days. Unless this was the intention of the Legislature, it may very well happen that the accused person should really have no reason to suppose that any proclamation was being issued. In this very case I find that from the issue of the warrant to the issue of the proclamation, a very long period expired. If the proclamation had followed immediately on the return to the warrant to the effect that the accused person had absconded, it might be taken as one continuing proceeding for securing the attendance of the accused.

But when a long interval is allowed to elapse between the return to the warrant and the issue of the proclamation, I, for my own part, cannot see how the accused person, who may have gone to a considerable distance at that time, is to be supposed to know that the proceedings have suddenly been revived against him. In this case the petitioner surrendered on the 19th December, and we do not know on what date between the 14th and the 23rd November the service of the proclamation was effected; and I do not think that we should be justified in assuming that the petitioner was not within 30 days of the issue of the proclamation when he put in his appearance on the 19th December. It must be understood that I have no intention to express dissent from any of the remarks made by my learned colleague in this case, but I think it is quite sufficient for me to put the order we propose to make upon the ground which I have indicated.

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*Before Mr. Justice Phear and Mr. Justice Ataulic.*

IN THE MATTER OF THE PETITION OF RAGHOO PARIRAH.<sup>1</sup>  
*Criminal Procedure Code (Act XXV. of 1861), s. 67<sup>2</sup>—Complaint—  
Dismissal without Enquiry.*

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Jan. 28.  
10 B. L. R.  
Ap. 26.  
[19 W. R. 28.]

REFERENCE by the Sessions Judge of Cuttack under the following circumstances:—

One Raghoo Parirah, on the 5th November 1872, presented a petition to the District Magistrate, alleging that he had been maltreated by the police, and asking for an enquiry. The deposition of the complainant did not appear to have been taken, nor was there any record of any enquiry having been made. The petition was ordered to be filed, but no further order was made in the case. Accordingly, the complainant, on the Magistrate going into camp, presented a second petition on the 20th November to the Joint-Magistrate in charge. He made no mention of his former petition. The Joint-Magistrate, after taking the complainant's deposition, fixed the 26th November for the trial of the case, and issued warrants against the accused. The District Magistrate, being informed of this, at once transferred the case to his own file, and directed the suspension of the warrants, and on the 3rd December he dismissed the complaint under s. 67 of the Criminal Procedure Code, observing that, after an enquiry made by him in his executive capacity, he was satisfied that the police had only acted in the discharge of their duty, and were therefore protected by ss. 76 and 77 of the Code.

The Sessions Judge, being of opinion that the complaint had been improperly dismissed, referred the matter for the orders of the High Court.

The judgment of the Court was delivered by

PHEAR, J.—It appears that the Magistrate removed a case from the file of the Joint-Magistrate to his own, after complaint had been made and warrants issued by the Joint-Magistrate, upon the footing of the complaint. The Magistrate, having removed the case, immediately suspended the warrants, and dismissed the complaint, on the ground that he had previously, in his executive capacity, made some enquiry into the matter out of which the complaint arose, and from information that he so gained was of opinion that the complaint ought

<sup>1</sup> Reference to the High Court, under s. 434 of the Code of Criminal Procedure, by the Sessions Judge of Cuttack.

<sup>2</sup> See Act X. of 1872, s. 147.

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to be rejected under s. 67 of the Criminal Procedure Code. The words of this section are, so far as it is necessary to read it now: "If, in the judgment of the Magistrate, there be no sufficient ground for proceeding, he shall dismiss the complaint."

We think that the Magistrate committed an error in taking this course. It has always been held by this Court that the proper officer to issue the warrant is the officer who has heard the complaint made, because it is he who can best exercise a discretion with regard to the *prima facie* merits of the complaint. When that officer has issued the warrants, the case ought to go on in due course according to the procedure prescribed by the Code, unless something occurs to show that the Magistrate who had issued the warrant had, from some cause or another, made a wrong exercise of his discretion, which has certainly not been the case here. It appears to me that, when the Magistrate took the case from the Joint-Magistrate's file, he ought to have proceeded with it as from the stage at which he found it; and I think he committed a material error by not doing so. In my opinion, therefore, the order of the Magistrate which suspended the warrants and dismissed the complaint should be set aside.

I do not think it necessary that we should transfer the case to any other Magistrate for complete investigation and decision, because I feel confident that the Magistrate whose order is now in question, when he is made acquainted with the opinion of this Court, will duly carry out the investigation which the complaint initiated, and will come to a fair and judicious determination of the matter.

1873.

April 18.

10 B. L. R.

Ap. 33.

[19 W. R. 73.]

*Before Mr. Justice Phear and Mr. Justice Glover.*

NEPOOR AURUT v. JURAI.<sup>1</sup>

*Maintenance, Order for—Criminal Procedure Code (Act X. of 1872), ss. 536, 537—Mahomedan Law—Divorce.*

THE following case was referred under s. 296 of the Code of Criminal Procedure by the Magistrate of Pubna:—

"Nepoor Aurut prayed for and obtained an order for maintenance, on the 18th May 1872, in the Court of a Full-powered Magistrate, Moulvi Amiruddin, who at that time declared that the plea of divorce set up by the husband had not been proved.

"On the 20th June following the woman petitioned, saying that the husband has failed to carry out the orders of the Court, and the case was made over to Moulvi Abdool Karim for needful orders with regard to the realization of the money due. On the 23rd July the Moulvi declared that, as the husband had divorced his wife, she was not entitled to maintenance, and that maintenance for the child could only be granted till he was 2½ years of age. This order has only lately come to my knowledge, and I called on the Moulvi for any explanation he might wish to make. In his explanation he has stated his views, but as it seems to me they are erroneous, and his order contrary to law, I forward the records for the perusal of the Court.

<sup>1</sup> Reference, under s. 296 of the Code of Criminal Procedure by the Magistrate of Pubna.

"In the first place, the case was sent to the Moulvi for realization of the money, and not for enquiry into any objections raised by the man on any subject not connected with payments already made; secondly, even had the Deputy Magistrate been authorized to enquire into any objections filed, it was not within his power to decide on the question of the alleged divorce, inasmuch as that had been already disposed of by a competent Court.

"The Deputy Magistrate in his explanation states that he did not look to the divorce alleged to have taken place previous to the orders of Moulvi Amiruddin, but to that which the husband in his presence gave to the woman, and which, according to the Mussulman law, was good and sufficient, and amounted to a change of circumstances which authorized a fresh order from him."

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JURAI,  
10 B. L. R.  
Ap. 33.  
[19 W. R. 73.]

The judgment of the Court was delivered by

PHEAR, J.—It does not appear very clear upon the papers which have come up to us in this reference what precisely was the order that was made by the Deputy Magistrate on the second occasion. We understand that an order for maintenance under the legislative provisions, which are found in s. 536 of the existing Criminal Procedure Code, was originally made, and that it came before the Deputy Magistrate for the purpose of being enforced. It appears from the Deputy Magistrate's letter of explanation that he called the husband before him to show cause why the order should not be enforced, and that the husband thereupon, in his presence, divorced his wife. And we cannot gather from the Deputy Magistrate's statement what course he took at this stage. He tells us that he considered the divorce so effected by the husband was sufficient to relieve the husband from the duty of compliance with the order of maintenance. As I have already said, however, the Deputy Magistrate does not state in words what formal order he passed. Now, it is clear, I think, that, as long as any order, duly made under s. 536, or its former equivalent, is existing unaltered by any subsequent proceeding, it is operative, and it would be the duty of the Deputy Magistrate, when called upon by the wife in whose favour the order was made, to enforce it. The following section (537) provides a mode in which the person against whom the order is made can, upon a change of circumstances, get that order altered. And it seems to me probable that, upon the facts stated by the Deputy Magistrate, when the husband in his presence divorced his wife, such an alteration of circumstances did occur which would justify the Deputy Magistrate, upon the application of the husband, in altering the order for maintenance in favour of the wife.

At the same time it appears to me quite clear that that change of circumstance, even if it were such as to justify the withdrawal of the order of maintenance against the wife altogether, would not relieve the husband from the necessity of obedience to the order during the time which had elapsed up to the date when and until that change of circumstance had occurred; in other words, that the husband was, at any rate, strictly bound to pay the maintenance-money according to the terms of the order up to the date when, in the Magistrate's presence, he divorced his wife, as the Deputy Magistrate says he did.

With these remarks, which may serve as some guidance to the Deputy Magistrate, we direct that the record be returned to him, in order that he may take the requisite steps in the matter, and pass the proper orders.



1873.

April 29, 30.

10 B. L. R.

Ap. 36.

[19 W. R. 71.]

*Before Mr. Justice Kemp and Mr. Justice Phear.*THE QUEEN v. RAJCOOMAR BOSE.<sup>1</sup>*Charge of a Judge to a Jury—How to sum up the Evidence—Verdict of Jury—Criminal Procedure Code (Act X. of 1872), ss. 255 & 256.*

Mr. Ghose (Baboo Bipradas Mookerjee with him) for the prisoner.

THE facts of this case and the arguments appear from the judgments of the Court :—

KEMP, J.—The prisoner, the Deputy Postmaster of Buggolah, in Zillah Nuddea, was suspended on the 2nd of May 1872. It appears that the reason of his suspension was that he had reason to find fault with a subordinate of the name of Jullodhur, and recommended his removal. His immediate superior wished to reinstate Jullodhur, but Rajcoomar Bose, the prisoner, objected to this, and this conduct on his part was considered to amount to insubordination, and led to his suspension. Subsequently to his suspension, his successor, on taking charge of the Post Office of Buggolah, found that the cash balance in his hands amounted to Rs. 57. Of this sum the prisoner accounted for Rs. 2, and said, with reference to the balance of Rs. 55, that it had been expended by him partly in keeping up a boat during the inundation of 1871, and partly in paying the wages of a railway-peon of the name of Sreesh Chunder Pal. An explanation was called for from the prisoner, Rajcoomar Bose, which he submitted in great detail to the Post Office authorities. In this explanation he makes the same statement with reference to the Rs. 55 cash-balance that he now makes before the Sessions Judge. The Post Office authorities, not deeming that explanation altogether satisfactory, directed the Inspecting Postmaster, who has been examined in this case, to prosecute Rajcoomar Bose. The charges against Rajcoomar Bose are under s. 409 of the Penal Code of criminal misappropriation of moneys which were in his charge in his capacity as a public servant. The Deputy Magistrate framed the charge under one head, but the Sessions Judge, for some reason which we do not quite understand, thought proper to split it up into three separate and distinct charges. The case was tried with the aid of a jury, and they convicted the prisoner under s. 409. The Sessions Judge has sentenced him to five years' rigorous imprisonment. The main grounds of the appeal are that the Judge has misdirected the jury, and that his summing-up is one-sided; that he has omitted to point out to the jury the evidence and points in favour of the prisoner; that he has omitted to point out to them the enmity which admittedly existed between the principal witness Jullodhur and the prisoner; that with reference to the alleged alteration of the date in the letter, which is marked J in the book, he ought to have pointed out to the jury that the prisoner's case was that the letter in question was despatched in September; that there was no reason why the prisoner should alter the date from September to October while the body of the letter remained unaltered, which conclusively shows that the letter was despatched in September, and not in October; and, further, that the prisoner could have had no control whatever over that letter-book, inasmuch as from the date of his suspension in May 1872 to the date of his trial many months after, it was never in his custody. Then it is urged that the Judge entirely omitted to draw the attention of the jury to the fact that the prisoner's case was not that he contracted with the boatman directly with reference to the hire of the boat during the inundation, but that the contract was made with Jullodhur,

<sup>1</sup> Criminal Appeal, No. 296 of 1873, from an order of the District Judge of Nuddea, dated the 17th February 1873.

and therefore the Judge was wrong in prominently calling the attention of the jury to the fact that the prisoner, instead of paying the boatman, had paid Jullohur, and directing them to take that circumstance into consideration as evidence against the prisoner. Then, and this is the most important error in the summing-up, and by which undoubtedly the Judge has misdirected the jury in a most important part of the case, inasmuch as the Judge has directed the jury to hold as conclusive evidence against the prisoner, the fact that the books which are admitted by him show that in January there was no such sum amounting to Rs. 40 as cash-balance from which the prisoner could have paid the witness Jullohur, as stated by him; whereas, on referring to these books, it appears that up to January there was a balance of Rs. 43. There are other minor omissions pointed out by the prisoner in the petition of appeal, but we think it sufficient for the purposes of this judgment to notice the principal ones which have been stated above. The petition winds up with a statement that the sentence of five years' rigorous imprisonment is too severe with reference to the prisoner's youth, and, on turning to the answer of the prisoner, we find that he is a young man of the age of 21.

Now, in this case, undoubtedly, the summing-up of the Judge is very defective, and he has in one or two instances, and notably in the instance of the cash-balance book, altogether misdirected the jury. The jury in this case have not been intelligently guided by the Judge. Evidence has been placed before them which ought not to have been placed before them, and deductions have been drawn from facts which do not exist. The style of the charge also appears to us to be very objectionable. The jury are repeatedly called upon in the following terms: "Do you believe this?" "Can you believe that?" instead of leaving them to judge of the evidence, and to decide what weight is to be attached to it.

Now, it is not in every case in which there has been a misdirection to the jury that this Court will set aside a verdict of guilty, but only in such cases in which the accused has been materially prejudiced, or where there has been a failure of justice. In other words, if this case had been tried with the aid of assessors, and this Court on appeal, after reading the [whole of the evidence, should come to the opinion that the verdict was not warranted by the evidence, this Court would be justified, under the ruling to be found in the case of *Queen v. Elahi Bax*,<sup>1</sup> to set aside the verdict, to direct the discharge of the prisoner, and not to direct any fresh trial. In this case I have very carefully gone through the evidence, and I think that the prisoner is on that evidence entitled to an acquittal. (The learned Judge proceeded to examine the evidence, and continued :) On the whole case, therefore, if this had been a trial with the aid of the assessors instead of a trial by jury, we should not think it right to convict the prisoner upon this evidence. We, therefore, do not direct a fresh trial, but direct that the prisoner be discharged.

PHEAR, J.—I entirely concur in all that has fallen from my learned colleague, Kemp, J., but I think that, under the circumstances of the case, it may be as well if I add a few words, inasmuch as it very constantly devolves upon me to conduct trials by jury, and it seems to me, judging by the aid of my own experience, that in one particular at any rate the trial of this case in the Sessions Court has not been exactly what the law contemplates. It seems to me that the Judge's charge to the jury was not a summing-up of the evidence for the

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QUEEN  
v.  
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<sup>1</sup> B. L. R. Sup. Vol. 459.

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prosecution and defence such as is prescribed by the words of s. 255 of the Criminal Procedure Code ; it was rather, as I read it, a sustained effort at persuasion, and there was no real endeavour made by the Sessions Judge to present the evidence on the one side and the other, both impartially before the jury. If I may be allowed to say so, I think that this error probably proceeded from the adoption of the narrative form of charge. It is impossible, I imagine, to put a case to a jury in the narrative form from beginning to end with complete fairness to both sides without giving the narrative a double shape, *i. e.*, stating it, so to speak, in the alternative, and I apprehend that very few persons indeed are able to do this with any great degree of success. It is no doubt, most useful, because it saves time, that the Judge should state to the jury in the narrative form so much of the facts as are admitted on both sides. But when he has reached this point, it is best, I think, that he explain distinctly the issues of fact which it remains for the jury to determine, having regard to that part of the case which is admitted, and to the charges upon which the prisoners are tried ; and having made the jury understand these issues, the more convenient mode of summing-up for him to adopt is, in my judgment, to present to the jury as clearly and impartially as he can a summary of the evidence, and the considerations and inferences to be drawn from the evidence, as they bear both on the negative and affirmative sides of each of these issues. It is impossible, of course, for any Judge to state every item of evidence, or to draw the attention of the jury to every fact which has been deposed to ; but he can, without difficulty, give them a summary of the leading points of the evidence, and the considerations and inferences to be drawn from it on the one side and on the other. He may, if he thinks fit, under the last clause of s. 256, at the same time express to the jury his own opinion as to the facts ; but that is a very different thing indeed from that which the Sessions Judge has done in this case. The Judge has not, as I read his charge, simply expressed his opinion, and then left all the evidence fairly before the jury on the one side and on the other for them to judge of it by the aid of his opinion if they chose to avail themselves of it. But he has endeavoured, I think—that at any rate is the impression which his charge has given me—from first to last, to persuade the jury to take the particular view of the facts and of the inferences from the evidence which he himself has taken and drawn, and indeed he has left them no loop-hole for taking any other view. This is not only not in accordance with the enactment of the Code of Criminal Procedure as I understand it, but I think it is a course calculated in the mofussil to withdraw altogether from the jury the actual decision of the case. Probably in other tribunals than a Mofussil Sessions Court, it might lead to exactly the opposite result to that which I suppose was desired by the Sessions Judge, that is, it would, in such a case as the present, lead to the opposite view being adopted by the jury, and so would cause an acquittal to be come to instead of a conviction. I concur with the decision pronounced by Kemp, J.

## BENGAL LAW REPORTS.

## [APPELLATE CRIMINAL.]

*Before Mr. Justice Phear and Mr. Justice Glover.*THE QUEEN *v.* KOONJO LETH AND OTHERS.<sup>1</sup>*Verdict of Jury set aside—Acquittal—Criminal Procedure Code  
(Act X. of 1872), ss. 263, 271, 287, and 288.*

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April 29, 30.

11 B. L. R. 14.

[20 W. R. 1.]

On a trial by jury before a Sessions Judge, the jury returned a verdict of guilty. The Judge disagreed with the verdict, and submitted the case to the High Court. *Held* that the High Court had power to set aside the verdict of the jury, and to direct an acquittal.

S. 263 of the Criminal Procedure Code (Act X. of 1872) explained.

IN this case the prisoners were found guilty by a jury of the offence of dacoity, and some of them of having stolen property in their possession, knowing it to be stolen. The Judge who tried the case disagreed with the verdict, and accordingly, under s. 263 of the Criminal Procedure Code (X. of 1872), submitted the case to the High Court.

Mr. *Ghose* (with him *Baboo Lukhy Churn Bose*) for the prisoners contended that, when a case has been referred by a Judge under s. 263 of the Criminal Procedure Code, the High Court can set aside the verdict of a jury, and direct an acquittal. The section is entirely novel. The disagreement referred to in s. 263 must be a disagreement on fact; the Judge can settle any question of law, the jury are concerned with the facts only. An appeal by a prisoner under s. 271 from a verdict of the jury must be on a question of law, but in that section there is no reference to a disagreement between the Judge and jury, therefore the "appeal" mentioned in s. 263 is to be taken in a wider sense, and the case submitted is to be treated as an appeal on a question of fact, as well as of law. [GLOVER, J.—But what is the meaning of the words in s. 263, "but it may convict the accused person on the facts"?] That is, the High Court may even go so far as to convict a person who has been acquitted by a jury, for it could not have been the desire of the Legislature to procure convictions solely: a remedy for the perverse verdicts of juries is intended, and the High Court can reverse such verdicts, whether of acquittal or conviction. The innocent are to be protected, as well as the guilty punished, but no doubt the words might have been more explicit. [PHEAR, J.—On a case being referred under s. 287, the High Court can acquit under s. 288; whereas, if the prisoner appealed under s. 271, the High Court cannot do so; so if a man has been sentenced to transportation for life, the High Court cannot interfere with the findings of fact of the jury, whereas, if he is sentenced to be hanged, it can.] The whole of s. 263 must be read together; "but it may convict," &c., may be in opposition to the judgment of the Sessions Judge. At any rate, this Court is not bound to convict; there has been no conviction, as no judgment was passed; and the High Court may agree with the Judge below, and order the discharge of the prisoners, or pass whatever sentence it may consider proper.

*Cur. adv. vult.*

<sup>1</sup> Reference to the High Court, under s. 263 of the Criminal Procedure Code (Act X. of 1872), by the Officiating Sessions Judge of Moorshedabad, in his letter No. 68, dated the 29th March 1873.

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PHEAR, J. (after shortly stating the facts).—Upon considering the evidence, we find that the prisoners have been recognized by some of the witnesses who have given their testimony; that certain articles said to have been found in the possession of the prisoners have been identified also by some of the witnesses as articles which had been stolen from the prosecutor in the course of the dacoity; and there is further a confession made before the Magistrate by Koonjo Leth, one of the prisoners jointly tried with the others, and in this confession every one of the other prisoners, as well as Koonjo Leth himself, are mentioned as taking part in the dacoity. If there were nothing on the record serving to impeach these several heads of evidence, no doubt the case against the prisoners would be very strong indeed. The Judge, however, has given reasons for thinking that the recognition of the prisoners by the witnesses cannot be depended upon; that the identification of stolen articles is untrustworthy; and that the confession of Koonjo Leth is not a true and real confession, but a confession which has been obtained by some contrivance of the police, or in such a way at any rate as serves to render it altogether untrustworthy. We concur with the Judge in this view. Indeed, I may say for myself that, if I had to judge of the facts merely by the testimony of the prosecutor and the other witnesses who have been called on the side of the prosecution, I should almost doubt whether there had been a real dacoity at all. (The learned Judge read and commented on the evidence of the witnesses and the confession of Koonjo Leth, and continued): I need not go further in detail into the evidence. I have stated enough, I think, to indicate the ground upon which we entirely concur with the Judge in thinking that the prisoners, excepting the first one, ought not to have been convicted upon the evidence which is on the record. The confession of Koonjo Leth, of course, could not have been legally used against the others at all excepting to such an extent as it was substantially corroborated by unimpeachable evidence *aliunde*. But so far from this being the case, as I have already mentioned, wherever the confession is really tested it is proved to be false. \* \* \* On the whole, then, we think, as I have already said, the prisoners ought not to have been convicted, and that in their interests of justice all the prisoners, excepting the first prisoner, ought to be acquitted.

But a question of somewhat of a serious character has arisen as to our powers in this case to acquit. The case comes before us in consequence of the Judge having submitted it to this Court under the provisions of s. 263 of the new Criminal Procedure Code. According to that section: "In cases tried by jury, \* \* if the Court disagrees with the verdict of the jurors, or of a majority of such jurors, and considers it necessary for the ends of justice to do so, it may submit the case to the High Court, and may either remand the prisoner to custody, or admit him to bail. The High Court shall deal with the case so submitted as with an appeal, but it may convict the accused person on the facts, and, if it does so, shall pass such sentence as might have been passed by the Court of Session." Do these words, "shall deal with the case so submitted as with an appeal," mean that the case submitted shall be in all respects considered and situated as an appeal. If so, then it is an appeal, if not preferred by the prisoner, yet preferred on his behalf against a conviction of a jury; and s. 271 says: "If the conviction was in a trial by jury, the appeal shall be admissible on a matter of law only."

In the case before us, the ground upon which the verdict of the jury is sought to be set aside is undoubtedly in substance a matter of fact, and not a matter of law. The construction of these words to mean that the case submitted is to be considered essentially as an appeal seems to be somewhat favoured

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by the words which follow—"but it may convict the accused person on the facts." because "but" seems to imply something in the way of opposition to, or inconsistency with, what would be the case of an appeal if that "but" was not there. And, certainly, if the appeal were preferred by the prisoner, it would be admissible on matter of law only. At the same time it is also obvious that, in the case of an appeal preferred by the prisoner, the Appellate Court could never have any occasion to convict on the facts, because by the nature of the case such an appeal must always be an appeal against a conviction already arrived at in the Court below. And in the case of an appeal preferred on the part of the Crown against an acquittal (allowed for the first time by s. 272 of the new Code), it does not appear that there is any restriction imposed relative to the exercise of the discretion of the Appellate Court. Therefore, looking back again to the words of the section which I have already read, it seems to me, on the whole, that the case submitted must, under this section, in the case of a conviction, be intended by the Legislature to be submitted for a wider purpose than simply that of becoming an appeal presented by the prisoner. The words are: "If the Court disagrees with the verdict of the jurors, or of a majority of such jurors, and considers it necessary for the ends of justice to do so, it may submit the case to the High Court." Now, the Court may disagree with the verdict of the jury, either on the ground that the jury had not followed its directions on a point of law, or on the ground that the jury had found the facts against what appeared to the Judge to be the weight of evidence. If the Legislature had intended the case which was to be submitted by the Judge in the event of a conviction to be limited to a point of law only, nothing would have been easier than to have used words which would have made that limitation perfectly unmistakable. But the words I have read are, on the contrary, general words without any limitation at all; and it seems to me impossible in reason to construe them otherwise than as extending to a disagreement with the verdict on matter of fact as well as on matter of law.

And then the section goes on to say: "And if the Court considers it necessary for the ends of justice to do so." It appears to me that justice may as much require that a verdict of the jury should be revised in a case in which the jury has gone wrong on facts as in a case where it has made a mistake in regard to law. So that, on the whole, I think there is really no limitation as to the nature of the case which the Judge may send up to the High Court under this section. In other words, I think, he may submit to the High Court a case in which he disagrees with the jury in their finding of facts, as well as a case in which he complains that the jury has not followed his directions as to the law. And I think that the word "but" may possibly be used not so much in opposition to the word "appeal" in the first part of the passage, as perhaps in opposition to, or enlargement of, the enactment of s. 272. According to s. 272, "the Local Government may direct an appeal by the public prosecutor, or other officer specially or generally appointed in this behalf, from an original or appellate judgment of acquittal; but in no other case shall there be an appeal from a judgment of acquittal passed in any Criminal Court." Construing the word "but" to be used with reference to this section, it would simply mean that, upon a case submitted by the Judge, the Court may, in the event of an acquittal, convict the accused person on the facts, notwithstanding the general prohibition to be found in the words of s. 272, which I have read. Or, again, it may be used with reference to the situation of a case so submitted by the Judge when it comes up to the High Court. That situation is peculiar in this respect, namely, that no judgment has been passed in the Court below from which this so-to-speak appeal

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has been brought; and this part of the passage may, therefore, mean that, in the event of the Court, upon consideration of the case submitted, being of opinion that there should be a conviction and judgment thereon, it is empowered to pass it as an original Court, notwithstanding, and indeed because there has been none passed in the Court below. However this may be, it seems to me, after the best consideration which I can give to the question, that, on a case submitted by a Sessions Judge under the provisions of s. 263, the High Court can acquit the prisoner, if it so thinks fit, on the facts, notwithstanding that the jury has found the prisoner guilty.

I construe the words "shall deal with the case so submitted as with an appeal" simply as directing the procedure to be followed, such as regards the notices which are necessary to be served, and so on. And I apprehend that under these words the Court may, if the case calls for it, send for additional evidence, and may deal with the case generally as is provided in Chap. XX. with regard to appeals. No doubt, the result of this construction is, that the prisoner is in a better situation with regard to an appeal, if that appeal be made through the intervention of the Judge under s. 263, than if he had preferred it himself, because s. 271 immediately says that, if the conviction was in a trial by jury, the appeal by the person convicted shall be admissible on a matter of law only. But this is not the only peculiarity of a similar kind which is to be found in this new Criminal Procedure Code, because, in the event of the conviction of a prisoner by a jury for the crime of murder and sentence of death following thereon, upon the reference which must be made to this Court for confirmation of the sentence, this Court has the power by s. 288 to acquit the prisoner on the facts, although if the prisoner had been sentenced to transportation for life instead of to death, and had simply himself appealed, the Court would not have been able to disturb the verdict of the jury on the facts.

I am, therefore, of opinion that all the prisoners, excepting the first prisoner, should be acquitted and discharged from custody so far as this conviction is concerned. The case is different with regard to Koonjo Leth, because he undoubtedly has confessed to having taken a part in the dacoity, and that confession is ample evidence as against him to support the conviction. As it falls upon us to pass sentence upon Koonjo Leth, we think that the sentence should be three years' rigorous imprisonment.

GLOVER, J.—I concur in this judgment except in so far as doubt is thrown upon the occurrence of the dacoity. I see no reason to discredit the evidence on this point, and the jury were satisfied that a dacoity did take place.

*Conviction set aside, except with regard to Koonjo Leth.*

*Before Mr. Justice Kemp and Mr. Justice Phear.*

THE QUEEN v. KHERAJ MULLAH AND ANOTHER.<sup>1</sup>

1873.  
 April 30.  
 11 B. L. R. 33.  
 [20 W. R. 13.]

*Code of Criminal Procedure (Act X. of 1872), Chap. XVIII., s. 228—Magistrate—Summary Trial—Appeal.*

If, on appeal from a summary trial under Chap. XVIII. of the Criminal Procedure Code, the evidence before the Judge is not sufficient to reasonably satisfy him that the prisoner has been rightly convicted, he ought to acquit him.

<sup>1</sup> Criminal Miscellaneous Case, No. 82 of 1873, from an order of the Sessions Judge of the 24-Pergunnas, dated the 8th April 1873, affirming an order of the Joint-Magistrate of Diamond Harbour, dated the 1st March 1873.

KHERAJ MULLAH and Abdool Sheikh were convicted by the Joint-Magistrate of Diamond Harbour, on the 1st March 1873, of causing hurt, and were sentenced to rigorous imprisonment for four months and to a fine of fifty rupees, or in default of payment of the fine to two months' further rigorous imprisonment. The trial was conducted under Chap. XVIII. of the Criminal Procedure Code (Act X. of 1872). The prisoners appealed to the Court of Sessions. The Sessions Judge, being of opinion that the record of the case did not embody the substance of what the complainant's witnesses stated, which the law intended it should do, and that it was necessary that all the provisions of the law, with respect to what is required to be put on record, should be fully complied with, referred the case to the High Court under s. 296 of the Criminal Procedure Code (Act X. of 1872).

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The High Court (Kemp and Pontifex, JJ.), however, considered that the judgment of the Magistrate gave the substance of the evidence both for the prosecution and defence (see s. 228 of the Criminal Procedure Code (Act X. of 1872)), and remanded the case to the Sessions Court for trial.

On remand the Sessions Judge held that it was impossible for him on the record as it stood to say that the Joint-Magistrate was wrong in believing the witnesses; that he could not, from the statements of the witnesses on the record, form any opinion as to their credibility; that there was nothing in the evidence which would warrant him in finding that the witnesses were not speaking the truth; and that, therefore, it appeared to him that all that the Appellate Court could do in such a case was to see whether the evidence on the record was sufficient to sustain the conviction. The learned Judge examined the evidence, and found that, on the record as it was before him, it was not possible for him to say that the Magistrate came to a wrong conclusion in finding the prisoners guilty of causing hurt. The Judge went on to say that it had been suggested that, under s. 282, the Appellate Court had the power of directing further enquiry to be made, or additional evidence to be taken; but that he could not exercise that power in the present case, for he could not name any particular point which required further enquiry, nor did he know of any additional evidence which the Magistrate had omitted to take, and which he could direct the Magistrate to take; that what he did think necessary was that the Joint-Magistrate should have more fully stated the substance of the evidence on which the conviction was had; that the High Court did not think this to be necessary; that the evidence as it stood was sufficient to sustain the conviction, and that, therefore, he must reject the appeal.

From this judgment the prisoners appealed to the High Court.

Mr. Ghose (with him Baboo Bykunt Nath Doss) for Kheraj Mullah.—The Sessions Judge ought to have tried the appeal, if he could come to no opinion: the High Court will quash the conviction. The prisoners are entitled to any doubt.

Baboo Nilmadhub Bose for Abdool Sheikh.

The judgment of the Court was delivered by

PHEAR, J.—It seems to us that the Judge treated the appeal before him more as if it were a special appeal than a regular appeal, and because he did not find sufficient on the record to convince him that the Magistrate was entirely wrong, he therefore affirmed his decision.

But the Judge was in the situation of an Appellate Court in which the matter came before him on regular appeal, and he ought to have judged, as best he



1873. — could, from the materials put before him on the Magistrate's written judgment, whether or not, as a matter of fact, the prisoners had committed the offence of which they had been convicted. On reading the Sessions Judge's judgment, it seems pretty clear that he was unable even with the aid of the Magistrate's finding to form an independent judgment as to whether the prisoners had committed the offence or not. That being so, it was, I think, his duty to have acquitted them. If the evidence which came before him, whatever its shape, was not sufficient to reasonably satisfy him that the prisoners had been rightly convicted, he ought to have acquitted them.

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There is a passage in his judgment which leads us to suppose that the Sessions Judge somewhat misapprehended the effect of the decision of a Division Bench of this Court passed upon his previously made reference. He appears to imagine that he was in some way bound by that decision of this Court to accept the finding of fact come to by the Magistrate. The decision of the Division Bench has been read to us, and Kemp, J., indeed pronounced that decision, and I think it quite clear that it was not the intention of the Division Bench to fetter the Sessions Judge in any way in regard to his judgment on the facts of the case from the evidence such as it was disclosed in the Magistrate's judgment. We think, as I have already said, that so far as we can arrive at the Judge's view, he ought to have acquitted the prisoners instead of dismissing the appeal. We accordingly direct that they be acquitted and discharged so far as this charge is concerned.

The fine, if paid, must be refunded.

*Conviction quashed.*

#### APPELLATE CRIMINAL.

1873.

April 21.  
11 B. L. R.

*Before Sir Richard Couch, Kt., Chief Justice, Mr. Justice Jackson, Mr. Justice Phear, Mr. Justice Ainslie, and Mr. Justice Pontifex.*

#### THE QUEEN v. SABED ALI AND OTHERS.<sup>1</sup>

347.  
[20 W. R. 5.]

*Penal Code (Act XLV. of 1860), s. 149 & s. 300, excep. 2—Unlawful Assembly—Common Object—Murder.*

One member of an unlawful assembly, whose common object was to eject certain persons from a piece of land the title to which was disputed, fired at and killed one of such persons. *Held* (by COUCH, C.J., and JACKSON, PHEAR, and PONTIFEX, JJ.) that, the act being sudden and unpremeditated, the other members of the assembly were not guilty of the offence of murder under s. 149 of the Penal Code,<sup>2</sup> but of rioting armed with a deadly weapon under s. 148. Ainslie, J., dissented.

SABED ALI, Ain Ali *alias* Anoo Ali, Kaloo Sikdar, and Gundhurbo Khan, were convicted by the Sessions Court of Backergunge, constituted of a Judge and two assessors, of the offence of murder under the provisions of s. 149 of the Indian Penal Code, and sentenced each to the punishment of transportation for life.

<sup>1</sup> Criminal Appeal, No. 979 of 1873, from an order of the Sessions Judge of Backergunge.

<sup>2</sup> *Act XLV. of 1860, s. 149.*—"If an offence is committed by any member of an unlawful assembly, in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in the prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence."

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The material facts of the case were stated thus in the judgment of the Sessions Judge. He says :—

"I agree with the assessors that it is clearly proved that the prisoners and others attacked Fuckeer Buksh whilst he was ploughing his own land in company with his three kinsmen and co-sharers, Samed Ali, Sharef Ali, and Kadez Ali, and that, in the struggle, Tareboolah, one of the attacking party (but not, it may be observed, one of the prisoners), fired a gun loaded with small shot, killing Samed Ali on the spot, and wounding Sharef Ali on the back. All the the prisoners therefore, as taking part in the riot, and having the same object in view, namely, to drive Fuckeer Buksh off the land, are in the eye of the law guilty of murder . . . It seems to me, therefore, quite clear, first, that the land was in the possession of Fuckeer Buksh, and that he and his companions were ploughing it when they were attacked ; and, second, that the reason assigned by Fuckeer Buksh for the attack is the natural and probable one, namely, that Sabed Ali, having paid up the full rent, was determined not to allow Fuckeer Buksh to hold and cultivate his land until he made good his quota. I cannot doubt that the unexpected resistance offered by Samed Ali and Sharef Ali, but more specially by the former, who was a young and powerful fellow, and who snatched a *latti* from the hands of one of his adversaries, and laid about vigorously with it, led to the sudden and probably at first unintended use of the gun by Tareboolah. Finding his party driven back by the two men, Samed Ali and Sharef Ali, for the two old men Fuckeer Buksh and Kadez Ali were not of much account (though Fuckeer Buksh's right hand shows that he was considerably knocked about), Tareboolah raised his gun and fired, striking the advancing Samed Ali full in the chest. Sharef Ali saw the impending blow, and just had time to turn and fly, and so received a considerable portion of the charge in his back.

"I hold it therefore proved on the evidence that all the prisoners are guilty of the offence laid to their charge.

"The Court, concurring with the assessors, finds that Sabed Ali, Ain Ali *alias* Anoo Ali, Kaloo Sikdar, and Gundhurbo Khan, are guilty of the offence specified in the charge, namely, that they, being members of an unlawful assembly, in the prosecution of the common object of which, namely, to enforce a supposed right to a certain piece of land, one Tareboolah, a member of the said unlawful assembly, committed murder by causing the death of one Samed Ali, have committed the offence of murder, and have thereby committed an offence under s. 149 of the Indian Penal Code, punishable under s. 302 of the said Code, and the Court directs that the said Sabed Ali, Ain Ali *alias* Anoo Ali, Kaloo Sikdar, and Gundhurbo Khan, be each punished with transportation for life from this date."

The prisoners appealed to the High Court.

The appeal came on for hearing before a Division Bench (Phear and Ainslie, JJ.), when, in consequence of a difference of opinion between their Lordships, the record was, by the order of Phear, J., submitted to the Chief Justice for the appointment of a third Judge. The Chief Justice, under the provisions of the Criminal Procedure Code (Act X. of 1872), s. 271, added three Judges to the Judges of the Division Court, and the appeal was then heard by five Judges.

Baboo *Ambica Churn Bose* and *Rojoneenath Bose* for the appellants contended that the act was done in self-defence. It does not amount to murder. The Judge finds that there was no intention to use the gun. Consequently there was no intention to kill Samed. The act would come under excep. 2, s. 300 of the Indian Penal Code, as it was done in defence of private property.

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No one appeared for the Crown.

The following judgments were delivered :—

AINSLIE, J.<sup>1</sup>—In this case there was a dispute about a piece of land between Fuckeer Ali and Sabed Ali, which ended in a riot, in the course of which a man named Tareboolah, one of the party of the prisoners, fired a gun, and killed Somed Ali. It has been found by the Judge that Tareboolah was a member of an unlawful assembly, of which the prisoners, whose appeal is now before the Court, were also members; and as to Sabed Ali it is also shown by the evidence that he directly invoked the aid of the party among whom was this Tareboolah, armed with a gun. Tareboolah himself is not under trial; but the Judge, in order to apply the provisions of s. 149 of the Penal Code to the other prisoners, has considered the nature of the offence committed by Tareboolah, and has found that it was murder, and in that finding I think he was clearly right. Under s. 149 he has convicted the present appellants of that same offence, and sentenced them to transportation for life. If they are rightly convicted under that section, the Court can pass no milder sentence; if that punishment is too severe, it can be reduced by the Local Government; but the only question just now before us is whether the conviction and sentence are according to law.

S. 149 runs as follows :—(*reads*). The last words are very stringent; if the section applies, the Court is bound to convict of the particular offence. Tareboolah committed the offence of murder; he was, at the time of the murder, a member of an unlawful assembly; the accused were also members of that unlawful assembly at the time when the murder was committed; then the questions are, firstly, was the murder committed in prosecution of the common object of the assembly? and, secondly, did the accused know that such an offence was likely to be committed?

As to the first, I find it impossible to say that the murder which occurred was not committed in prosecution of the common object. It seems to me that the common object was not merely to eject the party of Fuckeer Ali from the disputed field, but that it was to do so by show of force, and, if necessary, by actual force. I do not think it possible on the evidence to say that the common object was limited to the ejection, and that the use of force was not deliberately contemplated; nor do I think that we may say that force was only a means to an end, and that the ultimate object of obtaining possession of the field was the only common object of the party; it was clearly the deliberate intention of the unlawful assembly to use certain means to obtain a certain end, and I am therefore unable to come to any other conclusion than that the common object was compounded both of the use of the means and the attainment of the end. The evidence distinctly establishes that a number of men proceeded to the spot to eject Fuckeer Ali; that they or several of them were armed with *lattis*, and that one who was found among the party when the riot commenced, though we do not know when he joined it, was armed with a gun; and that, on resistance being offered, they proceeded to use violence; and, judging of their intentions from their actions, I cannot help finding that it was from the first their intention to overpower by force any resistance to the occupation of the field. This violence actually extended to the causing of the death of Somed Ali under circumstances which undoubtedly made the homicide murder on the part of Tareboolah. On this point, I believe, we are all agreed.

I then come to my second question—Was this murder an offence which the members of the unlawful assembly knew to be likely to be committed in pro-

<sup>1</sup> This judgment was read by the Chief Justice, Ainslie, J., being absent on leave.

secution of their common object, such common object being the use of force, if necessary, to obtain possession of the land? I take it that, when the law speaks of a man knowing the probable result of his acts, it meant that an ordinary man bringing his reason to bear on the matter must know that such result will probably ensue from his act. If A intentionally and without lawful excuse fires a bullet into B's body, he, if not of unsound mind, must know that death is the probable result, though he does not know that death will actually result. B may recover; but, if he does not recover, the causing of death is the intentional act of A. It is no excuse for A to say that he had not brought his mind to bear on the consequences of his act; that he had not thought of the matter, and therefore did not know at the time of committing the act what the probable result would be. If the act done is such that a reasonable man who chooses to consider it must know the probable result, the law will presume the exercise of reason and the consequent knowledge.

A number of men armed with clubs go out to enforce a right or supposed right by the use of those clubs; resistance is offered, and it becomes a question whether they, instead of overpowering their adversaries, are not overpowered themselves, is it likely that, under such circumstances, they will measure their blows? Yet clearly they have no right of private defence, and if they cause hurt in any degree, they must take the consequences. It cannot be said that a man who attacks another with a weapon calculated to inflict serious injury, though without intention of taking life, and finds unexpected resistance, is justified by that resistance in taking life. It may not have been his intention at first to do so, but it comes to be his intention, or at any rate he, under the pressure of the position into which he has forced himself, comes to commit an act so immeminently dangerous that it must in all probability cause such bodily injury as is likely to cause death, without any excuse for incurring the risk of causing such injury, and by that act he commits murder. As it is with the individual, so also is it with the members of an unlawful assembly collected with the common object of gaining a certain end by violence, if it cannot be obtained otherwise. They are bound to assume that the persons they are about to attack will exercise their right of private defence; and, as it seems to me, they must therefore contemplate the probability of the use of very considerable force, and cannot with any shade of reason say that the hurt likely to be inflicted is likely to be limited at any precise degree. They possibly do not wish to cause the death of any man, and would be well content to gain their end without striking a blow, by the mere show of force, but for all that, it is their intention to strike, if their end cannot be otherwise gained; and if a very great amount of violence becomes necessary, and is used, either to overcome the resistance of the opposite party, or to extricate themselves from the position in which they have placed themselves (their opponents being still within the limits of their rights of self-defence), I, for one, cannot but say that the use of that amount of violence, and nothing less, was within their intention; and that being so, I am forced to say that any probable result of that violence was within their knowledge. Homicide is certainly a probable result; and it can hardly be that such homicide under the circumstances can be anything less as regards the individuals whose act directly causes death than murder; and it therefore follows that the probability of the commission of the offence of murder was within their knowledge.

In this particular case we have one of the party to which the accused belonged, armed with a loaded gun, a weapon that could not be used as a weapon of offence without imminent risk to life, and, therefore, I look upon this case as

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one in which the probability of the commission of the offence of murder was more than usually great, and more certainly within the knowledge of the parties. It may be that the accused could have shown circumstances from which the Court ought to infer that the use of that gun was not within their intention or knowledge, but I do not think that the prosecution was bound to prove that no such circumstances existed.

Finding that the murder was committed in the prosecution of the common object of the unlawful assembly, and that it was an offence which the accused knew to be likely to be committed in the prosecution of that object, I am compelled by the words of s. 149 to hold that the accused as members of the unlawful assembly are guilty of murder. I would, therefore, on this appeal uphold the conviction and sentence, leaving the question of mitigation of punishment to be dealt with separately.

PONTIFEX, J.—In this case the Sessions Judge has found that the act which caused the murder was sudden, and was unpremeditated by any member of the unlawful assembly. The evidence fully supports such finding. Under these circumstances, I am of opinion that those members of the illegal assembly who did not commit the homicidal act cannot be considered guilty of murder under s. 149 of the Penal Code.

To apply that section to the case of murder, its alternative provisions must be read as follows: "If murder is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or if murder is committed by any member of an unlawful assembly, and the members of that assembly know murder to be likely to be committed in prosecution of that object, every person who, at the time of the committing of the murder, is a member of the same assembly, is guilty of murder."

In the present case the common object of the illegal assembly was to obtain possession of land by a large armed force from a small unarmed party. In my opinion, the evidence shows that the parties prosecuting that common object did not contemplate, or know it to be likely, that the offence of culpable homicide would be committed. The murder committed hastily by one member of the assembly was not, in my opinion, committed "in prosecution" of the common object of the assembly, in the planning of which no homicidal intention had been entertained. Nor could the members of the assembly think, and much less "know," murder to be likely to be committed "in prosecution" of a common object, which was intended to be, and which might naturally and probably have been, accomplished without homicide.

To bring the offence of murder, as defined by the Code, within s. 149, I think it must either necessarily flow from the prosecution of the common object, or it must so probably flow from the prosecution of the common object that each member might antecedently expect it to happen. The offence of murder, as strictly defined by the Code, requires a previous intention or knowledge in the perpetrator; and to "know" that murder is likely to be committed is to know that some member of the assembly has such previous intention or knowledge. The word "know" used in the second branch of the section is, I think, advisedly used, and cannot be made to bear the sense of "might have known." This interpretation of s. 149, so far as murder is concerned, seems to me confirmed by comparing ss. 398 and 396 with ss. 148 and 149. From s. 398, it appears that being armed with a deadly weapon at a dacoity is considered an offence deserving of far greater punishment than the offence under s. 148 of being armed with a deadly weapon at a riot. The

reason for this distinction must be that more serious consequences are likely, and must be known to be likely, to result from an armed assembly at a dacoity than at a riot, and yet, if murder is committed by one of five dacoits, the others are not guilty of murder, and may be sentenced to imprisonment for any time under ten years, while, if s. 149 is to be construed, as it has been construed by the Sessions Judge in this case, if murder is committed by one of five rioters, the others would all be guilty of murder, and must be sentenced to death or transportation for life, though less serious consequences would antecedently be likely to result than from a dacoity.

I am therefore of opinion that the prisoners who have appealed are not guilty of murder; but as it appears from the evidence that they were members of an illegal assembly, and were all armed with *latts*, they are guilty of an offence under s. 148, and ought, in my opinion, to be sentenced to three years' rigorous imprisonment.

PHEAR, J. (after stating the facts as above).—It appears to me that the reasoning by which the Judge on the facts thus stated by him brings the charge home to the prisoners is somewhat incomplete. The words of section 149, Indian Penal Code, are as follows:—(*reads*).

These words do not, in my opinion, support the view which the Judge expressed at the outset of his judgment, and by which he appears to have been guided to his final decision to the effect that, because murder was committed by one member of the assembly, therefore all the prisoners, as taking part in the riot, and having the same object in view, namely, to drive Fucker Buksh off the land, were, in the eye of the law, guilty of murder. It seems to me clearly not the case that every offence which may be committed by one member of an unlawful assembly while the assembly is existing, *i. e.*, while the members are engaged in the prosecution of a common object, is attributed by s. 149 to every other member. The section describes the offence which is to be so attributed, under two alternative forms, namely, it must be either, *1st*, "an offence committed by a member of the unlawful assembly in prosecution of the common object of that assembly," or, *2nd*, "an offence such as the members of that assembly knew to be likely to be committed in prosecution of that object."

Now, inasmuch as the continuance of the unlawful assembly is by the definition of s. 141 made conterminous with the prosecution of the common object, it seems tolerably clear that the Legislature must have employed the words "prosecution of the common object" with some difference of meaning in these two passages respectively. Also the mere fact that the Legislature thought fit to express the second alternative appears to show very distinctly that it did not intend the words "in prosecution" which are found in the first to be equivalent to "during the prosecution," for, if they were, then the second alternative would have clearly been unnecessary. And a comparison with this passage of the language which is used in s. 460, where the Legislature makes all the persons concerned in committing a burglary punishable with transportation for life, if any one of their number at the time of the committing of burglary causes death, &c., strongly bears out this view. I am of opinion that an offence, in order to fall within the first of the above alternatives, *i. e.*, in order to be committed in the prosecution of the common object, must be immediately connected with that common object by virtue of the nature of the object; for instance, if a body of armed men go out to fight, their common object is to cause bodily injury to their opponents; and in that case death, resulting from

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injury caused, would be homicide committed in prosecution of the common object. And an offence will fall within the second alternative, if the members of the assembly, for any reason, knew beforehand that it was likely to be committed in the prosecution of the common object, though not knit thereto by the nature of the object itself.

It seems, thus, on a little consideration, to be apparent that the two alternatives of s. 149 do not cover all possible cases of an offence being committed by one member of an unlawful assembly during the time when the common object of the assembly is being prosecuted. It follows that, in every trial of prisoners on a charge framed under the provisions of s. 149 of the Penal Code, even when it is proved that the specified offence was committed by one of the members of the assembly during so to speak the pendency of that assembly, it yet remains on issue of fact to be determined on the evidence whether that offence was committed in prosecution of the common object as I have endeavoured to explain the meaning of those words in the first part of that section, and, if not, whether it was an offence such as the members of the assembly knew to be likely to be committed in the prosecution of the object.

Returning now to the particular facts of the present case, I think there appears to be abundant reason for coming to the conclusion that Tareboolah committed murder in the way described by the Judge. But it seems also clear that murder, or even the taking of life, was not immediately connected with the common object of the unlawful assembly of which the prisoners were members. That common object was, as the Judge expresses it, to drive Fuckeer Buksh off the land, and to prevent him from cultivating it. There is, however, nothing in the evidence to indicate that the members of the assembly were prepared and intended to accomplish that object at all hazards of life. I do not think that they intended to attain the common object by means, if necessary, of murder. Indeed, the Judge himself says that "the resistance offered by Samed Ali and Sharef Ali was unexpected" by the prisoner's party, and that it "led to the sudden, and probably at first unintended, use of the gun by Tareboolah." This being so, I find myself unable, sitting as a Judge of fact, on this appeal, to arrive at the conclusion that Tareboolah committed murder in prosecution of the common object of the unlawful assembly, within the meaning of the first part of the section.

Neither do I think it is satisfactorily made out by the evidence that the prisoners knew it to be likely that this offence of murder would be committed in the prosecution of the common object of the assembly within the meaning of the second part of the section, taking that object to be the driving Fuckeer Buksh off the land. It was *a priori* possible, and indeed most probable, that that object would be effected without any risk of life whatever. The assailants had reason to suppose, indeed knew quite well, that the party they were about to attack was absolutely unarmed. The members of the unlawful assembly generally, including the prisoners, might reasonably have expected (and there is nothing whatever in the event to show that they did not) that Fuckeer Buksh and his co-labourers would be driven off the land by the mere show of such force as they had, or at any rate by the use of force very far short of life-taking. And even if I allowed myself to be carried by the evidence so far as to think (as I do not) that the prisoners and the other members of the unlawful assembly knew that culpable homicide was likely to be committed in the prosecution of the common object, still I should be unable to say that their knowledge also included any of the ingredients of aggravation which are required in order to convert the offence of culpable homicide into the offence of murder. It is obvious that, in the events

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which happened, those ingredients were of sudden origin, and were entirely personal to the actual murderer. Tareboolah committed murder by doing, on the spur of the moment, a previously unintended act, which act, however, he must himself be taken to have known at the time was so imminently dangerous that it must, in all probability, cause death, or such bodily injury as was likely to cause death, and which did, in fact, cause death. If, then, the prisoners knew that murder was likely to be committed in the shape in which it was committed, they must have been aware that it was likely one of the members of the unlawful assembly would do an act which would be likely to cause death, and which would, in fact, cause death—a statement which on the face of it seems to be a contradiction of terms. In truth, when the second likelihood comes to be placed upon the first, it has the effect, in my judgment, of removing the case altogether from the scope of s. 149. And none of those forms of murder from which “likelihood” is absent are brought by the evidence in this case within the contemplation of the prisoners or of anybody else. There is nothing to suggest that the prisoners (or indeed any of them) knew that it was likely that an act would be done by one of the members of the assembly with any of the intents mentioned in the first three clauses of s. 300 of the Penal Code, and would cause death.

On the whole I think that the prisoners have been wrongly convicted of the charge framed under s. 149. I think, however, that the facts established against them certainly amount to rioting; and it appears also that they were all armed with heavy *latties*. Therefore, under the provisions of s. 148, they are punishable with imprisonment for a term which may extend to three years. Accordingly I would reduce the sentence passed by the Sessions Judge to a sentence of rigorous imprisonment for three years.

JACKSON, J.—It appears to me that the construction of this section (149), that is, a construction which shall be at once reasonable and grammatical, involves two difficulties, or at least two points which call for attentive consideration:—

1st.—“The common object.”

2nd.—“Or such as the members of that assembly knew to be likely to be committed in the prosecution of that object.”

It has been proposed to interpret the “common object” in a precise sense, so as to indicate the exact extent of violence to which the rioters intended to go, namely, to take possession of the land by force, extending, if need be, to wounding and the like. This, I think, is not the sense in which the words were intended to be understood. They are not, it seems to me, used in the same sense as “the common intention” in s. 34, which means the intention of all, whatever it may have been. The words here seem to have manifest reference to the defining section (141), and to point to one of the five objects, which, being common to five or more persons assembled together, make their assembly unlawful. For this reason I think that any attempt to mitigate the rigor of the section by limiting the construction of the words “common object” must fail, and that any offence done by a member of an unlawful assembly in prosecution of the particular one or more of the five objects mentioned in s. 141, which is or are brought home to the unlawful assembly, to which the prisoner belonged, is an offence within the meaning of the first part of the section.

We then come to the second point, *i. e.*, the meaning to be given to the words “or such as the members,” &c. If the word “or” has been used in an alternative sense, the sentence would, if fully expressed, run thus: “If an offence is committed, which is committed in prosecution, or which, if not so com-



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mitted, is yet such as the members knew to be likely," which seems absurd. Nor can it be believed that the Legislature intended to attach the consequences of (say) murder committed by a member of an unlawful assembly in prosecution, &c., to all members of that assembly, unless those members had a knowledge that the commission of murder was likely, as an incident of their endeavours to carry out the "common object." For this would be the consequence, if the word "or" be a simple alternative, and if the first condition being fulfilled, namely, that the act was committed in prosecution of the common object, it was unnecessary to resort to the second, in which case the finding would simply be that an offence, namely, murder, had been committed by a member of the unlawful assembly in prosecution of the common object thereof, although the person who actually committed the murder had used means not within the contemplation of the others, such as the firing of a concealed pistol, or the like, and all the other members of that assembly would thereupon be liable to be hanged or transported for life at the discretion of the Judge—a thing which seems impossible to have been within the intention of the Legislature. But if the word "or" be treated, with some violence I admit, as illustrative, or instead of "and," and the knowledge of likelihood be thus a further condition imposed, the law becomes at once reasonable and intelligible.

In view of the difficulties caused by the section, I was at first strongly inclined to believe that the word "or" had crept in by a misprint, or clerical error, either instead of "and," or simply as an addition to the text, and I applied for information to the Legislative Department. My learned friend, Mr. Whitley Stokes, however, assures me that the word appears in all the copies of the Code as successively considered and amended as far back as 1856, when the section, as it now stands, took the place of the original section, numbered 133, which may be seen at p. 32 of the edition printed in England in 1851, and which was of a different character.

In the difficulty which besets us, the construction which I have suggested is the only one which seems to me possible, and I could not consent upon s. 149 to subject any person to the consequences of an offence which, though committed in prosecution of the common object of the unlawful assembly, he himself had not directly contemplated, unless it was proved that he knew it to be likely that such offence would be so committed.

In the particular case before us, I concur in the view of the facts taken, and in the order to be made by the majority of the Court.

COUCH, C.J.—The appellants in this case have been convicted under s. 149 of the Penal Code. A comparison of this section with s. 460 shows, as has been noticed by Phear, J., that s. 148 is not intended to subject a member of an unlawful assembly to punishment for every offence which is committed by one of its members during the time they are engaged in the prosecution of the common object. The difference of the language of the two sections seems to show that the legislative authority had in its mind the distinction between the two cases; and it is not sufficient, in order that a person may be convicted under s. 149, that there should be an unlawful assembly, that the members of it should be prosecuting the common object of it, and that an offence should be committed by one of them.

I need not repeat the language of the section. It is divided, as it seems to me, into two parts, and in my opinion, in order to bring a case within the first part, namely, that which speaks of the offence being committed in the prosecution of the common object of the assembly, the act must be one which upon

the evidence appears to have been done with a view to accomplish the common object. I think this is the meaning of that part of the section, and we must see whether the act was done with that view.

The Sessions Judge has found, and I think correctly, that the common object in this case was to drive Fuckeer Buksh off the land, and he has stated, I also think in accordance with the evidence, what occurred. "I do not doubt," he says, "that the unexpected resistance offered by Samed Ali and Sharef Ali, but more especially of the former, who was a young and powerful fellow, and who snatched a *latti* from the hands of one of his adversaries, and laida bout vigorously with it, led to the sudden, and probably at first unintended, use of the gun by Tareboolah. Finding his party driven back by the two men, Samed Ali and Sharef Ali, for the two old men, Fuckeer Buksh and Kadez Ali, were not of much account (though Fuckeer Buksh's right hand shows that it was considerably knocked about), Torab Ali raised his gun and fired, striking the advancing Samed Ali full in the chest." That does not appear to me to be an act done by Tareboolah with a view to accomplish the object of driving the other party off the land in consequence of the unexpected counter-attack of that party, and with a view to prevent or repel it. I think that is the fair conclusion from the evidence, and certainly in a case of this description, where, if the accused are found guilty, they are liable to a sentence of death, if there is a reasonable doubt as to the view with which the gun was fired, they ought to have the benefit of it. I am unable to say upon the evidence in this case that the firing the gun was done in the prosecution of the common object of the assembly.

Then, I have to consider the second part of the section that the offence is to be such as the members of the unlawful assembly knew to be likely to be committed in the prosecution of the common object. At first there does not seem to be much distinction between the two parts of the section, and I think the cases which would be within the first offences committed in prosecution of the common object would be generally, if not always, within the second, namely, offences which the parties knew to be likely to be committed in the prosecution of the common object. But I think there may be cases which would come within the second part, and not within the first. Without laying down the law as to any other case than that before us, I think there might be a case of this kind; persons assemble with a view to attack and plunder the house of a particular person; that would be an unlawful assembly, and the common object of the assembly would be house-breaking or the other offences which would be included in such acts as attacking and plundering a man's house; but from some cause, such as a show of resistance, they might not continue to prosecute that common object, and before they had dispersed, and whilst they continued to be an unlawful assembly, some of them might plunder another house, and thereby commit an offence. Such a case might come within the second part of the section, as an offence which the members of the unlawful assembly knew to be likely to be committed in prosecution of the common object, but which was not committed in the prosecution of it. But that is a case which we should have to determine when it arises. I only mention it as showing that there may be cases which would come within the second, but not within the first part of the section.

The question in this case is whether upon the evidence we can say that these persons, when they met together with the object of driving Fuckeer Buksh and his party off the land, supposing they knew that Tareboolah had a gun with him, knew also that he was likely to make use of it in such a manner as to be guilty of the offence of murder. Seeing what is necessary to constitute that offence, I am unable upon this evidence to come to the conclusion that these

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persons knew that this was likely. I think it is not only possible, but probable, that they did not think that the gun would be used in that manner by Tareboolah. And it seems to me upon the finding of the Sessions Judge that it was so, because he appears to have thought that the use of the gun was sudden and probably unintended. He seems to have thought that, if nothing more had occurred than driving the party off the land, and what might naturally be expected to happen in doing that, the gun would not have been used in such a manner as to make the person using it guilty of murder; and, as I said in regard to the first part of the question, we are bound, where there is a reasonable doubt, to give the accused the benefit of it.

I concur with the other members of the Court in thinking that the accused ought not to have been convicted under s. 149, but that they may properly be convicted under s. 148. The conviction will be altered accordingly, and the sentence will be one of three years' rigorous imprisonment.



APPENDIX.

*Before Mr. Justice L. S. Jackson and Mr. Justice Mitter.*

THE QUEEN *v.* GOOJREE PANDAY AND ANOTHER.<sup>1</sup>

*Criminal Procedure Code (Act X. of 1872), s. 280—Enhancement of Sentence.*

THE facts are fully stated in the judgment of the Court.

*The Junior Government Pleader (Baboo Juggodanund Mookerjee) for the prosecution.*

The prisoners were undefended.

JACKSON, J.—The prisoners in this case, named Goojree Panday and Jadu Sein, were convicted, by the Court of Session at Midnapore, of dacoity, and were sentenced, Goojree Panday to rigorous imprisonment for three years, and Jadu Sein to similar imprisonment for six months.

Upon the hearing of the appeal, the Junior Government Pleader appeared and applied to us to exercise the powers vested in the Court of Appeal by s. 280 of the Code of Criminal Procedure by enhancing the punishment which has been awarded against the prisoners. He represented that, considering the gravity of the offence and the circumstances under which it was committed, and the place, and also the class of persons to which the complainant belonged, being a traveller to the shrine of Juggernath, and the necessity of protecting such persons, the Court ought to see that an adequate sentence is passed. This Court is empowered, both as a Court of Appeal and also as a Court of Revision, to enquire into the sufficiency of sentences passed by the inferior Courts. One contingency in which that power may be exercised is when the Judge, recognizing the heinous nature of the offence committed, yet considers that there are circumstances which go to mitigate punishment, or make the prisoner an object of leniency. In such a case, no doubt, the High Court may enquire into those circumstances, and, although it is generally reluctant to do so, may take a different view of the discretion which ought to have been exercised, and may enhance the punishment. But there is another view of the case in which the duty of the High Court will arise, and that is, where no circumstances of mitigation have been set forth, and where, without any sufficient reason, the Court convicting the prisoner has awarded a punishment, which is in ordinary cases quite inadequate in respect of the offence committed. I think it is the duty of the High Court in such a case—a duty which the Legislature has, in ss. 280 and 297, specially imposed upon us—to take care that the inferior Criminal Courts do not, by the infliction of lenient punishments, give, as it were, encouragement to the commission of serious offences. Now, the offence of which the prisoners in this case were convicted is one which, under s. 395 of the Indian Penal Code, makes them liable to transportation for life, or rigorous imprisonment which may extend to ten years; and s. 397 provides: “If, at the time of committing dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years.” Now, I find in the evidence of the prosecutor in this case, and that evidence is not disbelieved

<sup>1</sup> Criminal Appeal, No. 287 of 1873, from an order of the Sessions Judge of Midnapore, dated the 18th February 1873.

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by the Judge, the statement : " A woman, who was travelling with us, had her foot hurt when the dacoits were pulling off her anklet ; a bannia, who was with us, and a garreewan, were struck on the head, and hurt ; and another cartman was struck on the foot, and a third carter had his leg broken," which amounts to grievous hurt ; and if the Court below had considered, as it might have done, all these circumstances, then, under s. 397, a less sentence than seven years' rigorous imprisonment could not be passed. Looking further into the case, the matter appears to have been a planned and preconcerted robbery on the part of the prisoners. The prosecutor, being one of a party of persons travelling to the shrine of Pooree, halted one afternoon for refreshment in a village place. The prisoners contrived to have access to them, and to get into their confidence in some degree, and doubtlessly observed where they kept their money, and afterwards attacked them when they had gone a short distance on their journey at the dead of night with a number of malefactors sufficient to overcome all resistance. I think this is a case in which the sentence of three years' rigorous imprisonment passed by the Sessions Judge on the principal accused is wholly inadequate ; and that, under the circumstances of the case, a punishment less than seven years ought not to have been passed on him. The sentence is enhanced accordingly.

In respect of Jadu Sein, the younger member, he is considered both by the Magistrate and the Sessions Judge to be a mere lad, who was led into the crime by inducement and persuasion ; and although we may have a suspicion that his criminality was something more than this, I do not think there are sufficient grounds for us to interfere with the exercise of the Judge's discretion by directing that no severer sentence should be passed on this prisoner. In his case, therefore, the sentence will be affirmed as it stands.

*Before Mr. Justice L. S. Jackson and Mr. Justice Mitter.*

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 [20 W. R. 14.]

KHETTER MONEE DASSEE *v.* SREENATH SIRCAR AND OTHERS.<sup>1</sup>

*Criminal Procedure Code (Act X. of 1872), ss. 332, 333, 334, & 530—Mode of recording Evidence.*

THE facts of the case sufficiently appear in the judgment of the Court, which was delivered by

JACKSON, J.—This is a case referred by the Officiating Sessions Judge of the 24-Pergunnahs, under s. 296, Act X. of 1872, for the purpose of annulling, under the powers of revision vested in this Court, the proceedings of the Joint-Magistrate of Diamond Harbour, in that district, who, on the 12th February 1873, made an order for the attachment of some 57 bighas of paddy-lands, and also gave orders relating to the disposal of the crops which had been previously cut by order of the said Joint-Magistrate.

The Sessions Judge has pointed out four particulars on which he considers the proceedings of the Joint-Magistrate irregular, and we have before us the Joint-Magistrate's letter, dated the 24th April last, in which he offers an explanation of those proceedings.

We consider that the proceedings complained of are so erroneous in one particular, that it is unnecessary to enquire into the other grounds of objection.

<sup>1</sup> Reference to the High Court under s. 296 of the Code of Criminal Procedure by the Officiating Sessions Judge of the 24-Pergunnahs.

These proceedings were commenced under the old Code of Criminal Procedure. Under the rulings of this Court, applicable to the sections relating to cases of this sort in the old Court, it has been repeatedly held by the High Court that an adjudication on legal grounds as to the imminence of a breach of the peace was a necessary preliminary to the commencement of proceedings. S. 530 of the new Procedure Code supersedes those rulings; but, of course, the benefit of this section cannot be claimed in respect of any irregularity in the present proceedings. The error to which I refer, and which is an error under the present Procedure Code, is one which, I think, vitiates the order of the Joint-Magistrate. Although, as I have already stated, the proceedings were commenced under the old Code, yet the enquiries made and the order passed were under the present Code. S. 530, Act X. of 1872, provides: "Such Magistrate may satisfy himself of the existence of a dispute likely to induce a breach of the peace from a report or other information; but the question of possession must be decided on evidence taken by him." Chapter XXV. deals with the mode in which such evidence is to be taken, and by s. 332 it is provided that, "in enquiries and trials (other than summary trials) under this Act, the evidence of the witnesses shall be recorded by the Magistrate or the Sessions Judge, as the case may be, in the following manner." Now, from trials there are first excepted "summary trials," and in respect of these a distinct procedure, including provisions as to evidence, has been provided by Chapter XVIII. of the Code. Then "trials," after that exception, have been again sub-divided into "summons cases" under s. 333 and other trials which are included with enquiries in the words "all other cases" in s. 334, and consequently it follows that we are to look to s. 334 and the following sections for the manner in which evidence is to be recorded in enquiries such as that now under consideration before the Magistrate. S. 334 directs that in such cases "the evidence of each witness shall be taken down in writing in the language in ordinary use in the district in which the Court is held, by or in the presence and hearing, and under the personal direction and superintendence, of the Magistrate or Sessions Judge, and shall be signed by the Magistrate or Sessions Judge." Under this provision there is no exception whatever in favour of cases in which no appeal lies. The Joint-Magistrate, therefore, was entirely in error in omitting to record the evidence in the mode prescribed by s. 334 and the following sections. This appears to us to be an error so material that under s. 297 we are bound to quash the proceedings, and set aside the order of the Joint-Magistrate as being founded on no evidence.

In respect of the land it is unnecessary for us to make any further order, and probably we have no power to make such order. It is always open to the Magistrate, if he thinks it necessary for the preservation of public peace, to bind parties who he considers are likely to break the peace by taking security or recognizance from them.

The money obtained by sale of the crops being now in deposit, it seems to us, from the necessity of the case, that it should remain so until the parties either come to a settlement of their dispute, or some of them establish a right to the land, which must be in the Civil Court.

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June 4.

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Ap. 8.

[20 W. R. 23.]

*Before Mr. Justice Kemp and Mr. Justice Phear.*IN THE MATTER OF MOONSHEE SYUD ABDOOL KADIR KHAN (PETITIONER) *v.* THE MAGISTRATE OF PURNEAH.<sup>1</sup>

*Powers of High Court—Non-compliance with Orders of High Court—Transfer of Proceedings—Jurisdiction—Criminal Procedure Code (Act X. of 1872), ss. 64, 142, 297, 389, 390, 391, & 398—Revision of interlocutory Proceedings before Magistrate—Suspension of Proceedings—Order for Bail—Non-bailable Offence—Warrant of Arrest—Commitment to Custody without Evidence taken—Remand without Evidence taken.*

THIS case came before the High Court upon three rules which had been obtained on the 12th, 19th, and 28th of May by Mr. Ghose on behalf of Abdool Kadir Khan. The first rule directed Mr. Kemble, the Magistrate of Purnea, to send up to the High Court the record, processes, and papers in certain criminal proceedings against Abdool Kadir Khan, to stay proceedings in his Court until further orders of the High Court, and in the meanwhile to release Abdool Kadir Khan upon specified security. The second rule called upon Mr. Kemble to show cause why he did not carry out the order involved in the former rule, Mr. Kemble having, after receipt of such rule, directed (in his capacity of Collector) the imprisonment of Abdool Kadir Khan upon certain fresh charges. And the third rule required Mr. Kemble to send up the records of the original proceedings, and also of proceedings upon such fresh charges instituted by Mr. Kemble before the Joint-Magistrate; and under which Abdool Kadir Khan had again been committed to custody.

The *Legal Remembrancer* (Mr. Bell) showed cause.

Mr. Ghose and Mr. *Ameer Ally* for Abdool Kadir Khan.

The facts of the case and the nature of the arguments appear fully from the judgments of the High Court. The argument on behalf of the petitioner was at the instance of the Court, addressed simply to the necessity of transferring the proceedings, and rested entirely on the facts.

The following judgments were delivered :—

PHEAR, J.—Three rules which were issued by this Court on the 12th, 19th, and 28th of last month respectively in the matter of one Abdool Kadir Khan have come before us to be adjudicated upon and disposed of. Before, however, I state the exigency of those rules, I will mention a few preliminary facts. In 1870 and 1871, or during a portion of those years, Abdool Kadir Khan was officiating head clerk of the Purneah Collectorate in the place of one Rooddro Chunder Mullick. Rooddro Chunder Mullick appears to have resumed his duties somewhere towards the end of the year, and shortly afterwards preferred three charges of embezzlement and two of forgery against Abdool Kadir Khan. These charges were enquired into by Mr. Weeks, who was at that time the Joint-Magistrate of Purneah, and dismissed by him. This occurred in November 1871. Subsequently, however, the Sessions Judge took up the matter, and directed the Magistrate to commit Abdool Kadir Khan for trial upon these charges; and, pursuant to this direction of the Judge, Mr. Wyer, who then had succeeded Mr. Weeks as Joint-Magistrate, issued a warrant of arrest; and Abdool Kadir was arrested under that warrant, I think, in October 1872, and was committed for trial. He was tried at the Sessions Court, and convicted on the 13th of January 1873. He was then sentenced by the Judge to ten years' rigorous im-

<sup>1</sup> Rules Nos. 666, 704, and 740 of 1873.

prisonment, and to pay a fine of Rs. 1,000, or in default of payment to suffer rigorous imprisonment for a further period of two years.

After Abdool Kadir Khan had been committed for trial by Mr. Wyer, Mr. Kemble, who was then and still is Officiating Magistrate and Collector of Purneah, wrote a letter on the 30th of December from himself as Collector to himself as Magistrate. The letter runs in these terms: "To the Magistrate of Purneah. Sir,—I have the honor to forward to you herewith, in charge of my head clerk, Baboo Sreenath Banerjee, the following papers connected with the late embezzlement by Syud Abdool Kadir Khan, at present in custody in the Purneah jail, and who will be now charged with further embezzlement. I shall be obliged if you will issue warrants for his arrest in case he should not be convicted on the charges on which he is to be tried on the 6th proximo.

"The papers named above are:—

"1st.—An abstract, marked A, drawn up by Mr. Worgan, dated February 27th, 1872, showing that Abdool Kadir, between September 1870 and May 1871, cashed certain bills as sub-divisional contingent and income-tax bills for larger sums than were billed for by the sub-divisional officers, and remitted to those officers the smaller amount only. This charge will be proved by the bills cashed, the copies of the original bills from Kishengunge, and the copy bill-book from Arrariah, and by the covering letters and the cheque-register, all of which are sent. These papers will show that fraud has been committed, and my head clerk is instructed to prosecute Abdool Kadir, who cashed these bills, under s. 409 or other cognate sections.

"3rd.—With reference to item 9 in Mr. Worgan's list, a charge of forgery will also be laid, as the original bill for Rs. 52-5-7 was not in this case destroyed, but was altered to Rs. 76-5-7 by manifest erasures. This charge will fall under Chapter XVIII. of the Penal Code.

"4th.—Any of my officers will be ready at any time to attend your Court to prove the documents now filed."

We have been informed that the schedule or papers annexed to this letter contain as many as twenty-four distinct items of charge. Mr. Kemble, the Magistrate, having been in this way informed by Mr. Kemble, the Collector, of the fact of a criminal offence having been committed by some one within his jurisdiction, took cognizance of it, and having been further led, I suppose, by the same means, to suspect that Abdool Kadir was the offender, he dealt with the matter as Magistrate under s. 142 of the present Procedure Code, and then made over the case for enquiry to Mr. Wyer, the Joint-Magistrate, and the result was that Mr. Wyer committed Abdool Kadir for trial on three out of the twenty-four charges mentioned or referred to in the letter. I feel myself obliged to say in passing that this really seems to me a very pitiful effort at disguising the fact that Mr. Kemble was in this matter the real prosecutor in his capacity of Collector, the prosecutor of Abdool Kadir Khan upon the charges contained in the letter of the 30th December; and it would have been much more straightforward, to say the least of it, if he had frankly avowed himself prosecutor, and laid a complaint before the Joint-Magistrate in the usual manner. Abdool Kadir was tried upon these charges and convicted by the Sessions Court on the 11th of March 1873, and was further sentenced, in addition to the sentence I have before mentioned, to a term of seven years' rigorous imprisonment. Against the convictions and sentences of the 30th of January and 11th of March respectively, the prisoner appealed to this Court, and was acquitted in the one case on the 25th of April, and in the other case on the 26th of the same month.

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An order for his immediate discharge from custody, so far as imprisonment under these convictions and sentences was concerned, was at once sent down to Mr. Kemble, the Magistrate of Purneah, who appears to have received the order in the afternoon of the 28th April. The Magistrate did not, however, promptly release the prisoner; before taking any step towards doing so, on the 28th, in his capacity of Collector, he sent a letter to Mr. Wyer, the Joint-Magistrate, which runs thus: "Sir,—As I hear that Abdool Kadir has been released by the High Court from the sentence recently imposed on him by the Sessions Court, I have the honor to request that you will go on with the other charges noticed in my letter No. 1933, dated 30th December 1872, to the address of the Magistrate. I have the honor to be, &c." Upon this letter is endorsed by Mr. Wyer: "A warrant will at once issue against Abdool Kadir Khan under s. 409, and be given to the Court-Inspector to be served." It also appears that, on the same day, Mr. Wyer issued a formal warrant according to the terms of this endorsement. This having been done, Abdool Kadir Khan was brought up from the jail before Mr. Kemble as Magistrate, and then told of his acquittal by the High Court, and of the order for his release from jail. Mr. Kemble also at the same moment turned round to the Court-Inspector who was present—I need hardly say not by accident—and said to him: "Has Mr. Wyer given you a warrant?" The answer was in the affirmative. Mr. Kemble then said: "Take him back to jail." Abdool Kadir was taken. No warrant of commitment to jail or written order of remand was made out, nor was the prisoner taken before the Magistrate who had issued the warrant of arrest according to the exigency of the warrant. This is on the 28th. On the 29th the Court-Inspector, becoming, probably not without good reason, a little anxious that a written warrant of commitment should be made out, endorsed upon the original warrant of arrest this memorandum: "Sir,—Yesterday, at 6 P.M., prisoner Syud Abdool Kadir was released by order of the High Court, Calcutta. At the moment he was under this warrant arrested, and by order of the Magistrate of this district sent to hajut. But, owing to the lateness of the hour, the purwannah for hajut was not sent. By this report, therefore, I beg to solicit that an order may be passed by the huzoor for giving a purwannah for hajut regarding the said defendant." Mr. Wyer endorsed under this the same day: "That a purwannah for hajut be given, and that the record in the matter of Abdool Kadir, made over by the Magistrate, be, by a proceeding, sent for from the Sessions Judge," and there is a further endorsement to the effect that a proceeding had been sent. This, I understand, is the endorsement which constituted the written order of commitment. On the 1st of May the Joint-Magistrate issued a further order in this matter. It seems that on that date Mr. Kemble wrote to Mr. Wyer in these terms: "With reference to the case of Abdool Kadir Khan now pending before you, I have the honor to request a postponement for one week, until I receive the judgment of the High Court in the cases previously decided." It does not appear that the prisoner was at this time brought before Mr. Wyer, or indeed that he was taken from prison before any Magistrate after the verbal commitment of Mr. Kemble on the 28th of April until the 8th May, a date to which I shall presently come. Mr. Wyer endorsed upon this application for adjournment made by Mr. Kemble: "The case will be postponed to the 8th," and on the same day he made out a formal order of remand until the 8th of May. It must be remembered that up to this time no evidence whatever had been taken, and we have not been made aware that there were any reasonable grounds or any ground whatever for a remand other than the letter of Mr. Kemble written to Mr. Wyer, which I have just now read; and I suppose that the sole reason, the only ground, upon which the Joint-Magistrate detained the pri-

soner in hajut was the ground afforded by such suspicion as was lurking in his mind in consequence of the original letter sent by Mr. Kemble to him on the 28th of April, strengthened, if it is possible to conceive it to be strengthened, by this letter of Mr. Kemble written to him on the 1st of May asking for an adjournment. It is perhaps not to be wondered at that in this state of things the prisoner desired to see the warrant of arrest in order to ascertain, if possible, the offence with which he was charged, and the matter for which he was held in custody. He accordingly petitioned Mr. Wyer for a copy of the warrant of arrest; this application was refused. He then petitioned Mr. Wyer to let him have a copy of the order of refusal; this application also was refused. He then made an application to be admitted to bail, not altogether an unreasonable one, considering that several days had already passed, and yet from the first no evidence whatever had been taken, and indeed no specific accusation or charge made against him. This application was again refused. Abdool Kadir then applied to this Court by petition upon the foundation of the material facts which I have just been relating, set forth in an affidavit; and upon this petition and affidavit the rule of the 12th of May issued, which in substance directed that the record and processes and papers in the case should be sent up to this Court; that the proceedings in the matter should be stayed in the Magistrate's Court until further order of this Court; and that, in the meanwhile, the prisoner should be released upon certain security (which was specified in the rule) for his appearance in the Magistrate's Court when called upon. This rule, I believe, reached Mr. Kemble on the 14th of May. The Magistrate acted upon this rule so far as to admit the prisoner to bail upon recognizances conditioned for his appearance every day in the cutcherry. At the same time the Magistrate wrote a letter to the District Superintendent of Police in these words: "Sir,—Abdool Kadir has just been released by orders of the High Court on bail Rs. 500 only. I think it extremely probable that he will try to escape and forfeit his bail. I therefore request that you will instruct the police to watch his movements, and to report to me if he should be discovered leaving Purneah. He is bound to present himself to me every morning." Upon entering into the recognizances conditioned in this manner, Abdool Kadir was released. The next day, the 15th, he presented himself at the cutcherry in obedience to the terms of the security-bond, and Mr. Kemble, as I understand, then directed that he should be taken into custody by his Nazir; the Nazir accordingly arrested him, detained him in his personal custody all day, and finally Mr. Kemble ordered that he should be taken to the civil jail and confined there. He professed to do this of his own authority as Collector under the provisions of Regulation XVIII. of 1817. No evidence was then taken; nor, I believe, was any evidence taken in the presence of the prisoner at any time during the period of his incarceration in the civil jail, which continued for seven days. Not unnaturally the prisoner Abdool Kadir did not consider this behaviour of the Magistrate towards him as amounting to a complete carrying into effect of the orders of this Court given in the rule of the 12th of May, which, among other things, certainly directed that he should be released. So he presented a second petition, fortified by an affidavit, to this Court; and on the 19th of May a second rule was issued, calling upon Mr. Kemble to show cause why he did not carry out the order of this Court which was involved in the rule of the 12th of May. Before this second rule reached Mr. Kemble, he had, it seems, been informed by the Commissioner that the imprisonment of Abdool Kadir in the civil jail was altogether illegal, because the Regulation under which he professed to act had been repealed, and he was instructed by the Commissioner to lay a complaint in his own person against Abdool Kadir before the Magistrate, and to proceed in the regular way for the

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prosecution of that complaint. He therefore released the prisoner from the civil jail on the evening of the 21st of May. [On the 22nd he made a complaint on oath before the Joint-Magistrate, Mr. Wyer, upon the footing of which Mr. Wyer issued a warrant of arrest, and Abdool Kadir was the same day again arrested upon the charges which were supposed to be embodied in this last mentioned complaint of Mr. Kemble. Upon his arrest a remand order was made out, by which he was committed to hajut to appear again before the Magistrate on the 30th of May, but it has not been shown to us that there was any evidence, and I believe I may take it that there was none upon which this order of remand to prison was made out. The prisoner then preferred a third petition to this Court, representing the facts which I have just mentioned, by affidavit; and a third rule was issued to Mr. Kemble on the 28th of May, requiring him to send up the record of this second case, as well as the first, and to release the prisoner upon bail of himself Rs. 1,000, and two sureties of Rs. 500 each. In the meanwhile Mr. Kemble had made a second deposition before Mr. Wyer, and not in the presence of the prisoner, the purpose of which it is not easy to apprehend, unless it was to make the original complaint upon which the prisoner had been already arrested, namely, on the 22nd May, more clear and more complete than it was before. Afterwards, again Mr. Kemble corrected both these depositions by what I may term a letter of appendix written to Mr. Wyer, and I believe that that letter has been placed upon the record by Mr. Wyer. Thus it has come about that the three rules which I first mentioned have been issued by this Court to Mr. Kemble, and are now before us for adjudication.]

I will now return to the matter of the first rule. The learned Legal Remembrancer objects that the rule was issued by this Court without jurisdiction. He has put his objections very clearly in a detailed form, but I think I may group them somewhat, and say that they substantially amount to, 1st, an objection that this Court has no jurisdiction to revise the proceedings of a Magistrate while they are in an interlocutory state; 2nd, that it has no jurisdiction to suspend such proceedings either at all, or at any rate without having the record before it; and, 3rd, that it has no jurisdiction in such a case to order bail to be taken, because the Sessions Court has exclusive jurisdiction in that matter by virtue of s. 390 of the Criminal Procedure Code, and also because, in this particular case, circumstances justifying the release of the prisoner on bail did not exist, the offence with which he is charged being, according to his own admission, a non-bailable offence, and the conditions of s. 398 not being satisfied. Now, it appears to me that s. 297 of the Criminal Procedure Code furnishes an answer to all these objections. The first clause of that section is as follows: "If, in any case either called for by itself, or reported for orders, or which comes to its knowledge, it appears to the High Court that there has been a material error in any judicial proceeding of any Court subordinate to it, it shall pass such judgment, sentence, or order thereon as it thinks fit." If that clause stood alone, clearly it would exhibit no limitation whatever in regard to the stage of judicial proceeding in which power is given to the Court to call up and revise these proceedings. The learned Legal Remembrancer argues, however, that the remaining clauses of that section, inasmuch as they are all directed to cases where there is a record, and where a final order, or an order which in some sense may be taken as a final order, has been passed, must be construed by implication to put a limitation of the kind which he contends for, upon the general words of the first clause. It seems to me that we should be wrong in coming to a construction of this sort, even looking upon the words of s. 297 alone; but when further we have regard to s. 64, which gives this Court the power, whenever it appears to it that its order will promote the ends of justice and so on, to "direct the transfer

of any particular criminal case or appeal, or class of cases or appeals, from a Criminal Court subordinate to its authority, or to any other such Criminal Court of equal or superior jurisdiction, or may order that any offence shall be enquired into or tried in any district or division of a district other than that in which the offence has been committed, or that it shall be tried before itself," it is quite clear, I think, that the Court must have power to take cognizance of and revise proceedings before a Magistrate while they are still in the interlocutory state of pending investigation ; otherwise there would be no reason why the Legislature should in this way give the Court express power to remove a case from one tribunal to another for the purpose of carrying on or continuing the investigation of it. I believe that the objection of the learned Legal Remembrancer on this point is made now for the first time, and at any rate the Court has, since the date when the new Criminal Procedure Court came into force, been, almost daily I may say, acting upon the general power of revision which hitherto has been supposed to be conveyed by this first clause. And if it has power by this clause, as it seems to me clear that it has, to call up to itself proceedings while they are in the condition of the preliminary stage of investigation for the purpose of correction and of giving proper directions for the conduct of the investigation, it must be incidental to that power that the Court should be able to suspend the proceedings, for it would be a manifest absurdity to my mind that the Court should be empowered by the Legislature to call up the record and the proceedings in a case for the purpose of looking at them, revising them, correcting material errors, and putting them upon a proper footing of investigation, but yet that the Court should have no power to stay the proceedings of the subordinate Court which require to be set right. It is, no doubt, a very forcible objection on the part of the learned Legal Remembrancer that a step of this kind should not be taken by this Court without inspection of the record, and I readily concede this much to him, namely, that the Court ought not in any, except extreme, cases to interfere with the Magistrate's proceedings until it has the record before it. But I entirely deny that it has not the power to do so. If the Court were altogether unable to take such a step without having the record before it, the non-existence or non-production of a record would really effect nullification of this Court's powers of revision in some cases which I could mention, and which by their nature would be cases in which it was most necessary that this power should be exercised. In this very case, which is now under our consideration, before the day when Sreenath Banerjee was examined as a witness,<sup>1</sup> there was nothing which could be called a record, and if the Magistrate chose to allow that state of things to go on, and to keep the prisoner in custody, without, in fact, taking any proceeding whatever, the result would be that, while the unfortunate prisoner might be illegally detained in jail for months, there would be no material in the shape of a record to be put before the Court upon which its action could be invoked. And yet obviously such a case as that would be one which would more require the intervention of this Court for the purpose of furthering the ends of justice than almost any other which could be instanced. In truth, the absence of anything to record might afford the strongest possible ground for the interposition of this Court. But it further seems to me that the words of s. 297 entirely dispose of this question : " By them the Court is expressly empowered to pass such judgment, sentence, or order as it thinks fit in any case called for by itself " (*i. e.*, where the record is sent for), " or which comes to its knowledge," and this last must, I apprehend, be any case the facts of which are brought to

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the knowledge of the Court in any sufficient manner, whether by the record or otherwise. It is however, I need hardly say, a rule of the Court not to suspend proceedings, and not to issue final orders to a subordinate Court, until it has the facts manifested to it in the most sure and certain shape, namely, the shape which the record itself affords, if possible; and nothing is more common, when the summary interposition of this Court is invoked, than for this Court in the first instance to say we can only at this stage send for the record, and when the record comes before us we shall see how the facts stand. But, as I remarked during the course of the argument, the present case seemed to us a very exceptional one. We had facts before us positively sworn to, with regard to which it was not likely that perjury would be committed; and if these facts were accurately stated, they were such as rendered it incumbent upon us at once without delay to afford the petitioner the relief which he asked. It turns out that these facts were perfectly accurate, and I will take the opportunity here to say that the representation of facts which has been made to this Court on the three different occasions by Abdool Kadir Khan, in his several petitions and in the affidavits made on his behalf, have proved, in our judgment, to be throughout most fair, most candid, and most accurate; and I think at any rate, in the final disposal of these rules, he ought to have such benefit as he can properly derive from the truthful attitude which he has taken up in this matter. I don't think it is necessary for me to add further reasons why, if we have the power to bring up these proceedings, we must also have the power to suspend action in the Court below pending our enquiry. We now come to the third objection of the Legal Remembrancer, to the effect that the order directing the Magistrate to admit Abdool Kadir to bail was made without jurisdiction. I find the answer to that objection in the same clause of s. 297 which I have already referred to. This Court is empowered by that clause to pass "such judgment, sentence, or order thereon as it thinks fit," and it must in any case at least be fit and proper that this Court should give the Magistrate such directions as to his action as will lead him to do that which he ought to have done without the directions of the Court. Now, unquestionably at the time when the order to admit to bail was sent down by this Court, although it is said the offence of which Abdool Kadir was accused was a non-bailable one, the Magistrate had power to remand the prisoner, and during the period of remand to admit him to bail; in fact, as matters were represented to us, and as they now stand unimpeached, it was his duty under s. 389 to have admitted the prisoner to bail at the time when the prisoner applied to be admitted to bail. When it is said that the jurisdiction which is given to the Sessions Court by s. 390 in such a case as this to admit the prisoner to bail has the effect of excluding the power of the High Court, it seems to me that some misapprehension, at any rate, with regard to the two cases must exist. The case can only be brought before the Sessions Judge for bail upon the footing upon which it stood before the Magistrate, and although, as it happened in this particular instance, the facts are such as rendered it the duty of the Magistrate to admit the prisoner to bail, and therefore such as would make it the duty also of the Sessions Judge on appeal to direct that he should be admitted to bail, yet generally the case before the Magistrate as regards the question of bail, and the case in this Court, may materially differ. When the case has been brought up to this Court under the powers given by s. 297, and the day for further investigation and inquiry in the Court below has thereby necessarily been postponed for a considerable period, an additional element, a further ingredient, has been added to the case, which would not have been in it had it been taken in the ordinary course in the Sessions Court; for it must be, as it seems to me, a most important matter for consideration in regard to the propriety of admit-

ting the prisoner to bail, that this Court has found it necessary to postpone the day of further enquiry, and thereby considerably enlarge the period of the prisoner's intermediate imprisonment if he is to be detained in prison in the meanwhile : this, I repeat, is a most important element to be considered when the propriety of releasing upon bail is in question, and the addition of it may serve to turn the scale in the prisoner's favour, when this Court is called upon to determine what order is fit and proper to be passed under s. 297. On the whole, then, it seems to me that the objections which the learned Legal Remembrancer made to the rule of the 12th of May fail him. I think that the rule is good and valid, and that it was the duty of the Magistrate to comply with it. It is virtually admitted on the facts that he did not comply with it, for he certainly did not release Abdool Kadir. It seems to me impossible to say that the admitting him to bail upon recognizances conditioned in the way in which the recognizances in this case were conditioned is the same thing as releasing the prisoner. I understood the learned Legal Remembrancer in his arguments of the day before yesterday to appeal to s. 391 as an excuse for the conduct of the Magistrate, and to urge that that section did afford a ground for a possible misapprehension on Mr. Kemble's part as to the intentions and orders of this Court involved in the directions to release on bail ; and this, I take it, is pretty nearly as much as admitting that the Magistrate did not carry out the orders of the Court as they were intended to be carried out. I do not think I need dwell upon the terms of s. 391, because it seems to me that, if any one reads that section with an intelligent attention, he will see that the meaning of it is, not that a man when enlarged should be given a qualified or abridged liberty, but that it should be competent to the Court to make the recognizances extend to ensuring his attendance at more than one stated time or contingency to meet the purposes for which it was necessary that he should be bound to attend the Court, as, for instance, from day to day during the investigation or trial. The learned Legal Remembrancer also very forcibly put before us that there could be no intention on the part of any subordinate officer to disregard the orders of this Court, because he had an overpowering incentive to do his duty in the certainty which he must perceive of the action which would be taken by the Executive Government in the event of his not doing it. If such motives as those for right action are to be referred to, I would also say that this Court has the power of vindicating its own authority whenever that authority is intentionally disregarded, and if it sometimes becomes necessary or expedient so to do when private persons are the offenders, such a course would be still more necessary and expedient when judicial officers subordinate to it deliberately disobey its orders. If such a case should ever occur, as I trust and believe it will not, it seems to me that it would constitute such a public scandal upon our administration of justice here as would demand the immediate intervention of this Court of its own authority, and I doubt not that such intervention would be effected. But we entirely accept the learned Legal Remembrancer's assurances that Mr. Kemble in this case had no intention whatever of disobeying the orders of this Court, or of doing any act of disrespect towards this Court. It is, I think, unfortunate that he was, if I may use the expression, not so entirely and thoroughly loyal towards superior authority in the first instance as he might have been ; because it is clear that, had the case to which the rule of the 12th of May was directed been sent up to this Court, and Abdool Kadir released on bail without delay, the further complication of the matter would have been avoided, and the subordinate Court would have been set right most easily without that inconvenience, even to Mr. Kemble himself, which the course adopted by him has certainly brought about.

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The third rule in some sense disposes of itself, and we have now before us both the record of the first case and the record of the second case preferred by Mr. Kemble against Abdool Kadir Khan. The last question then for us to consider is what is to be done in the matter of these two cases. The petitioner has asked that we should transfer the further investigation of them to some other Court, and I feel myself most reluctantly forced to say that, in review of the events which have occurred, I think both Mr. Kemble and Mr. Wyer, although, as I have already said, I acquit them altogether of any intention other than the intention to do their duty towards this Court and as public officers, have nevertheless come to be placed in a false position. As I remarked at the outset, the action which was taken by Mr. Kemble in the beginning was the action of a prosecutor. Had he openly prosecuted the case which he set up against Abdool Kadir before an independent Magistrate, I doubt not that everything would have gone well. As it was, he made some show of handing the matter over to another officer, but he did not do so in reality. I have already commented upon his letter of the 30th of December from himself to himself. On the 28th of April he directs the Joint-Magistrate to issue a warrant of arrest, and the Joint-Magistrate does so, not in the exercise, on his own part, of an independent judicial discretion, but because he is asked to do so by the Magistrate of the district upon the footing of a letter which that Magistrate wrote to him, or brought to his notice. The prisoner, upon being arrested, is not even then brought up before the Magistrate who issued the warrant of arrest, as he ought to have been in due course of law. Nothing, I think, can be clearer now than that the purpose of a warrant of arrest has been fulfilled when the prisoner is brought before the Magistrate who issued that warrant, or any other Magistrate qualified to act for him; and, further, that it is the duty of the person who receives the warrant, and is charged with its execution, to bring the prisoner before the Magistrate without any unnecessary delay. The warrant of arrest is issued, in the ordinary course, either upon information laid by a third person before a Magistrate, or by the Magistrate of his own authority under s. 142 of the Code; but still, when the prisoner is once arrested under it, the remaining course of proceeding which is to be pursued is the same in both cases; the prisoner should be brought promptly before the Magistrate, and the Magistrate has then no authority to further detain him in custody, or to remand him to prison without some reason made manifest to him either in the shape of sworn testimony given before him, or in some other form which can be put upon the record, and which is sufficient to justify him in sending the prisoner to prison, there to be detained for a limited period before further examination, a period which is never in any case to exceed 15 days. Nothing of the kind occurred here, and it is most important, I think, to bear this in mind, because it goes to show that Mr. Wyer has not, almost from the beginning to the end, or at any rate for the greater portion of the case, given himself even an opportunity of exercising a judicial discretion upon matters of evidence before him. In making the first order of commitment to hajut, *i.e.*, the first remand-order, he acted on the memorandum of the Court-Inspector only, and in making the more formal remand-order, which he issued on the 1st of May, he acted solely upon the request of Mr. Kemble, without any other reason manifested to him in any form whatever, as I understand, why he should so exercise his judicial discretion. The consequence was that, from the 28th of April until the 8th of May, *i.e.*, for ten days, Abdool Kadir was detained in custody without any legal cause, simply at the instance of Mr. Kemble, as it seems to my judgment. On the 8th of May the evidence of Sreenath Banerjee was taken. I will assume that that evidence was sufficient to furnish a ground for the further detention of the pri-

soner. In order that it should do so, it ought to have a tendency to show that the prisoner had committed some specified offence, and that further evidence would be likely to be obtained by a remand. I am not sure that there is even now, after Sreenath Banerjee has given his evidence, any sufficient material on the record to indicate what offence has been committed by any one, or further to indicate that Abdool Kadir is the person who committed it. The warrant of arrest was issued clearly in ignorance of any evidence bearing on the point, for it did not in any degree specify the offence of which Abdool Kadir was accused, it merely stated generally that he was to be arrested for an offence under s. 409 ; a vague statement of this kind, I may remark, is by no means a compliance with the provisions of the Criminal Procedure Code, which, for obvious reasons, directs that the offence shall be specified in the warrant. What information could possibly be conveyed to an ignorant prisoner by such a statement ? I will not pay Mr. Wyer the bad compliment of supposing that he ever thought it was sufficient. The fact was that he could not make it more specific, and this fact affords the key to the whole of the irregularities committed. After the 14th Abdool Kadir's imprisonment for seven days, which was effected by Mr. Kemble, was clearly without jurisdiction, and without legal cause. Mr. Kemble was still not in a position to make a definite accusation against Abdool Kadir, and nevertheless was still struggling by any means, regular or irregular, to keep him in his grasp. And again, when we come to the second case preferred by Mr. Kemble upon alleged new grounds against Abdool Kadir, we find that, although the original warrant of arrest was probably founded upon sufficient sworn information, yet the subsequent remand from the 22nd until the 30th was an order again made by Mr. Wyer without any reasonable ground or indeed any cause whatever. Thus it appears to my view very plainly that Mr. Kemble has been acting in this matter from first to last, in the first case as well as the second (calling them two cases, though they really are one), as the prosecutor of Abdool Kadir Khan. It seems to me further that, in neither the one case, nor in the other, is he yet in a position to specify in any degree the particular charge or charges upon which he is prepared to accuse Abdool Kadir, and in neither case is he yet prepared to offer evidence upon which he can ground a charge against him. It is probably pretty certain that there were very large defalcations in the Purneah Collectorate treasury in 1870 and 1871 ; and, no doubt, Mr. Kemble believes that Abdool Kadir was the person who embezzled a good deal of the money ; but he cannot yet make any particular accusation against him, and is uncertain that evidence of his guilt will ever be forthcoming. In this situation, Mr. Kemble has, as it seems to me, most anxiously, from the time when he came to know of the judgment of acquittal passed by this Court, endeavoured to hold Abdool Kadir as it were under his hand, while he is making those enquiries and investigations which he believes will enable him some day to make a definite charge, and to support it with evidence against Abdool Kadir. He has used the authority of Mr. Wyer as Joint-Magistrate in aid of his purpose to keep Abdool Kadir within arm's reach in the manner I have described. It further seems to me that, during all those proceedings, Mr. Wyer has lent himself to Mr. Kemble's purposes, and has refrained from exercising a real judicial discretion of his own. He has arrested Abdool Kadir at Mr. Kemble's dictation, and detained him in prison without legal cause at Mr. Kemble's request, and he did this last in the so-called second case when he must have had full notice of the high-handed character of Mr. Kemble's conduct in confining Abdool Kadir for a week in the civil prison. It is with this view that I say it appears to me that both Mr. Kemble and Mr. Wyer have come to be in a false position in this matter, and that I think it will not be right or fair either to themselves, or to the prisoner, that the

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further inquiry into an investigation of these two cases should be carried on judicially by either of these two gentlemen.

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I believe I may say that we are agreed upon taking the course in this case which was taken in the precedent afforded by the Bancoorah case.<sup>1</sup> There is no doubt, for the reasons which were put forward by the learned Legal Remembrancer the day before yesterday, that it would be exceedingly inconvenient, and probably would cause great expense and delay, if this case were sent to another district for inquiry and trial. We desire to avoid this consequence if possible; and accordingly we think that it will be best that our views, with regard to the necessity of removing these cases from the cognizance of Mr. Wyer and Mr. Kemble, should be communicated to the Government of Bengal, in the hope that the Government may depute a qualified officer to Purneah to entertain these cases in the place of either of those gentlemen. And upon being certified that such deputation has been made, we will make an order for the transfer of the cases to the officer so appointed for due inquiry and investigation. We think further that any other case which Mr. Kemble may wish to institute against Abdool Kadir in his capacity of Collector as prosecutor, arising out of these Collectorate defalcations, should be also preferred before this official, and be proceeded with, of course, as promptly as possible. Should the Government of Bengal not see good reason to make an appointment of this kind, we shall feel obliged to transfer the case to another district. We therefore make no order at present, but simply adjourn the case for one month. The accused will remain on the present bail until called upon to answer to the charges by the local Court.

**KEMP, J.**—I entirely concur in the judgment which has just been delivered by Phear, J. It has occurred to me to have to sit for a short time with that learned Judge during the illness of Ainslie, J., and during that period two cases which had been tried by two Sessions Judges of Zillah Purneah came before us on appeal. In both those cases the accused Abdool Kadir Khan was concerned. In one of those cases, Phear, J., passed a somewhat severe censure upon the conduct of the Sessions Judge, Mr. Lockwood; and I entirely concurred in that censure, although I did so with great regret.

I am of opinion, an opinion deliberately arrived at, that the whole of the proceedings in this case, so far as they have gone, are most discreditable to the judicial authorities of Zillah Purneah. It appears that in 1870, 1871, certain defalcations took place in the Collectorate of Zillah Purneah. I understand that the Government have recouped themselves by directing the then Collector, Mr. Worgan, to make good the sums embezzled by deductions from his salary. Subsequently it was necessary to cast about for a victim upon whom to saddle these defalcations, and various charges, the subjects of the former trials and of the proceedings now before us, were laid against the accused, Abdool Kadir Khan. This person was at the time of the defalcations the head clerk of the Collectorate. Ordinarily speaking, and I speak from my own experience, which is not a limited one in Collectorate matters, a person in such a capacity, namely, that of head clerk, would not be entrusted with any moneys belonging to Government; and, therefore, it must have been under very exceptional circumstances that Abdool Kadir Khan could ever have had anything to do with money-matters in the Collectorate. We have been told that Abdool Kadir was a great favourite of the late Collector, Mr. Worgan; and although, during that gentleman's presence at the station of Purneah, before he went to England on furlough, proceedings were taken against Abdool Kadir

<sup>1</sup> 4 B. L. R. App. 1 (see p. 166 of this book).

before Mr. Weeks, who was then the Joint-Magistrate of Purneah, proceedings taken some time after the defalcations were discovered, and as already observed at a time when Mr. Worgan was present at the station, who, having himself been called upon to make good the amount of these defalcations, had a personal interest in fixing the responsibility upon somebody else, even then, and upon picked charges, the final result is that the accused has been acquitted. After the double acquittal by this Court in the trials above alluded to, the first being conducted by Mr. Lockwood, and the second by Mr. Ward, further proceedings have been taken which have led to the three rules which are now before the Court.

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It is quite unnecessary for me to add anything but a few words of entire concurrence with what has fallen from Phear, J., with reference to the objections taken by the Legal Remembrancer as to the jurisdiction of this Court.

It appears to me clear that Mr. Kemble, the Magistrate, has disobeyed the orders of this Court ; but I am happy to find that my learned colleague is of opinion that there has been no want of *bona fides* on the part of Mr. Kemble in this matter. I must say, speaking for myself, that Mr. Kemble's conduct, more particularly with reference to the double capacity in which he has acted in this matter, endeavouring to evade compliance with the orders of this Court as Magistrate, by turning himself for the nonce into a Collector, and then acting under an old Regulation which has been repealed, is not altogether consistent with an earnest intention to carry out our orders. I do not wish, however, to press this matter further, nor in any way to dissent from the judgment which has just been delivered by my learned colleague.

In the matter of the transfer of the case to another Court, I admit that this is a step which this Court ought not to take except under extraordinary circumstances and on very clear and satisfactory grounds. I think it is undoubtedly a slur upon an official of any grade when proceedings which have been instituted before him are removed from his Court to another Court ; but if the interests of justice require that such a step should be taken, it is the duty of this Court to do so without any reference to what the feelings of an official may be on receiving the orders of this Court directing him to transfer the case to another officer. Such proceedings, of course, carry with them an indication that this Court can have no longer any confidence in that officer in the matter of his further proceeding in the case under consideration, but, as I have already said, the interests of justice must be first looked to. In this case I do not think it right that Abdool Kadir, after what has passed, and looking to the former proceedings which have taken place in this case, and to the attitude of defiance in which the local authorities have placed themselves in carrying out the orders of this Court, or rather in not carrying out its orders, should be tried either by Mr. Kemble or by Mr. Wyer. I do not think, and I say so advisedly, that Abdool Kadir would obtain a trial entirely free from bias before either of those officers. It is therefore with considerable reluctance and regret that I am obliged to concur in the transfer of this case, as also in the censure which has been passed upon the local officers by Phear, J.



## BENGAL LAW REPORTS.

## [APPELLATE CRIMINAL.]

*Before Mr. Justice Glover and Mr. Justice Pontifex.*IN THE MATTER OF THE PETITION OF BELILIOS.<sup>1</sup>*Criminal Procedure Code (Act X. of 1872), ss. 283, 286, 294, & 297—Revision—  
Power of High Court—"Material Error"—Privileged Communications.*

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Where the High Court sent for the record of a case, and it appeared therefrom doubtful whether the evidence was sufficient to support the conviction, the Court refused to interfere, there being no material error in law, or in the proceedings, which rendered such conviction illegal and improper.

*Per GLOVER, J.*—The power of the High Court under s. 294 of Act X. of 1872 is limited to sentences and orders passed by subordinate Courts as distinct from judgments of such Courts, and a judgment cannot be interfered with (except in cases where the law gives an appeal on the facts), unless it be shown that it is contrary to law.

*Per PONTIFEX, J.*—The High Court cannot, under s. 294 of Act X. of 1872, interfere with a conviction, unless there has been some material error of law which renders such conviction illegal and improper in law.

*Semble.*—Communications between a prosecutor in a criminal case and his attorney, and between the attorney and his clerk, as to the case, are not privileged.

ON a charge of cheating made by one Kally Doss Bonnerjee against the prisoner Belilios, one Toolsee Doss Nundy, and others, the accused Toolsee Doss was arrested, and thereupon the Deputy Magistrate who tried the case recorded the prosecutor's evidence in the presence of Toolsee Doss alone. The facts deposed to by the prosecutor were shortly as follow: That he, the prosecutor, having come to Calcutta for the purpose of selling indigo, casually met the prisoner Toolsee, with whom he was unacquainted; that Toolsee, under pretence of finding a purchaser for an indigo factory belonging to the prosecutor, took him to a house where they met the other persons accused; that Belilios, representing himself to be the agent of a rich Begum, agreed to purchase the factory on her account for the sum of Rs. 80,000, of which Rs. 16,000 were to be paid down as earnest-money; in payment of this sum Belilios proposed to give the prosecutor a promissory note for Rs. 20,000, the prosecutor to return Rs. 4,000, to which the latter assented; that on the following day the prosecutor handed over to Belilios the Rs. 4,000, which were taken by one of the prisoners to the pretended Begum; that, after some delay, Belilios informed the prosecutor that the Begum refused to part with the note, or to return the Rs. 4,000, but stated that, if the prosecutor would call at the house on the following day, he should receive the Rs. 16,000; but that, when he did call as arranged, he found that all the accused persons had decamped; that he, the prosecutor, informed an acquaintance, Nobo Poddar, and one Ghaseeram, how he had been duped, and described the persons who had cheated him, whereupon Ghaseeram guessed their names; and that by Ghaseeram's advice he laid a charge against them; that a few days thereafter Ghaseeram told the prosecutor that the accused were anxious to compromise, and offered to deposit Rs. 2,000 with some person whom all parties could trust; that the prosecutor suggested Nobo Poddar, and that

<sup>1</sup> Criminal Motion, No. 116 of 1873, from an order of the Sessions Judge of the 24-Pergunnas, dated the 25th July 1873.

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Rs. 2,000 in currency notes were accordingly deposited with Nobo by one Zahoorooddeen; that thereupon the prosecutor, accompanied by Zahoorooddeen and one Mahomed Lutif, went to Mr. Sims, the prosecutor's attorney, and stated that he wished, if possible, to withdraw the charge, as he feared that he should be unable to prove it; and that Mr. Sims made some statement to the Police Magistrate of Sealdah in the prosecutor's presence, which statement, however, being in English, the prosecutor could not understand.

The accused Belilios subsequently surrendered. The other parties charged absconded.

At the trial before the Deputy Magistrate, the prisoner Belilios reserved his cross-examination of the witnesses, among whom were Nobo Poddar and Ghaseeram, till the charge was framed, and afterwards was not allowed by the Deputy Magistrate to recall such witnesses. He thereupon obtained an order from the High Court, directing the Deputy Magistrate to recall such witnesses for the purpose of cross-examination; but in the interim Nobo Poddar had died, and Ghaseeram had left Calcutta. In defence the prisoner Belilios cited as witnesses the following amongst other persons, *vis.*, Mahomed Lutif, Mr. Sims, his clerk, and the Police Magistrate; the last-mentioned of whom deposed that Mr. Sims, on applying to withdraw the case, represented that it was a similar case to that of David Duff, in which money alleged to have been stolen was in reality lost in gambling. The Deputy Magistrate refused to allow questions to be put to Mr. Sims or his clerk as to the communications made to them by the prosecutor with reference to the withdrawal of the case, on the ground that such communications were privileged, and he refused to allow the prisoner to examine Mahomed Lutif upon the same ground. He ultimately convicted Belilios and Toolsee Doss, and sentenced the former to two years' rigorous imprisonment and a fine of Rs. 1,000, and the latter to one year's rigorous imprisonment and a fine of Rs. 500, and he ordered the Rs. 2,000, which had been deposited with Nobo Poddar, and the amount of the fines, to be handed over to the prosecutor.

Belilios and Toolsee Doss both appealed to the Sessions Judge. The latter, while holding that the Deputy Magistrate was correct in his view that the communications made by the prosecutor to Mr. Sims and his clerk were privileged, intimated that the suppression of such evidence would prejudice the case for the prosecution, and the prosecutor thereupon consented to their being examined on this point. The clerk deposed that the prosecutor admitted he had lost the money by gambling, and wanted to withdraw the charge. Mr. Sims stated that he did not understand Bengali, and took all the instructions in the case through the medium of his clerk, but that he was never instructed to withdraw the case, and did not tell the Police Magistrate that it was a gambling one, similar to that of David Duff; that the remark as to the similarity of the two cases was made by the Police Magistrate himself, and that he (Mr. Sims) merely assented. The Judge refused to allow any evidence to be given as to what passed between Mr. Sims and his clerk in order to explain the discrepancies in their evidence. With reference to the evidence of the Police Magistrate, he observed that no weight could be attached to it, as he had evidently throughout laboured under the impression that the case was a gambling one. Upon the whole case, as presented to him, the Judge acquitted Toolsee Doss, but convicted Belilios under s. 417 of the Penal Code, and sentenced him to rigorous imprisonment for six months and a fine of Rs. 1,000; and he ordered the Rs. 2,000 deposited with Nobo Poddar to be given to the prosecutor.

Upon the application of the prisoner Belilios, the High Court sent for the record of the case.

Mr. Woodroffe and Mr. W. Jackson (with them Mr. J. S. Leslie) for the prisoner.

The Advocate-General (Mr. Paul, Offg.) for the Government.

Mr. Woodroffe contended that the refusal of the Magistrate to allow the witnesses, whose cross-examination had been reserved by the prisoners, to be recalled, was irregular, and prejudiced the prisoner in his defence, and also amounted to a material error in the proceedings which would justify the Court in interfering under s. 297 of the Criminal Procedure Code; and that both the Magistrate and the Judge were in error in holding that the communications which passed between the prosecutor and Mr. Sims' clerk, and between Mr. Sims and his clerk, were privileged. [The Advocate-General admitted that in his opinion these communications were not privileged.] The learned Counsel then proceeded to show that the evidence was insufficient to support the conviction. [GLOVER, J.—It is unnecessary for you to go into the evidence, as we are of opinion that on the evidence the prisoner ought not to have been convicted.] That being so, the Court will interfere under s. 297. [PONTIFEX, J.—Have we that power?] The record of this case having been sent for, the High Court can, under s. 294 of the Criminal Procedure Code, look into the propriety as well as the legality of the sentence or order passed by, and also the regularity of the proceedings in, the subordinate Courts. By s. 295 the Zilla Court has the power to send for the record of a case, and satisfy itself as to the legality only of the sentence or order passed by a subordinate Court. [GLOVER, J.—If your contention is right, there may be two appeals in every criminal case.] There may be. The powers of revision of the High Court have been increased by the new Criminal Procedure Code. There is a marked distinction between ss. 294 and 295; in the latter there is no mention of "propriety," and some meaning must be given to that word in s. 294. [PONTIFEX, J.—The propriety of a sentence may refer to the amount of it.] The new Criminal Procedure Code (Act X. of 1872) is founded on decisions of the High Courts determining their power, and it is submitted the Legislature did intend to extend the powers of revision of the High Court. The record of the case being now here, the Court under s. 297 can pass such judgment, sentence, or order as it thinks fit. [PONTIFEX, J.—There must be a material error to enable the Court to proceed under s. 297, and to direct an acquittal.] A failure of justice is a material error, and the failure of justice here has prejudiced the prisoner in his defence; see s. 283. Justice may as much require that the facts should be gone into, where the lower Court has gone wrong upon the facts, as where it has gone wrong in law—*Queen v. Koonjo Leth*.<sup>1</sup> The words "material error" in s. 297 are "equivalent to the effect of s. 283"—*Queen v. Ramkanu*.<sup>2</sup> [PONTIFEX, J.—The story told by the prosecutor may seem improbable to us, but it was not so in the opinion of the lower Court.] It is sub-

<sup>1</sup> 11 B. L. R. 14, at p. 18 (or at p. 587 of this book).

<sup>2</sup> Before Mr. Justice Phear and Mr. Justice Arncliffe.

The 25th January 1873.

THE QUEEN v. RAMKANU. (a)

*Criminal Procedure Code (Act X. of 1872), s. 297—"Material Error."*

THE Deputy Magistrate had dismissed a complaint brought by the prisoner without examining certain witnesses called by him, and had ordered him to be prosecuted under s. 211 of the Penal Code. Under this order the prisoner was tried and sentenced to the month's rigorous imprisonment.

(a) Reference from the Sessions Judge of Cuttack.

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mitted that the question now is what does this Court consider. The order of the Judge here is not more final than an order of a Judge sitting with assessors, and if in the latter case the verdict was not warranted by the evidence, this Court would set it aside—*Queen v. Elahi Bax*; <sup>1</sup> see also *Queen v. Rajcoomar Bose*,<sup>2</sup> which was a case tried by a jury. This Court will not uphold a conviction which it thinks is an improper one. The order of the Judge, that the sum of Rs. 2,000 deposited with Nobo Poddar should be handed over to the complainant, was made without jurisdiction, and should be reversed.

The *Advocate-General* contended that there was no appeal to the High Court from the judgment of the lower Appellate Court. S. 286 of the Criminal Procedure Code says: "No appeal shall lie from any judgment, sentence, or order of a Criminal Court, except in the cases provided for by this Act, or by any law for the time being in force." This case comes up under s. 294. Under that section the legality of a sentence or order can be inquired into, but there is no mention of a judgment, and therefore, under this section, the judgment of the lower Appellate Court cannot be inquired into. [PONTIFEX, J.—Having been shown an irregularity, cannot we inquire into the sentence?] That depends on what the irregularity was; here the irregularity complained of was that certain questions were not allowed. The provisions of s. 297 are very stringent. The object of the revision-sections is not so much to do justice as to amend irregularities, and that being the case, no person has a right to be heard either personally or by Counsel; see last portion of s. 297. [PONTIFEX, J.—"Material error" in s. 297 may mean an error on which the sentence is founded.] Yes, but here there was no such error. Does a judgment come within the meaning of "a judicial proceeding" mentioned in s. 297? A sentence would be included in those words. [PONTIFEX, J.—"Judicial proceeding" in s. 297 must mean the whole matter; that section gives us power to pass sentence.] "Judicial proceeding" is defined in s. 4, and it is submitted that a judgment is only part of a judicial proceeding. The concluding paragraphs of s. 297 limit the effect of the first paragraph, or they are only illustrative of the cases in which this Court will interfere. The cases referred to are appeals from cases tried by juries, and

The Sessions Judge, being of opinion that the Deputy Magistrate acted illegally in ordering a prosecution, referred the case to the High Court. He stated his opinion, however, that the complaint was a false one; that the prisoner did not distinctly state what the witnesses, who were not called, were expected by him to prove, and that those who were examined gave no reliable evidence in support of the prisoner's complaint, and some of them directly contradicted him.

The judgment of the High Court was delivered by

PHEAR, J.—Although, as the Judge points out, there has been error in the proceedings, still it does not seem to be a material error within the meaning of s. 297 of the new Criminal Procedure Code, such as would justify our setting aside the proceedings on the trial and the conviction. For that purpose the error must be material; and we think that "material" in s. 297 is equivalent to the effect of s. 283, which says that: "No finding or sentence passed by a Court of competent jurisdiction shall be reversed or altered on appeal on account of any error or defect, either in the charge or in the proceedings on or before trial, or on account of the improper admission or rejection of any evidence, or by any misdirection in any charge to a jury, unless such error or defect has occasioned a failure of justice."

Here, according to the view which the referring Judge himself takes, there has been no failure of justice, inasmuch as it would appear that the charge which the prisoner originally made was in reality a false charge, and therefore the prisoner has been rightly convicted. We therefore do not think it necessary to interfere with the conviction or sentence.

<sup>1</sup> B. L. R. Sup. Vol. 459.

<sup>2</sup> 10 B. L. R. App. 36 (or p. 582 of this book).

are not applicable. The learned Counsel admitted that the order of the lower Court as to the Rs. 2,000 deposited with Nobo Poddar was erroneous.

Mr. Woodroffe in reply.—As to the argument that the concluding paragraphs of s. 297 limit the first portion of that section, that is negated by the case of *Moonshee Abdool Kadir Khan v. The Magistrate of Purneah*.<sup>1</sup> It is absurd to say that the High Court can call for the record of a case, and then pass, not such an order as it thinks fit, but an order or sentence which the lower Court thought proper, and of which this Court does not approve.

*Cur. adv. vult.*

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The following judgments were delivered :—

GLOVER, J. (after shortly stating the facts) continued : Mr. Woodroffe, for the accused Belilios, contends that the Judge's proceedings were irregular, and that he committed various illegalities in the conduct of the trial, which materially prejudiced his client's defence. Mr. Woodroffe also contends that, under the provisions of s. 294 of the Code of Criminal Procedure, this Court can go into the whole case, and decide whether the judgment of the Court below has been warranted by the evidence.

It will be convenient, I think, to consider the last objection first. By s. 294 we are empowered to consider the legality or propriety of "any sentence or order passed;" by which I understand that an illegal or improper sentence or order may be set right by the High Court, as, for instance, where a man is sentenced to seven years' rigorous imprisonment for the offence of hurt, or when a man is called upon to furnish security to keep the peace without any evidence having been taken as to the likelihood of a breach of it : here the sentence and order would have been illegal and improper, and this Court would have applied a remedy under the section. But the section does not say that the High Court may consider the propriety of the judgment passed by the Court below : and that the omission in s. 294 was intentional is, I think, shown by the wording of s. 296, which allows a judgment by a subordinate Court to be reported on by a Sessions Judge or Magistrate to the High Court when it is contrary to law. A great difference is made between "sentences or orders" and "judgments;" the one may be altered or set aside for illegality or impropriety, the other can be reversed for illegality alone. And were it not so, it would be difficult to understand the meaning of s. 286. That section limits the hearing of appeals; but if the word "propriety" allows this Court to take up every case of revision from a Sessions Judge, and decide it on its merits, it would give an appeal which the law nowhere contemplates, *viz.*, a second appeal on the facts from the decision of the Magistrate who originally tried the case. This, it seems to me, is an unanswerable objection to the meaning which the learned Counsel would place on the terms of s. 294. That section is, I consider, limited to "sentences and orders" as distinct from "judgments," and that the latter cannot be interfered with (except in cases where the law gives an appeal on the facts), unless it be shown that the judgment is contrary to law.

But, then, it is contended that there have been illegalities in the judgment. These are said to be the Deputy Magistrate's and the Judge's refusals to allow certain witnesses to be cross-examined, and their rulings that certain communications made to some of those witnesses were privileged. The Advocate-General has very fairly admitted that he is not prepared to support the Judge's decision on these points : and there can be no doubt, I think, that the accused ought

<sup>1</sup> 11 B. L. R. App. 8; see p. 14 (or p. 604 of this book).



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to have been allowed an opportunity of cross-examining; and that the communications between Sims and his clerk were not privileged. But, after all, what does the objection amount to? The answers which the accused expected or hoped to elicit from these witnesses had reference to the prosecutor's original statement that the money had been lost by gambling, and both Sims and his clerk admitted clearly that Kally Doss had made that statement. The other witnesses could have done no more, and the Judge took the point into careful consideration, and with a full perception of the improbabilities attaching to the prosecutor's story. He weighed the evidence of the Deputy Magistrate, Coomar Harendra Krishna, of Mr. Sims and his clerk, admitting that Kally Doss's story of the gambling had been told to them, but, on the whole, thought that "he ought not to find on it" (I use the Judge's own word) "that there was any gambling." Allowing, therefore, that the Judge was wrong in not permitting certain examinations, and in not insisting on the recall of certain witnesses, can it be said that there has been any "material error" in his "proceedings," such as is required by s. 297?

But it is contended further that the evidence on which the Judge relied was so manifestly insufficient for conviction that the result has been a failure of justice, and that this amounts to a "material error in the judicial proceedings" of the Court below such as to allow of our interfering under s. 297 and of annulling the judgment. But I am by no means prepared to go this length. I do not think that I should have convicted the accused Belilios on the evidence to be found on this record. His testimony was entirely uncorroborated, and was, moreover, inconsistent with his previous acts, besides being highly improbable, still I cannot say that the Court below was undoubtedly wrong in believing Kally Doss's evidence, or in allowing so little weight to that of Mr. Sims and his clerk. The Judge (an officer of unquestioned ability and long experience) had these witnesses before him, and so had advantages in forming an opinion which this Court cannot have, and if he, after a careful and deliberate weighing of that evidence, came to a conclusion unfavourable to the accused, I do not think that this Court would be justified in interfering under s. 297, however much it might hold a contrary opinion as to the value of the evidence.

One portion, however, of the Sessions Judge's decision must be altered. The Advocate-General, on the part of the Crown, has admitted that the order of the Sessions Judge, directing the payment of the Rs. 2,000, previously deposited by Zahoorooddeen to Kally Doss, cannot be sustained, and there is certainly nothing on the record whereby the accused can be in any way connected with this money, or to show that the Rs. 2,000 formed any part of the sum obtained by the cheating. So much therefore of the Sessions Judge's order must be set aside, and the money will be returned (if it has been paid to the prosecutor) to the party by whom the money was deposited, or to his representatives. With this exception, I hold that no ground has been made out for our interference where we have jurisdiction to interfere, and that on the merits of the case we have no power to interfere at all.

I would therefore reject this application. The accused must surrender to his bail, and be committed to jail to undergo his sentence.

PONTIFEX, J.—The record in this case was called for under s. 294, Criminal Procedure Code, upon an application made by the petitioner, stating that irregularities had occurred in the proceedings of the Courts below sufficient to induce this Court to satisfy itself as to the legality or propriety of the sentence passed by the lower Court.

The irregularities complained of were as follows: 1st.—That the lower Court had directed payment to the prosecutor of a sum of Rs. 2,000 standing in deposit, and over which it had no jurisdiction. 2ndly.—That certain questions proposed to be asked by the defendant's Counsel of some of the prosecutor's witnesses had, on the alleged ground of privilege, been stopped by the Court, and that two witnesses, who had been examined for the complainant in the original investigation before the Magistrate, had not been produced for cross-examination by the prisoner.

With respect to the first irregularity, the Advocate-General has conceded that the lower Court had no jurisdiction to deal with the Rs. 2,000; and the order of the lower Court must be modified so far by directing the refund of the Rs. 2,000 to the person (or his representatives) who, in pursuance of the order of the lower Court, paid that sum, if it has been paid, to the prosecutor.

With respect to the questions proposed by the prisoner's Counsel having been stopped on the ground of privilege, the fact is that in the lower Appellate Court the questions which had originally been stopped were put and answered; and with respect to the prisoner not having had the opportunity of cross-examining two of the original witnesses for the complainant, it is sufficient to say that the lower Court has not relied on either of those witnesses, and its decision would undoubtedly have been the same if those two witnesses had never been examined.

But it has been argued on behalf of the prisoner that the record in the case having, on proper and sufficient grounds, been called for and examined by this Court, we may now apply ourselves to the whole evidence in the lower Court, and if we consider the conviction improper, we may, under ss. 294 and 297, reverse it, and pass such judgment, sentence, or order as we think fit.

I am of opinion that under s. 294 we have no power to interfere with the conviction, unless there has been some material error of law which renders such conviction illegal and improper in law. I am further of opinion that there has not in this case been any such material error in law as would authorize us to interfere with the conviction; and if the conviction stands, I cannot say that the sentence is an improper one for the offence for which the prisoner has been convicted.

Upon first hearing the evidence, I was strongly inclined to think that I should not myself have considered it sufficient for a conviction, and even now, if I were trying the prisoner on the evidence taken in the Courts below, I should myself discharge the prisoner on the ground that the evidence was not sufficient for his conviction. But I am bound to say that, after a careful perusal of all the papers in the case, the judgment of the Court below does not seem to me to rest upon such a weak foundation of evidence as I at first supposed. I think there can be no doubt upon the evidence that the prosecutor did own some share or interest in indigo factories. It is immaterial to the propriety of this conviction whether such indigo factory, or the prosecutor's interest therein, was of the value of Rs. 80,000? The questions are—has the prosecutor any interest in any indigo factory, and did he attempt to sell such interest for Rs. 80,000?

There is certainly evidence on both those points, and on that evidence the Court below, which is, under the law, the proper tribunal to come to a final decision on the facts, has convicted the prisoner. With such conviction, therefore, we cannot interfere; and except with respect to the Rs. 2,000, which will be repaid as before-mentioned, the sentence of the lower Court will stand.

*Sentence modified.*

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## APPENDIX.

*Before Mr. Justice Jackson and Mr. Justice Mitter.*1873.  
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Ap. 2.IN THE MATTER OF THE CHAIRMAN OF THE MUNICIPAL COMMISSIONERS FOR THE SUBURBS OF CALCUTTA *v.* ANEESOODDEEN MEAH.<sup>1</sup>*Conviction—Illegal Sentence—Fine.*

THE following case was referred by the Magistrate of the 24-Pergunnas for the opinion of the High Court :—

"The defendant was, on the 18th July last, convicted before a Bench of Magistrates for infringing the provisions of s. 66, Bengal Act III. of 1864, in that he had kept on his land some bones more than twenty-four hours, otherwise than in a proper receptacle. The Bench found him guilty and sentenced him to pay a fine of Rs. 10, and further ordered him to remove the bones in three days, or in default to pay a fine of Rs. 2 for every day the nuisance continued unabated.

"It appears to me that, in accordance with the rulings of the High Court in the cases of *In re W. N. Love*<sup>2</sup> and *In re Sagar Dutt*,<sup>3</sup> the latter part of the conviction is bad, as being in fact an adjudication in respect of an offence which had not then been committed. As such an order vitiates the entire conviction, I submit the proceedings with a view to their being quashed, should the High Court think this course necessary."

The opinion of the Court was delivered by

JACKSON, J.—We think it proper to follow the precedent in the case of *In re W. N. Love*.<sup>2</sup> In the case of *In re Sagar Dutt*,<sup>3</sup> the Court had before it a conviction before the Justices, regulated by the English law, and which "could not be amended."

We set aside so much of the order before us as inflicts a fine prospectively of "Rs. 2 for every day the nuisance remains."

*Before Mr. Justice Phear and Mr. Justice Morris.*THE QUEEN *v.* AMANULLA.<sup>4</sup>1874.  
March 16.12 B. L. R.  
Ap. 15.  
[21 W. R. 49.]*Criminal Procedure Code (Act X. of 1872), s. 249—Evidence of Witnesses before the Committing Officer.*

UPON the trial of the prisoner for the murder of his wife and infant child, the witnesses for the prosecution gave evidence contradicting the evidence given by them before the Committing Magistrate.

The Sessions Judge, purporting to act under s. 249 of Act X. of 1872, discarded the evidence taken before himself, and grounded his judgment on the evidence given before the Magistrate, and upon this evidence he convicted the prisoner and sentenced him to death.

<sup>1</sup> Reference to the High Court, under s. 206 of Act X. of 1872, by the Magistrate of the 24-Pergunnas, dated the 29th August 1873.

<sup>2</sup> 9 B. L. R. App. 35 (see p. 546 of this book).

<sup>3</sup> 1 B. L. R. O. Cr. 41 (see p. 40 of this book).

<sup>4</sup> Criminal Appeal, No. 132 of 1874, against the order of the Sessions Judge of Rungpore, dated the 14th February 1874.

The prisoner appealed to the High Court.

Baboo *Bhuggobully Churn Ghose* for the appellant.

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PHEAR, J. (after stating the facts and various portions of the evidence adduced on behalf of the prosecution, continued): Now, it is remarkable that all these witnesses, not even excepting the chowkedar, told different stories altogether before the Sessions Court from those which they told before the Deputy Magistrate—different in material points. Ashirun, Upasha, and Duri, had their depositions read to them, and denied the truth of the statements which they made before the Deputy Magistrate. It is quite clear then that these witnesses are in themselves untrustworthy. Their testimony before the Sessions Court could not be relied upon, nor did it make out the case which the prosecution came into Court to establish. There was one other witness besides those that I have spoken of, namely, the Superintendent of Police, who searched Amanulla's house some fifteen or sixteen days after the occurrence, and spoke to traces of blood in various places. I shall have occasion to remark more particularly upon his evidence presently. It is enough for the present moment to say that, even taking it at the utmost which it can be worth, we think this man's testimony does not supply the defect apparent in the testimony of the other witnesses. The Sessions Judge perceived that the case for the prosecution was not made out by the testimony given before the Sessions Court, and he expressed his opinion that the principal witnesses had then perjured themselves. Indeed, two, if not three, of them he directed to be sent before the Magistrate upon a charge of giving false evidence. Nevertheless, he convicted the prisoner of murder, and sentenced him to be hanged. This is certainly a somewhat startling result, and he arrived at it in the following way: After making some analysis of the testimony of the witnesses before him, and contrasting it with the depositions which they had made before the Deputy Magistrate, he says: "From the above abstract of the evidence of the witnesses as given before the Committing Officer and before this Court, it is evident that the two sets of evidence are contradictory and inconsistent with each other. The question now is, whether the whole evidence ought to be treated as untrustworthy on the ground of those contradictions and inconsistencies, or whether a portion of it should be relied upon and made the basis of my judgment in the case? Now, as regards the evidence given by the witnesses before the Committing Officer, it must be observed that, at the time when they were examined by that Officer, they were apparently free from all external influence, and would have deposed to nothing but what they had witnessed; while, on the other hand, when they gave their evidence before this Court, those interested in bringing about the prisoner's acquittal had had ample opportunity of tampering with the witnesses, and the witnesses themselves had also sufficient time to think over the consequences of their evidence. I have, therefore, very carefully considered both these sets of evidence, and have duly weighed the circumstances under which each was given, as also the arguments urged against its credibility by the prisoner's Counsel, and the conclusion at which I arrive is that the testimony of the witnesses as given before the Committing Officer is to be believed, and I do accordingly believe it, and, acting under the provisions of s. 249, Criminal Procedure Code, I ground my judgment thereon."

In other words, the Judge founds his conviction of the prisoner on the charge of murder upon the testimony which was given before another judicial officer, not before himself, by the very persons who, according to his own view, before him showed themselves, in the very same matter, to be utterly unworthy of belief. Even if s. 249 warranted the Court in taking such a step as this, it seems to me certainly an inordinately long step to take. And I might almost say that the

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logical consequence would be that the taking of evidence in the Sessions Court might be altogether dispensed with. For if it is legitimate, proper, and safe that the Sessions Court should come to a verdict against the prisoner upon the evidence given before the Magistrate by witnesses who before the Sessions Court denied that evidence, and showed themselves unworthy of belief, *a fortiori*, it would be right, proper, and safe for the Sessions Court to found its judgment upon the evidence given before the Magistrate in those cases where the witnesses afterwards confirm that evidence by the testimony which they give in the Sessions Court. And I think that this very obvious consequence shows very conclusively that the Judge misapprehended the true scope of s. 249 of the Criminal Procedure Code. That section runs in these words: "When a witness is produced before the Court of Session or High Court, the evidence given by him before the Committing Magistrate may be referred to by the Court, if it was duly taken in the presence of the accused person; and the Court may, if it think fit, ground its judgment thereon, although the witnesses may, at the trial, make statements inconsistent therewith."

It appears to me that the Legislature, in framing this enactment, desired merely to authorize the Court to take a particular statement made by a witness before the Committing Magistrate as the true statement, notwithstanding that it was denied, or a statement inconsistent therewith was made by the witness before the Court itself, if the Court could see from the evidence of that same witness before itself, or of other witnesses before itself, that the original statement was worthy of belief;—not that the Court should discard wholly the testimony of witnesses given before it, and have recourse to the testimony of the same persons which was given elsewhere before another judicial officer on the occasion of making the investigation preliminary to the final trial. The discretion which is conferred by the passage, "if the Court thinks fit," in s. 249, is to be exercised upon substantial materials rightly before the Court, and reasonably sufficient to guide the judgment of the Court to the truth of the matter, and not, as was the case here, upon mere speculation or conjecture.

I think, therefore, that the prisoner ought not to have been convicted, and that the sentence of the Sessions Court should be set aside and the prisoner discharged.

MORRIS, J.—I quite agree in the view of the evidence taken by my learned colleague in this case. I also think that it was not safe to convict the accused Amanulla solely on the evidence given by the witnesses before the Magistrate—witnesses whom the Judge considered had perjured themselves before him. It seems to me that, under s. 249 of the Criminal Procedure Code, a Judge may base his judgment on the evidence given before the Magistrate in the presence of the accused, when there are special and particular reasons for considering that evidence to be honest and true, and when that evidence is to a certain extent corroborated by independent testimony before himself. In the present instance there is nothing of this kind. There is really no one such substantive fact conclusively proved as can enable the Judge to say with confidence that the evidence given before the Magistrate was true as opposed to what was said before himself. Nor can it be said that the police-officer or any other witness before the Court of Session affords independent testimony corroborative of the evidence given before the Magistrate. It is most unfortunate that so much valuable time was lost in the prosecution of this case. The police-officer who made the first enquiry considered that the mother and child had died of cholera, and that the case was not one of murder; and certainly on the evidence, as it now comes before us, I think it impossible to say that there is any certainty in regard to the

mother and child having been murdered by the prisoner. I therefore concur in ordering the discharge of the prisoner.

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*Before Mr. Justice Markby and Mr. Justice Birch.*

THE QUEEN *v.* HATU KHAN.<sup>1</sup>

*Criminal Procedure Code (Act X. of 1872), ss. 296, 297—Powers of High Court—Sentence of Acquittal.*

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Dec. 16.

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Ap. 22.

IN this case, in which the accused was charged under ss. 141, 441, and 352 of the Penal Code, the Deputy Magistrate, after hearing two of the prosecutor's witnesses only, and without taking the evidence of the remaining witnesses named by the prosecutor, two of whom at least were present at the trial, and without examining the prosecutor himself in the presence of the accused, passed a judgment of acquittal under s. 211 of the Criminal Procedure Code.

The Magistrate, being of opinion that such judgment was illegal, reported the case and forwarded the record thereof to the High Court under s. 296 of the Criminal Procedure Code, with a request that that Court would pass "an order directing the re-trial of the accused with observance of the proper procedure."

The judgment of the High Court was delivered by

MARKBY, J.—We do not think that we have power to do what the Officiating Magistrate asks, namely, to set aside the acquittal of the prisoner, and to direct a re-trial. The proceedings of the Deputy Magistrate were undoubtedly illegal, but they have resulted in the acquittal of the prisoner, and we are not empowered by the Criminal Procedure Code to interfere when a prisoner has been improperly acquitted. If a prisoner has been improperly discharged, we may order him to be tried, or to be committed for trial, under the second clause of s. 297. If the Legislature had also intended us to interfere when the prisoner was acquitted, it would undoubtedly have been so expressed in that clause.

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<sup>1</sup> Criminal Reference from the Officiating Magistrate of Bograh, dated the 12th November 1873.



## BENGAL LAW REPORTS.

[FULL BENCH.]

*Before Sir Richard Couch, Kt., Chief Justice, Mr. Justice Jackson,  
Mr. Justice Phear, Mr. Justice Birch, and Mr. Justice Morris.*

THE QUEEN v. OKHOY COOMAR SHAW.

IN THE MATTER OF THE PETITION OF NAGENDRA LAL CHATTERJEE.<sup>1</sup>1874.  
March 30.

Penal Code (Act XLV. of 1860), s. 405—Partner—Criminal Misappropriation.

13 B. L. R.

307.

A partner who dishonestly misappropriates or converts to his own use any of the partnership property with which he is entrusted, or which he has dominion over, is guilty of an offence under s. 405 of the Penal Code. [21 W. R. 59.]

THIS was an application under s. 297 of the Code of Criminal Procedure to call up the record of a case before the Cantonment Magistrate of Dinapore, in which the petitioner, on the 26th of January 1874, on solemn affirmation, charged Okhoy Coomer Shaw and others with the offence of criminal misappropriation. The Magistrate, relying upon the decision *In the Matter of the Petition of Lall Chand Roy*,<sup>2</sup> dismissed the complaint, and discharged the defendants on the ground that, by a deed of partnership, the complainant and the accused were joint owners of the property in respect of which the criminal misappropriation was alleged to have been committed. The application was made before Couch, C.J., and Ainslie, J., who, differing from the decision *In the Matter of the Petition of Lall Chand Roy*,<sup>2</sup> referred to a Full Bench the following question: "Whether, if a partner dishonestly misappropriates or converts to his own use, or dishonestly uses or disposes of, any of the partnership property which he is entrusted with, or has dominion over, he is guilty of an offence punishable under the Penal Code?"

The parties were not represented by Counsel.

The opinion of the Full Bench was delivered by

Couch, C.J.—In this case a charge was preferred by the applicant against Okhoy Coomar Shaw and others before the Magistrate of an offence of criminal misappropriation. The Magistrate dismissed the complaint, and discharged the defendants on the ground that the complainant and the accused were partners, or, as he says in the first part of his judgment, that they were, according to a deed of partnership, joint owners of the property in respect of which the criminal misappropriation was alleged. He founded his decision upon a case in this Court—*In the Matter of the Petition of Lall Chand Roy*<sup>2</sup>—in which two of the learned Judges, Kemp, J., and the late Mitter, J., held that, if there was a partnership, there could not be a conviction for criminal breach of trust. Elphinstone Jackson, J., appears to have doubted this, and not to have concurred with the other two Judges. He took a different view of the facts of the case, and also said that he was inclined to think that there might be circumstances under which one partner might be guilty of criminal breach of trust against another.

An application was made to this Court before myself and Ainslie, J., under s. 297 of the Criminal Procedure Code, to send for the papers, and to decide upon the validity, in point of law, of the Magistrate's decision.

<sup>1</sup> Criminal Appeal of 1874 against an order of the Cantonment Magistrate of Dinapore, dated the 26th January 1874.

<sup>2</sup> 9 W. R. Cr. Rul. 37.



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Seeing that the Magistrate had acted upon a decision of this Court, we felt bound to refer the question for decision by a Full Bench, although I think, I may say, that we neither of us at the time entertained any serious doubt upon it.

It appears that there is a decision of Markby and Birch, JJ., in the case of *The Queen v. Gour Benode Dutt*,<sup>1</sup> in which those learned Judges have held that there may be an offence under s. 424 of the Penal Code; there may be a fraudulent concealment or removal of property, whether the fraud is intended to be practised on creditors or partners. This case was not quoted when the application was made to us; but if it had been, we should still have been under the necessity of referring the question to a Full Bench.

<sup>1</sup> Before Mr. Justice Markby and Mr. Justice Birch.

THE QUEEN v. GOUR BENODE DUTT AND ANOTHER (a).

*The 4th December 1873.*

*Penal Code (Act XLV. of 1860), s. 424—Partner—Fraudulent Removal of Property.*

Mr. T. D. Ingram (Baboo Poorno Chunder Mookerjee and Sham Lal Mitter with him) for the petitioners.

The judgment of the Court was delivered by

MARKBY, J.—The prisoners in this case have been convicted of dishonestly removing certain account books under s. 424 of the Indian Penal Code. It appears that the books in question were books of account belonging to a partnership, and I will assume, for the purposes of this case, that the Magistrate has found that the prisoner Gour Benode Dutt was a partner in this business, and therefore, as a partner, the books will be the property of himself jointly with his co-partners. The books were kept at the headquarters of the firm at Cutwa, and were removed by the prisoners at night. There had been some disputes between the members of the firm; and upon the removal of the books being made the subject of a charge against the prisoners, they denied having removed the books, and said that it was a false charge got up against them.

Now, it is contended before us that the prisoner Gour Benode Dutt, as being a partner in the concern, and having therefore a right to the custody of these books, could not be guilty of the offence under s. 424. It is urged that s. 424 belongs to a class of offences which comprise concealment or removal of property so as to defraud creditors; and, further, that a person could not be guilty, criminally speaking, of removing property of which he himself is the owner. Now, it is not necessary for us to enter into the question, whether or no a partner would have a right of removing books of the firm from their proper place of custody, namely, the place where the business is usually carried on. Assuming that he has such a right, still it appears to us that the case falls within s. 424. It is found that the object of removal was to defraud his co-partners, and there is nothing in s. 424 which would justify us in limiting it, as we are asked to do, to offences in respect of creditors only. The heading of the chapter is perfectly general—"Of Fraudulent Deeds and Dispositions of Property;" and the words of the section are also perfectly general. There is no reason why a man should not be criminally punished for defrauding his partner, just as he would be criminally punished for defrauding his creditors; nor is there any reason why a man should not fraudulently remove the property of a partnership just as he may fraudulently remove the property which belongs to himself. There may not have been that particular sort of removal which is necessary to constitute theft; but what we are considering, is not whether the prisoners are guilty of theft, but whether they are guilty of an offence under this section, and the offence which this section contemplates is such a removal or concealment of property—in other words, such a change of the place in which the property is deposited—as can be considered fraudulent. That having been found to be the case, I see no reason in point of law why this conviction should not stand.

Mr. Ingram is also desirous to go into the facts of the case. I think it would be contrary to the practice of this Court, when the facts have been twice investigated and found against the prisoners, that they should be again reconsidered here. Assuming the

(a) Application under s. 207 of the Criminal Procedure Code against an order of the Officiating Magistrate of East Burdwan, dated the 22nd September 1873.

We think the words of s. 405 of the Penal Code are large enough to include the case of a partner, if it be proved that he was in fact entrusted

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facts found to be correct, I think that the prisoners are rightly convicted.

I wish to add that, in our opinion, the case which has been referred to—*The Queen v. Allah Buksh (a)*—is quite distinguishable from the preseat one. The observations of the Chief Justice in that case, we think, were only intended to apply to the facts of that case and the charge then under consideration. That was not a charge under s. 424, nor was there any allusion to that section; but the charge was one of the theft under s. 378, and the Chief Justice only says that, if any offence had been committed at all, it certainly was not theft.

The case will, therefore, go back to the Magistrate of the District, who will give necessary orders for carrying out the sentence passed upon the prisoners.

(a) *Before Mr. Justice Norman, Offg. Chief Justice, and Mr. Justice Lock.*

*The 15th April 1871.*

### THE QUEEN v. ALLAH BUKSH. (b)

*Penal Code (Act XLV. of 1860), s. 378—Partner—Theft.*

NORMAN, J.—The facts of this case are as follow: Kiamooddeen, the gomasta of a shop, called the shop of Mozuffer Meah, was coming out of the Small Cause Court with some books, a *khatiyān* and a *jama-kharach* account, belonging to that shop. Allah Buksh, who had a share in that shop, took these books out of the possession of Kiamooddeen, and kept them against the will of Kiamooddeen, saying they were his.

The Deputy Magistrate says: "The fact of Allah Buksh having a right to the papers is not questioned in this case. He may have every right to them; but so long as they are legally in the possession of another person, he cannot get possession of them, except through the Civil Court. It matters little either whether he is any special gainer by taking possession of the papers, when the fact remains that he did take them, and that against the will of the complainant.

The Deputy Magistrate found Allah Buksh guilty of theft, and sentenced him to a fine of Rs. 10, and ordered the papers to be returned to the complainant.

It appears to me that this conviction cannot be sustained.

Kiamooddeen was the servant of the prisoner Allah Buksh and his partners. By s. 27 of the Indian Penal Code, it is declared that, when property is in the possession of a person's servant, it is in that person's possession within the meaning of that Code. The *khatiyān* and *jama-kharach* account must, therefore, be taken to have been in the possession of Allah Buksh and his co-sharers at the time when Allah Buksh took them from Kiamooddeen. S. 378 does not include under the offence of theft the case where one joint proprietor takes into his own sole possession property belonging to himself and his co-proprietors, which had been previously in their joint custody. If the law were as supposed by the Magistrate, no master could safely take his own property from the hand of his servant; no partner in a business could safely take a rupee from the till for the most urgent necessity. It may be that the accused did, or intended to do, some wrong to his co-sharers in taking possession of the books. But, if so, the offence, if any, is not theft.

I am of opinion that the conviction and order of the Deputy Magistrate must be quashed, and the fine refunded.

LOCK, J.—To constitute the offence of theft, there must be not only a taking against the will of the person in possession, but a taking dishonestly. The definition of "dishonestly," as given in s. 24 of the Penal Code, is the doing anything "with the intention of causing wrongful gain to one person or wrongful loss to another person." Did Allah Buksh take the book from the gomasta dishonestly as defined above? He does not appear to have done so with any intent to injure his co-partners, or to derive gain to himself. It is true that the gomasta says in his examination that the papers showed an entry of Rs. 500, by not showing which the accused would gain. But there is nothing to show that Allah Buksh intended to make away with these papers, and the gomasta admits that they were heretofore in the possession of Allah Buksh and his two co-sharers.

I do not think the charge of theft is made out, and I concur with the Chief Justice in quashing the conviction and directing the repayment of the fine.

(b) Reference to the High Court under s. 434, Act XXV. of 1861, by the Officiating Magistrate of Backergunge, dated Barisal, the 27th March 1871.

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with the partnership property, or with a dominion over it, and has dishonestly misappropriated it or converted it to his own use. There is no reason that the case of a partner should be excepted from the operation of this section. Indeed, there is every reason that it should be included in it. It is a question of fact whether there has been an entrusting of the property, or giving a dominion over it, sufficient to come within what is required. But if it be made out by the evidence that one partner was entrusted by his co-partners with property or with a dominion over it, and that he had dishonestly misappropriated it, or dishonestly used it in violation of the mode in which his trust was to be discharged, or of the agreement between the parties as to the use he was to make of the property, he ought to be tried for that offence. I therefore think we should say that the decision *In the Matter of the Petition of Lal Chand Roy*<sup>1</sup> cannot be supported, and that the Magistrate ought to enquire into the charge, and determine whether, upon the evidence which may be produced before him, there is sufficient ground for putting the accused upon their trial. I do not think that we can make an order of that kind in the Full Bench. The matter will, therefore, stand over until Ainslie, J., returns.<sup>2</sup>

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[FULL BENCH.]

*Before Sir Richard Couch, Kt., Chief Justice, Mr. Justice Kemp, Mr. Justice L. S. Jackson, Mr. Justice Phear, Mr. Justice Markby, Mr. Justice Glover, Mr. Justice Ainslie, Mr. Justice Pontifex, Mr. Justice Birch, and Mr. Justice Morris.*

THE QUEEN v. MAHOMED HOOMAYOON SHAW.<sup>3</sup>

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*Alternative Charge—Finding—False Evidence—Contradictory Statements—Criminal Procedure Code (Act X. of 1872), s. 455, Sch. III.—Penal Code (Act XLV. of 1860), s. 193.*

Where a person was convicted of giving false evidence upon an alternative charge in the form given in Sch. III. of the Criminal Procedure Code, *Held*, by the majority of the Court (JACKSON and PHEAR, JJ., dissenting), that the conviction was good, notwithstanding the jury had not distinctly found which of the two statements charged was false.

*Held per* JACKSON, J., that such a charge is bad, and further that an alternative finding upon such charge is invalid.

*Held per* PHEAR, J., that, although a person may be lawfully tried upon such a charge, still the Court or jury must, for a conviction, find specifically which branch of the alternative is true.

THE question arising in this case was as to the validity of a conviction upon a charge of giving false evidence framed in the alternative. The matter was referred for the opinion of a Full Bench by JACKSON and MITTER, JJ. The facts appear sufficiently in the observations made by the former Judge on referring the case.

JACKSON, J.—The offence of which the prisoner is convicted is stated in these words: "That he did, on or about the 23rd day of January 1873, at Alipore, in the course of the trial of Tulsi Das Dutt and Mahomed Latif on a

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<sup>1</sup> 9 W. R. Cr. Rul. 37.

<sup>2</sup> Ainslie, J., was at this time absent on leave.

<sup>3</sup> Criminal Appeal, No. 656 of 1873, against an order of the Officiating Additional Sessions Judge of the 24-Pergunnas, dated the 12th August 1873.

charge of cheating, state in evidence before Moulvi Abdul Latif, Deputy Magistrate at Alipore, that the greater part of the furnitures was sent by me to that house (*viz.*, the house at Chitpore), and a small portion by Belilios and Zahur-uddin; and that he did, on or about the 13th day of February 1873, at Alipore, in the course of the trial of J. R. Belilios, Tulsi Das Dutt, and Mahomed Latif, in the same case of cheating, state in evidence before Moulvi Abdul Latif, Deputy Magistrate at Alipore, that Belilios never sent any furniture of his own or of any one else to that house (*viz.*, the house at Chitpore), nor was any of the furnitures in that house belonging to Belilios;” and it is said that one of these two contradictory statements the prisoner “either knew or believed to be false, or did not believe to be true, and that he has thereby committed an offence punishable under s. 193 of the Indian Penal Code.” It is not found that one or the other of these statements is in fact false, or that either of such statements, if false, was intentionally given, but the conviction manifestly rests upon the simple circumstance that the two statements are contradictory one of the other. It has been contended that neither s. 193 or s. 72 of the Indian Penal Code, nor any provision of the Criminal Procedure Code of 1872, justifies such conviction. There is a ruling of the Full Bench in the case of *The Queen v. Mussamat Zamiran*<sup>1</sup> which supports the conviction, but the authority of that decision has been questioned in several later cases, *viz.*, the case of *The Queen v. Mati Khowa*,<sup>2</sup> the case of *The Queen v. Nomal*,<sup>3</sup> and the cases of *The Queen v. Soonder Mohoorie*,<sup>4</sup> *The Queen v. Kalichurn Lahoree*,<sup>5</sup> and *The Queen v. Bidu Noshyo*.<sup>6</sup> For myself I feel bound to say that I always entertained the contrary opinion. I expressed that opinion on the occasion of a case coming

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<sup>1</sup> B. L. R. Sup. Vol. 521.

<sup>2</sup> 3 B. L. R. A. Cr. 36 (see p. 112 of this book).

<sup>3</sup> 4 B. L. R. A. Cr. 9 (see p. 159 of this book).

<sup>4</sup> 9 W. R. Cr. Rul. 25.

<sup>5</sup> 9 W. R. Cr. Rul. 54.

<sup>6</sup> Before Justice Sir C. P. Hobhouse, Bart., and Mr. Justice Markby.  
The 24th June 1869.

#### THE QUEEN v. BIDU NOSHYO AND OTHERS.(a)

*Alternative Finding—False Evidence—Contradictory Statements—Criminal Procedure Code (Act XXV. of 1861), s. 381.*

The following judgments were delivered:—

HOBHOUSE, J.—I should have preferred in these cases that the Judge had come to a distinct finding on one or other of the alternative charges made against the prisoners, and that some attempt at least should have been made to obtain evidence upon one or other of the said charges before judgment was given, and a finding arrived at in what is known as the alternative form.

I cannot tell from the records in these cases whether or not such evidence was available, but it seems at first sight that no attempt was made to procure it, and whether the alternative finding be legally good or not, it is certainly not in the interests of justice to be resorted to, until both the Committing Officer and the Sessions Judge are satisfied that no reliable evidence is procurable in support of one or other of the two charges.

It is quite certain, however, that we cannot now obtain any finding of the Judge on either of the charges separately, for he is no longer Judge of the district, nor can we expect after this lapse of time to obtain any satisfactory finding on a re-trial.

(a) Criminal Appeals against orders of the Officiating Sessions Judge of Rungpore, dated the 1st February 1869.

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before the English Committee of this Court in 1862, the papers of which case are appended to this record. It may be suggested that this reference is not necessary, inasmuch as the decision of the Full Bench is partly based on the terms of s. 381 of the old Code of Criminal Procedure, which is no longer in force,

I think, therefore, we must take the record as it stands, and decide upon that record as to the guilt or innocence of each one of the prisoners.

No. 66.

In this case the prisoners were each of them charged with giving false evidence in one or other of the following instances, *vis.*, either before the Magistrate in stating that a certain person was killed by one Eku, or before the Sessions Judge in stating that that certain person died of snake-bite.

They all pleaded guilty to the first charge.

The Judge and the assessors were equally unable to decide upon which one of the alternative charges, Gahori Mundul, one of the prisoners, was guilty; and so the Judge, concurring with the assessors, came to what is well known in our procedure as an alternative finding, to the effect that Gahori was guilty either of an offence under the first or under the second charge, and upon this finding the Judge sentenced the said prisoner to one year's rigorous imprisonment.

The Judge, differing from the assessors, thought himself able to decide that the rest of the prisoners before us were guilty of the charge of giving false evidence when they stated that the deceased died of snake-bite, and so he found them guilty under that charge, and sentenced each of them to three years' rigorous imprisonment. He relied entirely on "the evidence of the medical officer." That evidence was to the effect that, though the *post mortem* examination of the deceased showed no marks of snake-bite, and did show marks of violence such as to lead him to the opinion that the deceased died by strangulation, yet that some of the internal appearances of death by snake-bite would be like those of death by strangulation.

This evidence is not, in my judgment, sufficient evidence to warrant a conviction on the charge that the prisoners spoke falsely when they said that the deceased died of snake-bite; and I would therefore discharge the prisoners found guilty of this charge.

On the other hand, it is said that the first finding of the Judge is a legal finding within the meaning of the Full Bench decision in the case of *The Queen v. Mussamat Zamirani*.<sup>(a)</sup> As I understand that ruling, an alternative finding, to be a legal finding, must proceed upon two statements absolutely contradictory the one of the other, and irreconcilable, and thereby necessarily one or other of them false. But in this case the two statements of Gahori are not of this nature. In the one, according to the charge, he simply says that Eku told him he had killed Methi, and in the other he says he had heard that Methi had died of snake-bite.

These two statements are clearly not of a nature to warrant an alternative finding, and I would therefore discharge Gahori also.

No. 64.

In this case the prisoner was charged as in case 66 alternatively with giving false evidence.

He pleaded guilty to the second charge: the Judge thought this plea a false plea; the assessors thought it a true plea.

But eventually the Judge, differing from the assessors, found the prisoner guilty in the alternative form, *vis.*, guilty either of the offence of giving false evidence before the Magistrate, or of that of giving false evidence before the Sessions Court, and the Judge then sentenced the prisoner to one year's rigorous imprisonment.

Before the Magistrate the prisoner positively swore he had seen the accused beating a man, so that he died; before the Sessions Court he as positively swore he had seen no such beating.

(a) B. L. R. Sup. Vol. 521.

but I think it cannot be denied that, if the reasoning of Sir Barnes Peacock in that case is carried to its full extent, it will also hold good under the new Code of Criminal Procedure Code. It is also pointed out that Sch. III., annexed to the Procedure Code, contains the form of an alternative charge under s. 193, and from this it may be supposed that the intention of the Legislature was to make a conviction in that form perfectly good. As at present advised, I think this is not so, and on all considerations I think this matter should be referred to a Full Bench for an authoritative ruling.

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I am of opinion, therefore, that when the two statements to which the accused on the two several occasions deposed were of the nature shown, the Judge was justified in his finding—see the Full Bench ruling I have above quoted—and I would therefore uphold this conviction.

No. 68.

In this case the prisoners were committed to the Sessions on the alternative charge of having given false evidence either in stating that a certain deceased person was killed by a particular person, or in stating that that deceased person committed suicide.

The prisoners pleaded guilty to the first charge.

The Judge and the assessors were equally unable to say which statement was false, and which true; and the Judge, therefore, concurring with the assessors, came to a finding in the alternative form, *vis.*, to the effect that the accused were guilty either of an offence before the Magistrate or of an offence before the Sessions Court, and the Judge sentenced each one of the prisoners to one year's rigorous imprisonment.

I have read most carefully and more than once the so-called contradictory depositions on which the prisoners have been convicted and sentenced, and I find that none of the prisoners said before the Magistrate that the accused had killed the deceased. On the contrary, one of them distinctly said she had not seen the accused to do so. Neither did they say before the Judge that they had seen the deceased commit suicide. They spoke as from hearsay only.

I am of opinion, therefore, for the reasons given in No. 66, that the conviction of these prisoners is bad in law, and I would discharge them.

No. 67.

In this case the alternative charge was of the offence of false evidence either in stating that one Kalimuddin killed a deceased person, or in stating that one Shukti killed the same deceased person.

The prisoners pleaded guilty to the first charge.

The Court, concurring with the assessors, found the prisoners guilty in the alternative form, *vis.*, that they had given false evidence either in their respective statements before the Magistrate, or in their respective statements before the Sessions Court, and the Court sentenced each of the prisoners to two years' rigorous imprisonment.

In the case of the prisoner Patu, she swore before the Magistrate that one Kalimuddin had killed the deceased, and before the Sessions Court that one Shukti did so. But, in making this latter statement, we do not know whether she was speaking as from her own knowledge or not, and the statements are not either of them necessarily untrue nor even contradictory, for it is possible that both may have been true, for both Shukti and Kalimuddin may have together killed the deceased, and we must give every doubt in favour of the deceased.

In the case of the prisoner Ono, she did distinctly say before the Magistrate that she saw the accused kill the deceased, but before the Sessions Court she did not say that she saw Shukti kill the deceased. On the contrary, she spoke of this from hearsay only.

In neither case, therefore, are the two contradictory statements sufficient to warrant an alternative finding, and both prisoners, therefore, should, I think, be discharged.

No. 65.

In this case the alternative charge was that the prisoners gave false evidence either in stating that a certain person killed the deceased, or that the deceased committed suicide.

The prisoners pleaded guilty to the first charge.

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Mr. Jackson for the prisoner.—The charge, finding, and conviction in this case, are bad. Sch. III. of the Criminal Procedure Code contains a form of charge like the present one, but that form is inconsistent with the body of the Code. Before the passing of the new Code, an alternative charge was not allowed by the law; see *The Queen v. Palany Chetty*,<sup>1</sup> although in that case a conviction upon such a charge was held to be good; but the construction there put by the Court upon s. 242 of the old Code, and which, they stated, was support-

The Court, concurring with the assessors, came to the following finding, *vis.*, to the effect that the prisoners were guilty either of having given false evidence before the Magistrate or before the Sessions Court, and the Court sentenced the prisoners to one year's rigorous imprisonment.

There is no doubt that before the Magistrate the prisoners did distinctly swear that they saw the accused kill the deceased. But before the Sessions Court, when they spoke of the suicide of the deceased, they did so from hearsay only.

I think, therefore, that in this case there were no such contradictory statements as to warrant an alternative verdict, and I would therefore discharge both prisoners.

MARKBY, J.—I think it would be impossible to find a series of cases more strongly illustrating than these the extreme danger of resorting to alternative findings.

The cases before us comprise fourteen convictions for perjury. Thirteen persons, male and female, some very young, have been convicted and sentenced to various terms of imprisonment; one woman having been convicted twice. The prisoners have even been six months in jail under sentence. The cases, although arising out of facts originally unconnected, present features of remarkable similarity. All the prisoners gave evidence in the first instance before the Magistrate against persons who were accused on various occasions of having committed crimes of great violence, all or nearly all amounting to homicide. From the mass of papers before me, I have not been able to ascertain in how many different cases the prisoners were called as witnesses, but there were certainly several such cases, and these cases were not apparently in any way connected.

All the prisoners, when they appeared as witnesses before the Magistrate, gave evidence unfavourable to the persons then under accusation.

All the prisoners, when they appeared as witnesses before the Sessions Judge, gave evidence favourable to these same persons.

All the prisoners now adhere to their second statement, and all make the same defence, namely, that their first statement was a false statement made under compulsion put upon them by the police.

I gather from the judgment of the Sessions Judge that in all the cases he was strongly inclined to believe that the first statement was the true one; that he thought the charge of ill-treatment made against the police was unfounded; and that, even if true, it did not amount to a defence, because the prisoners were not in fear of instant death when they made their first statement. I infer, however, that he had not finally made up his mind on these points, because he does not act upon this view which would lead to a conviction of all the prisoners on the charge of giving false evidence before the Magistrate: in all the cases but one he convicts the prisoners of having given false evidence either before the Magistrate or before the Sessions Judge.

When these cases came before Hobhouse, J., and myself on the first occasion, we thought that s. 381 of the Code of Criminal Procedure, which gives power, when it is doubtful under which of two sections the offence falls, to come to a finding in the alternative form, did not apply to cases where the two charges are, as in this case, under the same section; we thought, therefore, that an alternative finding was not legal, and sent the cases back in order that the Sessions Judge might come to a legal finding. As, however, the Judge had, in the meantime, left the country, that order could not be complied with.

We must, therefore, deal with the cases as they stand.

<sup>1</sup> 4 Mad. H. C. Rep. 51.

ed by reference to the whole enactment, was obviously wrong, as is apparent if this section be taken in conjunction with the two preceding ones. The power to frame a charge in the alternative was first given by s. 455 of the new Code, but the only cases in which such a charge is allowable are indicated by the illustration to the section, *viz.*, cases in which the facts being clearly found it is doubtful on those facts what provision of the law applies; and this view is borne out by other provisions of the criminal law.

I have had the advantage of reading the judgment which Hobhouse, J., will deliver in this case, and, for the reasons he has so fully pointed out, the convictions of seven out of these thirteen prisoners must fail (a); because the statements made in each case on the two occasions, though conflicting in the sense of one being favourable, and the other unfavourable to the person accused, are not so absolutely contradictory that it is impossible that both should be true. It is, of course, plain that before a prisoner can be convicted of perjury on the ground that he has made two contradictory statements without ascertaining which of the two is true, and which is false, every presumption in favour of the possible reconciliation of the statements must be made. On that ground therefore, apart from all other considerations, the convictions of these prisoners must be quashed.

With regard to the five prisoners, Shinduri, Yendi, Punchma, Kishur, and Bhurru, who have been convicted of giving false evidence before the Magistrate, I do not find upon the record the evidence upon which the Sessions Judge relies as satisfying him that the statements on this occasion were false. He relies on the opinion of the medical officer and on something which passed before the Magistrate in an enquiry which took place on the spot. But neither the medical officer nor the Magistrate were called upon this trial, nor do I find any note by the Judge that the medical officer's deposition before the Judge was put in. There is nothing whatever, therefore, to support the finding against these five prisoners. But further, as Hobhouse, J., points out, even if the deposition of the medical officer may be looked at, it does not negative the statement of these prisoners before the Judge that the death in question occurred from snake-bite. The convictions of these five prisoners must, therefore, also be quashed.

The remaining case is that of Bidu Noshyo. He is a lad of fifteen. He maintains, like the rest, that the story told to the Magistrate was the untrue one, and that it was made in consequence of threats by the police.

The opinions of the assessors in this case are not as fully recorded by the Judge as required by s. 324 of the Code of Criminal Procedure, but I gather that, whereas the Judge thought the statement made on the second occasion was the false one, the assessors thought that was true, and that the statement made on the first occasion was false.

Now, apart from all questions of law, I consider that it was absolutely necessary clearly to ascertain in this case which of these two views was right. If the view of the assessors was right, then it seems to me extremely probable that the rest of the boy's assertion is true, namely, that he made his first statement under the influence of the police; and if he did so, it seems to me almost a perversion of language to call the making of this false statement a crime. It may be that, in strictness of law, it is so, but it is a crime which I should visit with no punishment.

An investigation which leaves it uncertain whether a crime has been committed which requires a year's rigorous imprisonment, or a crime which requires no punishment at all, whether legal or not, is to my mind highly unsatisfactory; and I am unable to affirm a conviction founded upon such an investigation.

Upon this view of the case, therefore, and differing as regards this prisoner with much regret from Hobhouse, J., I would quash this conviction also.

This being so, and all the convictions being disposed of on the merits, the point of law, whether the alternative finding is legal when the two charges are under the same section, does not strictly arise. But as a judgment on this point has already been delivered by us, I would say that the words of the section seemed to me so clear that I could not under-

(a) The names of these seven prisoners were given in the margin of the judgment as follows: Culi Awrat, Beni Awrat, Feli Awrat, Patu Awrat, Ono Awrat, Solim Awrat, and Gour.

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But, even if it be held that the present charge is a good charge under Sch. III., it is submitted that an alternative finding is inadmissible. There must be a separate charge for every distinct offence; Criminal Procedure Code, s. 452. When it is doubtful of which of several offences specified in the judgment the accused is guilty, he is to be punished for the offence for which the lowest punishment is provided; Penal Code, s. 72. The jury are to decide which view of the facts is true; Criminal Procedure Code, s. 257; and it is clear from the illustration to the section that, in the case of an alternative charge for murder or culpable homicide, an alternative finding that the accused had been guilty of one or the other would not be permitted. S. 263 enacts that the jury shall return a verdict on all the charges; if, therefore, in the present case, instead of a charge framed in the alternative, separate charges had been drawn up—and this is a matter wholly in the option of the officer who draws up the charge—the jury would have been bound to come to a distinct finding on each charge. Had the alternative charge been compulsory, the argument that the Legislature, when providing for an alternative charge, meant an alternative finding to follow, would, no doubt, have some force; but, as it is, it would seem that the Legislature intended to deprive juries of the power of returning alternative findings in cases in which there might be separate charges or heads of charge—a power which it had been decided they possessed under the old Criminal Procedure Code, Act XXV. of 1861; see *The Queen v. Palany Chetty*,<sup>1</sup> and *The Queen v. Mussamat Zamiran*.<sup>2</sup> Where the trial is with assessors, not only the finding, but the reasons for that finding, are to be specified in the judgment; Criminal Procedure Code, s. 464. Again, whereas s. 55 of the former Code, following the English rule, enacted that “a person who has once been tried for an offence, and convicted or acquitted of such offence, shall not be liable to be tried again for the same offence,” the corresponding s. 460 of the new Code provides that he “shall not be liable to be tried again on the same facts for the same offence.” It is evident that this provision would be a dead letter, unless the facts had been distinctly found on the previous trial: for instance, it would be impossible to plead a conviction upon an alternative finding in a case like the present in bar of a trial for perjury committed by making the first statement. Neither the case of *The Queen v. Palany Chetty*,<sup>1</sup> nor the Calcutta Full Bench

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stand, nor did I understand, that the Full Bench decision in the case of *The Queen v. Mussamat Zamiran* (a) turned upon this point. As regards my interpretation of the Full Bench decision, I am inclined now to think that I was wrong. But as regards my interpretation of the law, with the very greatest respect for the Judges who took part in that decision, I still think I am right.

It is, indeed, a matter of regret that there should be any difference of opinion on such a point. But, so far as any expression of the opinions of Judges of this Court may serve as a guide to the Courts of original or inferior appellate jurisdiction, I think that no inconvenience ought to follow. It is clearly the right course to follow the decision of a Full Bench rather than that of a single Judge.

I wish to repeat, however, that in my opinion this case most strongly shows how careful Judges ought to be in using the powers which s. 381 confers upon them. I believe every one would agree that that section was only intended as a last resort, when it became impossible to ascertain the truth.

The convictions of all thirteen prisoners will be reversed, and the prisoners released.

<sup>1</sup> 4 Mad. H. C. Rep. 51.

<sup>2</sup> B. L. R. Sup. Vol. 521.

decision in *The Queen v. Mussamat Zamiran*,<sup>1</sup> meets this difficulty, which Abbott, C.J., in *The King v. Harris*,<sup>2</sup> describes as a most material objection, *viz.*, that the defendant might be twice convicted and punished for perjury if the alternative finding were admissible. The object of the trial is to solve the question whether false evidence has, in fact, been given; but if the two depositions only are put in, and no other evidence offered, and the alternative finding allowed, the question remains unsolved. Moreover, if such a finding be good, proof of intention is unnecessary; the intention clearly cannot be inferred, as it might be where the jury finds that one statement is false.

Up to the present time the decisions in this Court on this subject have been conflicting; see *The Queen v. Mussamat Zamiran*,<sup>1</sup> *The Queen v. Bidu Noshyo*,<sup>3</sup> *The Queen v. Mati Khowa*,<sup>4</sup> and *The Queen v. Kola*.<sup>5</sup>

The Advocate-General, Offg. (Mr. Paul), for the Crown.—The jury have clearly found the accused guilty of giving false evidence. In summing up the Judge told them: “Before you can find him guilty, you must be satisfied that he made one or other of the statements contained in the charge, knowing that such statement was false, and intending deliberately to make a false statement.” [JACKSON, J.—That is no part of the referring order.] It corresponds with the wording of the order. The question whether a conviction under s. 193 of the Penal Code for giving false evidence can be based on two statements, diametrically opposed to each other, can be best determined by reference to the law of this country before the passing of the Penal Code. That law, it is submitted, was exactly the same as the English law before the decision in *The King v. Harris*.<sup>6</sup> That case turned upon a purely technical rule of English law: whereas in this country it would be open for a person who had been convicted upon a charge like the present one to plead in bar of a second trial, “I was convicted on a charge including the one now made of giving false evidence on the trial of A.” [JACKSON, J.—How would it be if the two statements were made, one in the course of a criminal trial, and the other in a civil proceeding?] That could only affect the degree of certainty. The Penal and Criminal Procedure Code do away with the necessity of proving which of the two statements is false. The contradictory nature of the statements is in itself proof that one or the other is false—*The Queen v. Ross*.<sup>7</sup> The new Criminal Procedure Code, Sch. III., legalizes a charge framed in the alternative; and *Place v. Potts*<sup>8</sup> shows that, when the Legislature has legalized a form of declaration, such form is not demurrable. [PHEAR, J.—The form given in Sch. III. would not apply to statements made in two different Courts; it is only with respect to statements made on the preliminary enquiry and on the trial.] That is just the present case. Then, if the offence is well described in the charge, both the finding and conviction upon the charge are valid. In *The Queen v. Narain Doss*,<sup>9</sup> a conviction on an alternative charge was held good. The words “view of the facts” in s. 257 of the Criminal Procedure Code refer to the views respectively taken by the prosecutor and the accused as to the guilt or

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innocence of the latter. There is no conflict of cases on the point. In *The Queen v. Mati Khowa*<sup>1</sup> and *The Queen v. Kola*,<sup>2</sup> the statements were not necessarily contradictory, and in all the cases decided in *The Queen v. Bidu Noshyo*<sup>3</sup> both statements might have been true.

Mr. Jackson in reply.

*Cur. adv. vult.*

The following judgments were delivered by the Full Bench :—

MORRIS, J. (BIRCH, J., concurring).—I think it sufficient to say upon this reference that, in my opinion, the conviction arrived at by the jury upon two charges framed in the alternative form, according to the model given in Sch. III. of the Criminal Procedure Code, is good in law. It seems to me that the two statements embodied in each charge, which were made by this prisoner, must be taken together, and that, when so taken together, they comprehend the specific offence of intentionally giving false evidence in a stage of a judicial proceeding. It is possible that each of the statements, and not one of them merely, was in itself false, and that, taken singly, each might have afforded good ground for a distinct charge of an offence under s. 193 of the Penal Code. But this course was not followed; the simpler course allowed by the law was adopted of framing a charge containing two contradictory statements of such a nature that the two, when taken in combination, disclosed the specific offence of intentionally giving false evidence. It must be matter of evidence whether the contradictory statements contained in the charge are *per se* so irreconcilable that one of them is necessarily false, and also that the prisoner in making them intentionally spoke falsely in regard to one of them. This it is the province of the jury or Court to determine, and, in the present instance, the jury had no difficulty in arriving at such a determination. It seems clear that the new Code of Criminal Procedure has expressly contemplated, and indeed provided for, this result. When s. 442 provides that the charge may be in the form given in the 3rd schedule, and when the 3rd schedule gives an alternative form of charge in these words—"That you, on or about (such a date and place), in the course of the inquiry into (such a matter), and before (such an officer), stated in evidence (such and such words); and that you, on or about (such another date and place), in the course of the trial of (so and so), before (such an officer), stated in evidence (such and such other words), one of which statements you either knew or believed to be false, or did not believe to be true, and thereby committed an offence punishable under s. 193 of the Indian Penal Code"—I cannot but hold that, if those statements are radically contradictory one of the other, so that the contradiction involves of necessity a falsehood, and it be proved that the deponent uttered them, and that he, by so doing, deliberately intended to speak falsely, the substantive offence of intentionally giving false evidence in a stage of a judicial proceeding is thereby established, and no need exists to determine by distinct evidence which one of the two statements is absolutely false. No doubt, strictly speaking, this form of charge is not an alternative charge in the sense contemplated by s. 455 of the Criminal Procedure Code. This is not a case where two or more offences are disclosed by the single act or set of acts committed, or rather alleged to have been committed, by the accused, and it is doubtful what particular offence in law can be found on the facts proved; but the alternative consists in this, that of two statements made

<sup>1</sup> 3 B. L. R. A. Cr. 36 (see p. 112 of this book).

<sup>2</sup> 4 B. L. R. A. Cr. 4 (see p. 155 of this book).

<sup>3</sup> *Ante*, p. 325 (or p. 633 of this book, note).

by the accused, one or other of them, it does not matter which, inasmuch as the two involve an absolute contradiction, must be of such a nature that the person making it either knew or believed it to be false, or did not believe it to be true. It is, as already said, expressly to meet this particular kind of offence that Sch. III. contains a specific form described as a form for "alternative charges on s. 193" of the Indian Penal Code. If it were intended that the jury or Court should find which of the two statements set out in the charge was false, not only would this form be cumbrous and unmeaning as an alternative form, but the force of the two contradictory statements in combination would be entirely lost, so as to enable such jury or Court to determine that the accused knew or believed one of the statements to be false, or did not believe it to be true, and that he thereby committed an offence under s. 193 of the Indian Penal Code.

AINSLIE, J.—I am also of opinion that the conviction on a charge framed in the form given in the 3rd schedule of Act X. of 1872 is good, although it may not declare which of the two statements set out in the charge is false. By s. 442 of the Act, a charge in that particular form is declared to be a good and valid charge. If it is a good charge to try a man on, it appears to me to follow of necessity that it must be a good charge to convict him on; and there is nothing in s. 461 which requires that the circumstances which constitute the offence should be set out in the conviction. It appears to me that this is not a case which comes under the second part of the section which refers to offences punishable under different sections, or parts of a section, of the Penal Code, but that it falls under the first part of s. 461. If the Court comes to the conclusion that the accused person must of necessity have given false evidence, it is sufficient, under the first part of s. 461, to state in the conviction that he has given false evidence, and is therefore punishable under s. 193 of the Penal Code.

MARKBY, J.—I am of opinion that a conviction in the form in which this prisoner has been convicted upon a charge in the same form is good in law.

It appears to me that this is a case to which the 2nd clause of s. 461 has no application. The offence of which the prisoner has been convicted is giving false evidence, and the section of the Penal Code under which he has been convicted is s. 193. There is no necessity, therefore, for resorting to the alternative given in the 2nd clause of s. 461, and it need not be further considered.

Nor does it appear to me that s. 455 has any application either. There was not in this case "a single act or set of acts of such a nature that it was doubtful which of several offences the facts which could be proved would constitute." The facts which could be proved, even if they are to be treated as a single set of acts, could only constitute the offence of giving false evidence under s. 193, and no other.

The only question which it appears to me that we have to consider in this case is whether a charge in this form is sufficient. If it is sufficient, then it appears to me to follow as a matter of course that a conviction which follows the words of the charge must be good also. And whatever might otherwise be my own opinion in the matter, I think we are precluded from saying that this is not a good charge, seeing that it is in the very form given by the 3rd schedule, and the Act provides (s. 442) that the charge may be in the form therein given.

It is said that the Legislature will thus, by the form in which they have drawn the charge, have altered the definition of the offence of giving false evidence as given under the Penal Code, which was not their intention. I am not sure that this is the effect of what has been done. But, even if it is so, the Legislature must, I think, be taken to have been aware, when they laid down

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these forms authoritatively, that the form in which a charge is laid does affect materially the evidence which is necessary to support it, and that, by changing the evidence which is necessary to support a conviction for an offence, the nature of the offence itself may sometimes be changed. I think there could not be here any accidental omission or oversight. This form of charge must have been given to meet this very case. I think, therefore, I am bound to consider this to be a good charge, and to apply to it the usual rule, which I understand to be this, that a charge is proved when all the material averments in it are proved. Here the finding is that all the averments are true; and a conviction in these terms is certainly a good conviction, though I should have thought it equally good if it had merely been that the prisoner was guilty of giving false evidence, as that would have been equivalent to a finding that the charge as laid was proved.

PHEAR, J.—The matter before us entirely depends upon the right construction to be placed upon certain portions of the existing Criminal Procedure Code, and if, in considering the question which has been put to us in this reference, we were restricted from travelling beyond the limits of the actual text of that Code. I think I should be led without difficulty to the opinion that the verdict of the jury ought not merely to find that the one or the other branch of the alternative charge made against the prisoner in the present case is true, but ought to specify which of the two branches is true.

The charge is a statement, express and implied (ss. 439 and 440), of the facts which the prosecution undertakes to establish by evidence against the accused, and several sections of the Code are directed to enacting that it shall generally be precise, single, and unambiguous.

The prosecution may (with certain limitation) at one and the same trial offer to the jury several views of the facts, either of one, so to speak, criminal occurrence, or of several criminal occurrences, according to which views the prisoner's conduct in each occurrence amounts to the commission of a corresponding offence (ss. 452, 453, 454, and 455). If there are several views of the same occurrence, then the offence varies with the section or part of a section within which the particular view brings it: if they are views of several occurrences, then the corresponding offences may fall within the same section. And it is important in reference to a Full Bench decision which will be presently mentioned to bear this distinction in mind.

These several views of the facts should generally be exhibited in a succession of distinct charges (s. 454); but (in the case at any rate of their being only alternative statements of one criminal occurrence) they may be put in the shape of an alternative charge (s. 455 explained by the illustration).

And whether alternative views of the facts of one criminal occurrence are exhibited in a series of charges, or in one alternative charge, if the Court is doubtful which is established by the evidence, it must expressly say so, and in that event will pass judgment in the alternative according to s. 72 of the Penal Code (para. 2, s. 461). In all other cases it would seem, at least inferentially, the Court must pass judgment separately on the view of facts involved in each charge.

The duty of the jury as a part of the Court is also, plainly, to decide which of the several views of facts presented to it for consideration by the prosecution is true (s. 257), and to say specifically as to the view of facts exhibited in each charge whether it is true or not (s. 263). There is no relief from this obligation to come to an express finding with regard to each alleged view or set of facts,

except that which is by implication given in para. 2, s. 461, just referred to, and that paragraph applies, as it seems to me, only to cases where the several sets of facts are the alternative representations of one criminal occurrence.

But the alternative views of facts stated in the charge which is now under our consideration are not alternative views of one criminal occurrence; they represent two entirely distinct criminal occurrences: the one being to the effect that the accused, on the 23rd January 1873, at Alipore, in the course of a trial of two persons on a charge of cheating before Moulvi Abdul Latif, stated in evidence, &c., which statement he at the time of making it knew to be false, &c.; the other that the accused, on the 13th February 1873, in the course of the trial of these same two persons, together with a third person on the same charge before the same Magistrate, stated in evidence, &c., which statement, &c. And, therefore, if the scope and spirit of ss. 455 and 461, para. 2, are that which I have above described, this case does not fall within either of them. In other words, there does not appear to be in the text of the Criminal Procedure Code any warrant for an alternative charge of this kind, or for an alternative finding of these two substantively different sets (or views) of facts, whether exhibited in an alternative charge or in two separate charges. Consequently, if the text alone of the Code were consulted, it would not, as I understand it, support the conviction which is before us.

And this is not a matter of mere technical regularity; it very closely touches upon the right and satisfactory administration of justice. Obviously, it might be of the greatest possible moment to the persons who were being tried before the Magistrate on the 23rd January and 13th February, that it should be distinctly established in the case now before us which of the two statements alleged to have been made by the present accused on those two days respectively was false. And, therefore, a procedure which would enable the prosecution in the present case to procure a conviction of the accused in the alternative, without troubling itself to go the length of establishing the falsehood of the one statement, or the other, might work a serious grievance to those persons. Again, the present accused person himself, by an alternative conviction, is deprived of the advantage which he ought to have in the event of a material witness to the falsity of one of the statements being convicted of perjury.

If, also, the prosecution is not under a legal obligation to establish the falsity of either statement, then it is plain that it may launch its case upon the bare evidence that the two alleged statements were respectively made, and then leave the prisoner to satisfy the Court as best he can that neither of them was false. This is the course which is most usually taken, and I do not hesitate to say that it is generally most unfair. The contradiction between the two statements is seldom absolute, though there is commonly enough opposition in them to lead a not over and scrutinizing jury to presume it; and the contradiction being arrived at, the falsity, again, is presumed in spite of anything which the prisoner may say in the dock. Convictions of this character are most unsatisfactory, and do very little to meet any real mischief. Yet the temptation to the public prosecutor to seek them is so great, that in this country perjury is hardly ever attacked in any other way. Deliberate perjury, persisted in, is not often the subject of prosecution in the Mofussil Courts. Several other considerations of public importance might be brought forward, but it seems to be sufficiently plain, without more, that perjury is the one offence of all others in the Penal Code which calls for precision and unambiguity of statement in the charge and in the judicial finding.

Thus it appears to me that the construction of the text of the Criminal Procedure Code, taken by itself, which I have arrived at, accords with the

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expediency of the matter, and that thereby its reasonableness is in some degree supported.

However, when we pass on from the text of the Criminal Procedure Code to the forms of charges in Sch. III. appended to the Code, which are prescribed for adoption by s. 442, we find the last of them runs as follows:—

That you, on or about the      day of      , at      , in the course of the enquiry into      , before      , stated in evidence that      , and that you, on or about the      day of      , at      , in the course of the trial of      , before      , stated in evidence that “      one of which statements you either knew or believed to be false, or did not believe to be true, and thereby,” &c.

Now, inasmuch as an alternative charge is only referable to s. 455, the fact that the Legislature has authorized this form seems to show that s. 455 was intended to extend, as it well may, beyond its illustration, that is to say, to the alternative allegation of different occurrences, at any rate in the particular case which is covered by this form. And it has been argued from the form itself that the finding of the jury and the judgment of the Court may, when such an alternative charge as this is preferred, be in the alternative. But s. 461, para. 2, certainly does not here apply, and it is difficult to see how the distinct provisions of s. 257 can be escaped.

The Full Bench ruling in the case of *The Queen v. Mussamat Zamiran*<sup>1</sup> decided that, under the late Criminal Procedure Code, there might be an alternative finding, as well in a case in which the evidence proves the commission of one of two offences falling within the same section of the Penal Code, and it is doubtful which of such offences has been proved, as in one in which the evidence proves the commission of an offence falling within one of two sections of the Penal Code, and it is doubtful which of two sections is applicable. This ruling, if it could be adopted now, would therefore support the finding in the present case. The reasoning, however, by which it was arrived at depended upon two sections of the old Code, which are not present in the new Code. The first of these sections was s. 242, which, so far as it is now necessary to quote it, ran thus: “When it appears to the Magistrate that the facts which can be established in evidence show the commission of one of two or more offences falling within the same section of the said Code, but it is doubtful which of such offences will be proved, the charge shall contain two or more heads charging each of such offences.” This was held to justify the framing a charge containing two heads, apparently similar in substance to that which is under our consideration. And although this s. 242 of the old Code is not repeated in the new Code, its substitute being the present s. 455, yet, so far as concerns the case before us, the double-headed charge may be said to be justified by the last form of Sch. III. Thus, we are under the existing Code, as well as under the old, carried over the first steps towards the Full Bench conclusion. And the double-headed charge of two offences having been in this way arrived at, the Full Bench made its second step upon the footing of s. 382, cl. 5, which authorized the jury to find in the alternative upon a double-headed charge. But there is no equivalent to this in the present Code. The jury are now bound to find which view of the facts is true (s. 257), subject only, as before-mentioned, to such qualification as is to be found in s. 461, para. 2, which appears to be purposely so framed as to exclude an alternative finding of two offences falling under the same undivided section of the Penal Code. It is carefully worded so as to cover the cases belonging to the

<sup>1</sup> B. L. R. Sup. Vol. 521.

first part of the old s. 247, but omits those of the second part, among which the Full Bench case and the present case come.

It was thrown out during the argument in this case that the "view of the facts," with regard to which the jury are by s. 257 called upon to decide whether it is true or not, is in a double-headed charge the, so to speak, entire alternative view expressed in the charge. But this does not accord with the natural meaning of the words. An alternative charge of the kind for which this construction of the sentence is especially wanted puts forward two views of the facts which are inconsistent with each other, and which might, if the prosecution had so chosen, been made the subject of a separate charge: either the accused told the truth on the first occasion and falsehood on the second, or *vice versa*.

It has been said that the prosecution, by alleging in the charge that the accused stated this on the first occasion and stated that on the second, and that one of these two statements was false, presents but one view of the facts to the jury. But it appears to me plain that this is not correct. The true effect of the charge is to put forward in a concise form at least two perfectly distinct views of facts, always inconsistent with each other, in those cases for which the ambiguous conviction is most zealously demanded, namely, in those cases where it is assumed to be patent on the face of the two statements that, if either one of them is true, the other must be false. And the very reason for thus putting forward two views is that the prosecution cannot venture to assert which view is true. When, then, the Legislature says that it is the duty of the jury to decide which view of the facts is true, it can hardly mean that, in the event of two inconsistent views being in this way simultaneously offered to the jury, with the implied admission on the part of the prosecution that it cannot say which is true, it is enough if the jury finds that either the one or the other is true. Moreover, if the authorization of a double-headed or alternative charge, by the force of implication alone, authorized a general finding on the evidence that such a charge was made out in one or other of its branches, then it is difficult to see why the express provisions of s. 461, para. 2, were enacted in reference to one class only of double-headed or multiform-headed charges; for they could hardly have been intended merely to introduce s. 72 of the Penal Code into the Criminal Procedure Code. Plainly, by the spirit of s. 455, if not by its words, charges which might, under its provisions, be put in the alternative, but which are nevertheless left to stand separately, may be dealt with by the Court as if they had been presented in the alternative, and if it is a consequence of an alternative charge that the Court is relieved from the obligation to find which head of it is true, then it seems to follow that s. 461, para. 2, is partial and superfluous.

At first I was disposed to think that the Legislature, by introducing into Sch. III. the alternative form applicable to the present case, indirectly, if not expressly, intimated its acceptance of the Full Bench ruling in the case of *The Queen v. Mussamat Zamiran*,<sup>1</sup> and virtually incorporated the law enunciated by it in the new Act, and this would probably have been so, if the new Act did not substantially differ from the old Act in the particulars which furnished the foundation for the Full Bench decision. But I have already pointed out that these particulars are absent from the new Act. The reasoning by which the late Chief Justice arrived at the conclusion in that case could not be supported upon the basis of the present Act. It appearing then that the Legislature,

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when passing the new Act, entirely removed the foundation on which the ruling of the Full Bench was placed, we cannot safely infer from the introduction of the alternative form of charge alone, which answered at most to the first part only of that ruling, that the entire ruling was intended to be enacted.

On the whole, then, though I admit, not without great hesitation, I have reached the opinion that, under the existing Criminal Procedure Code, while, no doubt, an accused person may be lawfully tried upon an alternative or double-headed charge, such as that which is brought before us in this reference, still the Court or jury must, for a conviction, find specifically which branch of the alternative or head of charge is true.

JACKSON, J.—Having given to the very important question raised in this case the best consideration in my power, I come to the conclusion to which I first inclined that the finding and conviction are insufficient.

No one can feel a stronger respect than I do for the opinion of Sir Barnes Peacock in such a matter as this, and no one can be more adverse to disturbing settled rules of law; but I feel it, for reasons which I shall state in the sequel, to be a duty still more imperative than that of respecting decisions, to express my dissent from a ruling which I think in effect adds to the Penal Code an offence not defined by the Legislature.

It seems to me that neither s. 242 of the repealed Code, nor s. 455 of the present Code of Criminal Procedure (apart from the form in Sch. III., to which I shall presently advert), warranted the exhibition of a charge like that before us, and my persuasion is yet stronger that nothing at all events in the existing Code, which is the material question, justifies a finding and conviction in such terms.

It is not requisite now that I should give at any length my reasons for dissenting from the Full Bench decision which is based upon repealed enactments; but I may say that, while I admit the latter clause of the old s. 242 to embrace charges of false evidence based upon statements given at different times, contradictory of each other, I conceive the Legislature to have had in view in framing that section the uncertainty as to which of the offences would be proved, and therefore to have contemplated the necessity of proving one or other statement to be false and therefore to amount to an offence, and that it did not sanction the more entangling of the accused in a logical snare from which, as a matter of reason, he could not escape. As far, moreover, as the words of the Code went, the charges would have, it seems to me, to be exhibited *seriatim*, and not alternatively.

But I find no provision in the Code of 1872 replacing the latter portion of s. 242. On the other hand, the Legislature, seeing, it may be, the dangerous ambiguity of that clause, has recast the whole section, and, dropping the last clause entirely, has put the other into new words, which seem to admit of no misinterpretation; for while the charge, alternative as to fact, but identical as to offence, is excluded, the many-headed charge arising when several distinct offences are comprised in one section (as in s. 382, Indian Penal Code) is preserved in the schedule. S. 452 provides "that there must be a separate charge for every distinct offence of which any person is accused, and every such charge must be tried separately, except in the cases hereinafter excepted." The only exceptions to this rule are contained in ss. 453 and 454, and I do not find that the present case falls within either of them. Further, s. 440 declares that "the charge shall contain such particulars as to the time and place of the alleged offence and the person against whom it was committed as are reasonably sufficient to give notice to the accused person of the matter with which he is charged;" and s. 441 goes

on to declare that, "when the nature of the case is such that the particulars mentioned in ss. 439 and 440 do not give sufficient notice to the accused person of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the offence was committed as will be sufficient for that purpose." One of the illustrations to this section (c) is to this effect: "A is accused of giving false evidence at a given time and place. The charge must set out that portion of the evidence given by A which is alleged to be false." There is nothing in the text of the Criminal Procedure Code which qualifies these clear provisions in the case of perjury.

Giving false evidence in a stage of a judicial proceeding by stating falsely before the Magistrate, &c., &c., is a distinct offence. Giving false evidence in a stage of a judicial proceeding by stating falsely before the Court of Session is also a distinct offence. Would it be a compliance with the sections I have quoted to put these distinct offences into one charge, and to allege that A had either given false evidence at a certain time and place against X by saying so and so, or given false evidence at a certain other time and place against the Queen by saying something else? I think it would not.

But we are told that a charge, if not in accordance with these sections, is expressly authorised by the 3rd schedule, which, no doubt, may be read as part of s. 442, having been removed to the end of the Act merely for the sake of convenience to avoid interruption of the sense. The section says: "The charge may be in the form given in the 3rd schedule to this Act, or to the like effect;" and where a form so given seems to be directly at variance with precise rules contained in the Code itself, I prefer to stand by the rules.

But the composition of the schedule, and in particular the place allotted to this very form of charge with the wording of it, appear to me to indicate that it has suffered from one of the inadvertencies almost unavoidable in the preparation of so long and intricate an Act. The 3rd schedule is divided into two parts: I. Charges with one head; II. Charges with two or more heads.

On the first I need not observe. The second is framed to answer the purposes of s. 455 in the same way that s. 243 of the repealed Code was subservient to s. 242.

But while those two sections used in common the expression "heads of charge," it is disused in s. 455 ("in the alternative" being employed instead), and appears only in the schedule, where, on the other hand, the term "alternative" does not appear except to denote the peculiar form under s. 193, Indian Penal Code, which, however, is a matter quite different from what is spoken of as alternative in s. 455. And curiously enough the schedule gives no form of charge upon the most obvious and usual alternative case, *vis.*, that of doubt between the offence of theft and that of criminal breach of trust. On the other hand, a variety of charges with more than one head are supplied, which have been rendered useless by s. 456 or s. 457. For instance, why need a Magistrate not draw up several heads of charge against an accused for murder, culpable homicide, grievous hurt, and so forth, when, upon a charge of murder or of culpable homicide, a conviction for any offence of the same nature, but inferior in degree, may follow?

The form called "alternative charges on s. 193" comes also into this division, though it is not a charge with several heads at all, but something entirely distinct, and, as I think, not warranted by any section of the Code at all.

I pause here to remark that the old Code provided forms of conviction, the present Code does not. And while the old Code, setting out forms of charge

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with several heads for doubtful cases, provided alternative forms of conviction, the new Code gives in the schedule several many-headed charges, and one alternative charge.

Having said this, I return to the wording of this charge. It does not run—  
 that you, on or about the , intentionally gave false evidence by stating  
 , and thereby committed ; or that you, on or about  
 , intentionally gave , and thereby committed ; but—  
 “ that you, on or about the , stated in evidence , and on or  
 about , stated , one of which statements you either knew or  
 believed to be false, &c., and thereby committed an offence.”

That is to say, the offence is made to consist of having made first the one statement, afterwards the other, one of them being false, though the Magistrate has not been able to determine, perhaps not taken the trouble to inquire, which.

Now, besides that the offence here stated is not that defined by the Penal Code, and required to be set out by the Criminal Procedure Code, namely, the intentional making of a particular false statement, but simply making of two statements at different times, one or other of them being known to be false, it will be observed that, so far as this form of charge goes, the two statements need not be contradictory one of the other. Also that in fact the two statements, though contradictory, may both be false, and not one only. As for instance, if the witness swore on the preliminary enquiry that he had seen the accused, without provocation, strike the deceased a blow with a club, such statement being prompted by enmity, and afterwards on the trial swore that he had not seen the accused strike the deceased at all, this latter statement being brought about by the receipt of a large bribe, the fact being that the witness had seen the accused, when irritated by the foulest insult, strike the deceased a blow with his fist, which blow, contrary to probability, produced death.

It appears to me, therefore, that the form in question is neither consistent with the positive provisions of the Code as to charges, nor sufficient for the purposes which it seems to contemplate.

One may, indeed, suspect that it was framed to meet, not the definition of any offence as contained in the Penal Code, but either the ruling of the Full Bench in *The Queen v. Mussamat Zamiran*,<sup>1</sup> or the exposition of the law of perjury promulgated by the Nizamut Adawlut in their Circular Order No. 126 of Vol. III., and No. 10 of Vol. IV.<sup>2</sup> In the first mentioned Circular Order that Court directed, (overruling a previous reported decision of two Judges, of whom one was the illustrious Colebrooke) that, where a prisoner was arraigned for perjury on two contradictory statements, it would not be necessary to prove the falsity of either. In the second Circular Order they prescribed a form of charge, which, at all events, had the merit of being exact and complete according to the views which the Court at that time entertained.

It may be observed that the establishment of perjury by contradictory statements is taken from the Mahomedan law as expounded by the law-officers of the Sudder Court in an elaborate opinion printed in No. 656 of the *Constructions* (the passage will be found at p. 21 of the 2nd Volume, 4th edition). The Sudder Judges, however, in adopting it, annexed to it an important qualification, *viz.*, that the contradiction should be on a point material to the issue of the case. This restriction, in accordance with the present law as to giving false

<sup>1</sup> B. L. R. Sup. Vol. 521.

<sup>2</sup> See Carrau's N. A. Circular Orders, 346 & 422.

evidence, would be and is held unnecessary so that the charge before us is going beyond Sudder practice, and is, in fact, pure Mahomedan law of the Muftis.

We are not concerned at present with the enquiry whether the law should be so, but have only to consider whether it is so or not.

I have hitherto discussed the matter with reference to the charge, and I now turn to the conviction, upon which I found arguments, which appear to me conclusive of the matter.

In the first place, it may be well to state what, in my view, according to the Code of Criminal Procedure, is the bearing which the charge has upon the conviction. The charge I take to be, first, a notice to the prisoner of the matter whereof he is accused, and it must convey to him with sufficient clearness and certainty that which the prosecution intends to prove against him, and of which he will have to clear himself; second, it is an information to the Court, which is to try the accused of the matters to which evidence is to be directed. And by the forms and illustrations provided, the Legislature, no doubt, indicates what in certain instances it deems to be a sufficient compliance with the rules which it has laid down.

Thus, it may be that the framers of the law intended to furnish, in reference to s. 193 of the Penal Code, a convenient and suitable form in which an accusation founded on contradictory, and probably false, statements might be exhibited, though it seems to me that the intention has not been successfully carried out. But precise and positive rules apply to the conviction, and a judgment of conviction which is not in conformity with those rules is bad in law.

S. 461 declares that "the judgment, if the accused person be convicted, shall distinctly specify the offence of which, and the section of the Indian Penal Code under which, he is convicted; or if it be doubtful under which of two sections, or under which of two parts of the same section, such offence falls, the Court shall distinctly express the same, and pass judgment in the alternative." The accused cannot be convicted of matter not contained in the charge, except as provided in ss. 456 and 457; but, however loosely the charge may have been framed, the conviction must be precise, except in the particular cases now very accurately defined, where the law allows an alternative judgment.

If the trial in a Court of Session is held with the aid of assessors, the Judge with whom the decision rests must record "the point or points for determination, the finding thereupon, and the reasons for the finding" (s. 464). If the trial is by jury, a partition of functions takes place, and it is the duty, not of the Court, but of the jury, "to decide which view of the facts is true" (s. 257), and it must appear in the Judge's record of the heads of his charge to them that the proper point or points for determination have been laid before the jury. And therefore I think it clear that, when the prisoner is charged with having given false evidence in making this statement or that, the finding must be express:—

1st.—Because an alternative finding will not satisfy the requirements of s. 461.

2nd.—Because there is no other warrant for any kind of alternative finding.

3rd.—Because a bare finding that he has given false evidence will not suffice; for the definition of false evidence in s. 191, Indian Penal Code, demands the making of some statement which is false, and by s. 441, Code of Criminal Procedure, illustration (c), the particular statement must be set out, whereas the jury here has not found that either statement is false.

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4th.—If it be a question raised in the charge which of the two contradictory statements is false (if only one be charged as false), then it would seem that the jury, as having the duty of deciding which view of the facts is true, must find that this or that statement is proved to be false, or that both are found, or that neither is found to be false.

And it seems to me highly inexpedient that an ambiguous verdict of the kind contended for should be permissible, for it is obvious that the degree of criminality involved in such a charge may vary almost infinitely; for, as already observed, the more venial or the more wicked of the two statements, or both, might have been false; and one of the many consequences would be that, from the uncertainty of the facts found, the Appellate Court would be quite unable often to exercise any control, or even express an opinion as to the measure of punishment which was proper in the case. Other embarrassments and other unsatisfactory results might ensue. If, for instance, one of the false statements charged had been in support of a charge of murder, the accused, if he were convicted, might, in a certain case, be punished with death under s. 194. Could the Court which tried him tack on to an alternative as to fast a second alternative as to offence, and say that he had either given false evidence, for which he might be hanged under that section, or given some other false evidence by which he could be imprisoned only under s. 193; and although, if this could be done, the Court would be bound under s. 72, Indian Penal Code, to award the lighter punishment, would it be desirable, would justice be satisfied, if so momentous an issue were left undetermined as to whether the prisoner had or had not given false evidence with intention, and had thereby caused an innocent person to be convicted and executed in consequence of his false evidence?

Nor does the question apply only to the case of false evidence. At least, one other instance occurs to me, in which, if the arguments for the Crown be well-founded, analogy would authorize an alternative finding. I mean the offence of bigamy.

There is a case in Hale called *The Lady Madison's case*.<sup>1</sup> *A* married *B*, and afterwards, during *B's* life, married *C*. *B* then dying, but in the lifetime of *C*, she married *D*. Thus, marriage of *A* with *D* was not bigamy, because, *B* living, the marriage to *C* was void. Now, let us suppose that in this case the evidence left it in doubt whether *B* had been living at the time of *A's* marriage with *C*. Could *A* have been charged alternatively with having committed bigamy either with *C* or with *D*—for, if *B* was then living, the marriage with *C* would be bigamy, but if he was dead, then the marriage with *C* would be good, and the marriage with *D* bigamy—and could she be convicted on such alternative charge?

I conclude, therefore, that the conviction in this case is not sustainable, and I would order the appellant to be discharged.

The contrary, no doubt, was held seven years ago by a Full Bench of this Court. The precedent has been followed, though it has always appeared to me unwillingly by the Division Benches, and there is this further reason for adhering to it now that the ruling has been adopted by the High Court of Madras. But this does not bind my conscience. The Courts are bound to solve to the best of their ability questions of law which arise in the course of their business; and if these questions relate to civil rights or obligations, and the rule becomes settled, persons begin to shape their conduct thereby, and numerous titles are

<sup>1</sup> Hale's Pl. Cr. 693 (p. 692, ed. of 1800).

founded thereupon, and the mischief of unsettling titles far outweighs the benefit of securing scientific accuracy of decision. If scores of men, however, have been improperly convicted and punished on erroneous views of the law, that is not, in my opinion, a good reason for proceeding to convict and punish others on the same view. The Courts are not empowered to inflict penalties for that which the law has not constituted an offence, nor are Courts which are subject to a Code of Procedure, in cases provided for by that Code, authorized to act otherwise than in accordance with the procedure enjoined. The Legislature might, of course, if it thought fit, prescribe a punishment for contradictory statements, material or otherwise, made before a Court of Justice, as an impediment in the way of justice, though, whether in so doing, an equally serious mischief might not be done by as it were constraining men through fear of certain punishment to cleave to false statements once made, may be worth considering. And if the occurrence of this case should have the effect of bringing about an authoritative declaration by the Legislature one way or the other, I shall not regret having brought the matter under the serious attention of my colleagues.

COUCH, C.J. (KEMP, J., concurring).—The charge in this case against the accused was first “that he did, on or about the 23rd of January 1873, at Alipore, in the course of the trial of Tulsi Das Dutt and Mahomed Latif on a charge of cheating, state in evidence before Abdul Latif, the Deputy Magistrate of Alipore, that the greater part of the furnitures was sent by me to that house (*vis.*, the house at Chitpore), and a small portion by Belilios and Zahuruddin; and that he did, on or about the 13th of February 1873, at Alipore, in the course of the trial of J. R. Belilios, Tulsi Das Dutt, and Mahomed Latif in the same case of cheating, state in evidence before Moulvie Abdul Latif, Deputy Magistrate of Alipore, that Belilios never sent any furniture of his own or of any one else to that house (*vis.*, the house at Chitpore), nor was any of the furnitures in that house belonging to Belilios,” one of which statements he either knew or believed to be false, or did not believe to be true, and that he had thereby committed an offence punishable under s. 193 of the Indian Penal Code. The second charge is similarly framed, and states that the accused gave evidence on the 23rd of January 1873 and the 13th of February 1873 at Alipore, and that he either knew or believed one of the statements to be false, or did not believe it to be true.

It is material to notice that the charge does not allege that the statement made on the 23rd of January 1873 was known or believed to be false, or not believed to be true. Nor does it allege that the statement made on the 13th of February 1873 was known or believed to be false, or not believed to be true. It merely alleges that one of the two statements set out in it was known or believed to be false by the accused, or not believed by him to be true.

Upon this charge he was tried, and in the summing-up of the Judge the jury were told, and very properly: “Before you can find him guilty, you must be satisfied that he made one or other of the statements contained in the charge, knowing that such statement was false, and deliberately intending to make a false statement.” The majority of the jury found that the accused was guilty of the offence specified in the first and second heads of charge, the offence specified being an offence punishable under s. 193 of the Penal Code. After such a summing-up, calling the attention of the jury so plainly to the necessity of their being satisfied that one or other of the statements was known to be false, and that the accused deliberately intended to make a false statement, I think there can be no doubt that the offence of giving false evidence within the meaning of s. 191 of the Penal Code was committed on one or other of the occasions specified in the charge. Then it appears to me that the only question is, was it

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necessary, in order to make the conviction legal, that the jury should find on which of the two occasions the offence was committed? Does the law in this country render that essential to a conviction for giving false evidence?

The 439th section of the Code of Criminal Procedure now in force requires that "the charge shall state the offence with which the accused person is charged," and the 440th that "the charge shall contain such particulars as to the time and place of the alleged offence and the person against whom it was committed as are reasonably sufficient to give notice to the accused person of the matter with which he is charged." The charge in this case does that. It states what the offence is, namely, that the accused committed an offence punishable under s. 193 of the Penal Code, and it contains such particulars as to the time and place as give sufficient notice to the accused of what he is charged with. He is told that, by making the two statements, one of which, it is alleged, he knew or believed to be false, or did not believe to be true, he committed an offence punishable under s. 193.

S. 442 says that the charge may be in the form given in the 3rd schedule to the Aft. In that schedule there is such a form of charge as was made against the accused in this case, and it appears to me that, unless a conviction upon a charge so framed is allowed by law to be valid, the putting this form of charge in the schedule was not only useless, but is also inconsistent with saying that the jury is required by the law to find and to state upon which of the two occasions mentioned in the charge the false evidence was given. If the jury is required to state that, then two charges in the form No. 10 in the schedule would be proper. One would state that evidence was given on the 23rd of January 1873, which the accused either knew or believed to be false, and the other would state that evidence was given on the 13th of February 1873, which the accused either knew or believed to be false. If it is required by the law that the jury or the Court, where the trial is with assessors, should find distinctly on which of the occasions the false statement was made, the alternative charge given in the schedule is perfectly useless.

Again, if it is necessary for the jury, in order that the conviction shall be valid, to say which of the two statements is the false one, it is requiring the jury to find what is not alleged in the charge. All that the charge alleges is that one of the statements was known or believed to be false, or not believed to be true, and that thereby the offence was committed. Such a charge being authorized by the law, it appears to me that all which the Court has to find to sustain a conviction for giving false evidence is that the allegations in it are proved.

In considering what the intention of the Legislature was in making these provisions in the new Code of Criminal Procedure, and giving in the schedule this form of charge, I think it is important to see what, at the time this Aft was passed, was the acknowledged state of the law. It had been decided by a Full Bench of this Court that a conviction upon a charge of this description was legal. That view of the law had been acted upon, undoubtedly, for some years in this Presidency. In Madras, as appears from the case of *The Queen v. Palany Chetty*,<sup>1</sup> the same view of the law was adopted, and it cannot be doubted that this decision was acted upon in that Presidency. We have no reported case in the Bombay High Court, and I do not desire to speak merely from memory as to what was the practice in that Presidency. But in Madras and in Calcutta, and my belief is in Bombay also, the law was considered at the time this Aft was passed to be

<sup>1</sup> 4 Mad. H. C. Rep. 51.

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that a conviction of a person who was found to have intentionally made contradictory statements on oath or solemn affirmation was legal. I cannot think that the Legislature intended, by the way in which the new Code has been drawn, by the omission of certain sections which are in the old Code and the substitution of others, which probably were supposed to be an improvement in the wording or arrangement of it, to alter the law as to the offence of giving false evidence. That this charge, although called an alternative charge, and being so far alternative that two statements are set out in it when one offence only is alleged, namely, that the accused thereby, that is, by making statements one of which he knew or believed to be false, committed the offence, should be considered as a charge of but one offence, and was to be dealt with by the jury as such, I think is shown by s. 452, which says that there shall be a separate charge for every offence.

It was argued that it would prejudice the accused in respect of his subsequently pleading an acquittal or a conviction if a conviction were allowed upon a charge framed as this is, and that he might be tried again for making one or other of the statements which are the subject of the present charge. S. 460 provides for a person who has once been tried for an offence, and convicted or acquitted of such offence, not being liable to be tried again on the same facts for the same offence, nor for any other offence for which a different charge from the one made against him might have been made under s. 455, or for which he might have been convicted under s. 456. If the question should ever come before me, what is the effect of a conviction or an acquittal upon such a charge as this, I should hold that the accused could not be tried again for giving the evidence on either occasion which is set out in the charge, for then he would be tried again on at least a part of the same facts as he had been tried upon before.

I concur with my learned colleagues in thinking that the second part of s. 461 does not apply to this case. This is a charge of but one offence, and the conviction is a conviction of that offence, and need not specify more than the offence of which the person accused is convicted. Here the jury found upon the facts proved before them that the accused committed an offence punishable under s. 193. It appears to me that this finding is a good finding; nor do I see that s. 257 as to the duties of the jury interferes with it, or prevents the finding being as it is. S. 257 says "that it is the duty of the jury to decide which view of the facts is true, and then to return the verdict which under such view ought, according to the direction of the Judge, to be returned." I understand this to mean that it is the duty of the jury to find whether the view of the facts that the accused made the two statements, that they were such that they could not both be true, and that he knew or believed one of them to be false, is true. I do not understand it as meaning that the jury have to select from a part of the charge some of the facts and say whether they are true. What is meant is the whole view of the facts alleged against the accused, the view taken by the prosecution which leads to the conclusion of his guilt, or the view which is set up on his behalf, and which would make him innocent. I do not feel at all pressed by the provisions of s. 257.

It appears to me that this was a charge authorized by the law, and that the allegations in it, which are sufficient to support a conviction, have been found by the jury to be proved. If it is a good charge, nothing more is necessary to be found by the jury than that the allegations contained in it are true. I cannot say that it is an illegal charge, finding it, as I do, deliberately allowed by the Legislature, and inserted in the schedule which is referred to in s. 442.



I think therefore that the conviction is a good one.

I have to mention that two learned Judges, not now present, Glover and Pontifex, JJ., are also of opinion that the conviction is good.

### [APPELLATE CRIMINAL.]

*Before Mr. Justice Markby and Mr. Justice Mitter.*

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*European British Soldier—Commitment by Magistrate—Crime committed at a place more than 120 miles from Calcutta—Jurisdiction—Powers of the Indian Legislature—Regulations XX. of 1825 and XIII. of 1833—4 Geo. IV., c. 81—Criminal Procedure Code (Act X. of 1872), s. 33.*

A British-born European soldier in a regiment stationed at Hazaribagh was committed by the Deputy Commissioner of that place to the High Court on a charge of the murder of a comrade. Upon an application to have the commitment quashed, and the prisoner handed over to the Military Authorities in accordance with Regulation XX. of 1825, it was held that the provisions of Regulation XX. of 1825 as to the course to be taken in dealing with European British subjects who have committed offences were rescinded in Hazaribagh by Regulation XIII. of 1833, s. 3, as being rules for the administration of criminal justice within the meaning of that section. Assuming the Regulation was in force, *Held* that 4 Geo. IV., c. 81, and Regulation XX. of 1825, though they gave jurisdiction to the Military Authorities in certain cases, did not wholly exclude the jurisdiction of the Civil as opposed to the Military Courts, and that inasmuch as the proceedings before the Deputy Commissioner had been taken at the request of the Military Authorities, and assented to by them, such proceedings were not void, and the commitment was valid.

RULE granted by the High Court (Markby and Mitter, JJ.), calling on the Deputy Commissioner of Hazaribagh to show cause why a commitment by him should not be quashed.

The prisoner, a European British-born subject and a private in her Majesty's 2-22nd Regiment stationed at Hazaribagh, was committed by the Officiating Deputy Commissioner of Hazaribagh to the High Court on a charge of murder of one of his comrades. The murder was stated to have been committed on the 14th May at Hazaribagh, a place distant more than one hundred and twenty miles from Calcutta.

After the committal, but before the trial, an application was made on behalf of the Crown to Pontifex, J., sitting on the Original Side of the High Court, to have the commitment quashed, and the prisoner made over for trial to the Military Authorities, on the ground that, by Regulation XX. of 1825, a crime committed at a distance more than 120 miles from the Presidency-town by a person subject to military law was cognizable only by the Military Tribunals, and not by the Civil Courts. The application was supported by the affidavit of the Adjutant-General. Pontifex, J., directed the application to be made to the Bench then taking criminal business upon the Appellate Side, which being accordingly done on the 22nd May, the present rule was granted. At the hearing of the rule, the Deputy Commissioner of Hazaribagh did not appear, but sent an affidavit setting out the circumstances under which he had acted. From this affidavit it appeared that the Deputy Commissioner received from the Adjutant of the 2-22nd Regiment, on the 15th May, a letter informing him that

<sup>1</sup> Criminal Rule against an order of the Deputy Commissioner of Hazaribagh.

Private Taylor, a soldier in the Regiment, had been shot on the previous night, and that he at once directed the prisoner to be brought up before him for the usual preliminary inquiry, which was done apparently without any objection on the part of the Military Authorities. The Deputy Commissioner further submitted that Regulation XX. of 1825 was not applicable to Hazaribagh, having been rescinded in that and some other Non-Regulation districts by Regulation XIII. of 1833.

The *Advocate-General*, Offg. (Mr. Paul), and the *Standing Counsel* (Mr. Kennedy), on behalf of the Crown.

Mr. Collis, for the prisoner, instructed by the Clerk of the Crown, now showed cause.—Regulation XX. of 1825 was *ultra vires*, as the Governor-General had not the power to legislate for European British subjects resident in the mofussil—*Reg. v. Reay*.<sup>1</sup> The Governor-General in Council, by s. 36 of 8 Geo. III., c. 63, has power to make Laws and Regulations not repugnant to the laws of the realm. Regulation XX. of 1825 is not binding, inasmuch as its provisions were repugnant to the laws of the realm as they then existed—namely, the Charter of the Supreme Court. That Court alone had criminal jurisdiction over British-born subjects resident in the mofussil, and this Regulation, by which another criminal tribunal was created, and to which European British-born subjects were made amenable, is therefore repugnant to the Supreme Court Charter, s. 19—Smoult & Ryan's Rules and Orders, pp. 22 and 23. The High Court, under the Charters of 1862 and 1865, has the same criminal jurisdiction as the Supreme Court. The Governor-General had no power to curtail the jurisdiction of the Supreme Court. Whenever it was curtailed or altered, it was done by Imperial Statute: for instance, 21 Geo. III., c. 70, s. 8, takes away the jurisdiction of the High Court in revenue matters; 33 Geo. III., c. 52, s. 151, gives the Governor-General power to appoint Justices of the Peace; 53 Geo. III., c. 155, s. 96, empowers the Indian Government to make Laws, Regulations, and Articles of War for the native troops, and to hold Courts Martial, and there is nothing relating to the European British soldiery in the Statute. S. 105 expressly recites that British subjects are only subject to the jurisdiction of the Supreme Court: this being so, it is submitted that it required an express statutory enactment to take away that jurisdiction or to render a European British soldier liable to be tried by a Court Martial; in fact, such a Statute as was passed for the native soldiery—*Reg. v. Sheikh Boodin*.<sup>2</sup> The earlier Bengal Regulations clearly recognize the fact that the Supreme Court alone had sole jurisdiction over European British subjects; for instance, Regulation II. of 1793, s. 17, prohibits the Collector from giving lands in farm to Europeans, the reason for this prohibition being that Europeans were not amenable to the Provincial Courts of Judicature; see Regulation XXXVIII. of 1793, s. 1; Regulation II. of 1796, s. 2, expressly says that European British subjects are amenable only to the Supreme Courts; see also Regulations VI. of 1803, s. 19, and XV. of 1806.

Again, Regulation XX. of 1825 is founded on 4 Geo. IV., c. 81. Now, that Act certainly did not intend to exclude entirely the Civil Courts; see ss. 16, 17. There are significant words in s. 3, namely—"and for which no proceeding shall have been commenced in any ordinary Court of competent civil or criminal jurisdiction." In such a case persons liable to be tried by Court Martial are to be delivered over to the Military Authorities. In this case proceedings were commenced in a competent Civil Court, and if this was a matter coming

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<sup>1</sup> 7 Bom. H. C. Rep. Cr. Ca. 6.

<sup>2</sup> Perry's Oriental Cases, 434; see p. 464.

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under the Statute, the Military Authorities certainly would fail in this application. If it was not intended that this Statute should exclude the Civil Courts, can this Regulation, which is based on it, do so? If it does, then it is invalid as being repugnant to the Statute. Under the Criminal Procedure Code, s. 33, a commitment can only be set aside when the Court consider the accused person has been prejudiced, or he objects to the jurisdiction of the committing Magistrate.

The *Advocate-General*.—The case of *Reg. v. Reay*<sup>1</sup> is widely different from the present. That case came within the Indian Councils Act, 1861 (24 & 25 Vic., c. 67), s. 42, the Bombay Council being supposed to have passed an Act affecting an Act of Parliament in force in the Presidency. That decision was not considered good law; and therefore Act XXII. of 1870 was passed by the Supreme Government. Regulation XX. of 1825 in no way affected the jurisdiction of the Supreme Court. The criminal jurisdiction of that Court, and of the High Court up to the passing of Act XIII. of 1865, rested, not on the commitment by the Magistrate, but on the finding of a true bill by the Grand Jury. The commitment was merely a means to an end; it merely forwarded the prisoner to the place where the trial was to take place, or held him to bail to appear there. Therefore, this Regulation, as it dealt only with proceedings by the Magistrates, did not touch the jurisdiction of the Court. The Regulations which it modified were merely those by which Magistrates were made Justices of the Peace. The other side has fallen into error from confounding the right to try with the means by which the trial should be commenced. It must be assumed that Regulation XX. of 1825 was properly enrolled in the Supreme Court. [Mr. *Collis*.—The certificate of the Registrar states that it does not appear to have been enrolled.] It appears in a collection of the Regulations published under the authority of Government, and it must therefore be taken to have been enrolled: where it is an officer's duty to do an act, it must be taken to have been properly done—*Mussamut Golab Koonwar v. The Collector of Benares*;<sup>2</sup> see also *In the Matter of Ameer Khan*.<sup>3</sup> Then as to Regulation XIII. of 1833, that applies only to the native inhabitants of certain districts, and not to Europeans. The preamble runs as follows: "Whereas considerations connected with the present state of certain tracts of country now included in the districts of Ramghur, Jungle Mehals, and Midnapore, the nature of the disturbances which recently prevailed in various parts of those districts, and the character of the inhabitants, have rendered it expedient to separate these tracts from those districts." That shows the Regulation must have a limited meaning put on it; if not, then there is no law applicable to Hazaribagh. A rule of practice simply requiring a Magistrate to hand over a person to the Military Authorities is not a rule of "criminal justice" within the meaning of this Regulation. A Statute cannot, in this way, by mere general words, repeal a prior Statute which is in no respect repugnant to it—*Hawkins v. Gathercole*,<sup>4</sup> *Crespigny v. Wittenoon*,<sup>5</sup> *Mason v. Armitage*,<sup>6</sup> and *Ryall v. Rolle*.<sup>7</sup>

The words "competent Court" in 4 Geo. IV., c. 81, s. 2, cannot refer to a Magistrate's Court. That Court is not mentioned amongst the Courts enumerated in the 4th Institute and in Wharton's Law Lexicon, p. 250. A Court

<sup>1</sup> 7 Bom. H. C. Rep. Cr. Ca. 6.

<sup>2</sup> 4 Moore's I. A. 240.

<sup>3</sup> 6 B. L. R. 459 (see p. 291 of this book).

<sup>4</sup> 6 De. G. M. & G. 1.

<sup>5</sup> 4 T. R. 790.

<sup>6</sup> 13 Vas. 25; see p. 36.

<sup>7</sup> 1 Atk. 182.

of Justice is defined by the Penal Code, s. 20, to be a Judge who is empowered by law to act judicially alone, or a body of Judges, &c. That cannot apply to a Magistrate. Here, there has been a material error on the part of the Magistrate, and the Court can, under s. 297 of the Criminal Procedure Code, set the commitment aside, notwithstanding the provisions of s. 33—*Queen v. Nabadwip Chandra Goswami*.<sup>1</sup>

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The *Standing Counsel* on the same side.—4 Geo. IV., c. 81, is an English Statute, and must be construed by English law. When it was passed, criminal proceedings in England might be begun in any one of three ways—*viz.*, by indictment, by inquisition, or by information; if appeals of felony were then in force, that would be a fourth mode. The proceedings taken by a Magistrate were merely to secure the custody or the bail of the accused, the object being to cause his detainer, and to have him brought before a competent Court. Therefore I say that the proceedings in a competent Court, referred to in 4 Geo. IV., c. 81, s. 2, cannot mean the preliminary proceedings before a Magistrate. [MARKBY, J.—When do you say that criminal proceedings begin now that the Grand Jury has been abolished?] When the Magistrate's charge has been converted into an indictment, and laid before the Court. But, even if the framing of the charge by the Magistrate be the commencement of criminal proceedings, the present case is not affected, because the Magistrate had no jurisdiction, and his charge is therefore illegal.

*Cur. adv. vult.*

The judgment of the Court was delivered by

MARKBY, J.—In this case a rule was issued, calling upon Mr. Beadon, the committing Magistrate, and the prisoner William Jackson, to show cause why the commitment should not be quashed as contrary to the provisions of Regulation XX. of 1825. The rule was issued upon an affidavit of Major-General Johnson, the Adjutant-General of Her Majesty's Indian Army, stating that, on the 16th May last, the Officiating Deputy Commissioner of Hazaribagh committed William Jackson, an European British subject and a private in Her Majesty's 2-22nd Regiment stationed at Hazaribagh, to take his trial before this Court at the next Sessions on a charge of murder of a comrade, committed at Hazaribagh, a place distant more than one hundred and twenty miles from Calcutta; and that the Commander-in-Chief was desirous of having the prisoner made over to the Military Authorities at Hazaribagh to be dealt with according to the Military Law. Mr. Beadon has not appeared to show cause, but he has sent an affidavit stating the circumstances under which the commitment took place; and according to the usual practice in these cases, we have referred to that affidavit in order to acquaint ourselves with those circumstances. The prisoner has appeared by counsel, and has shown cause against the rule; and through his counsel he has expressed his desire that the commitment should not be quashed, and that he should be tried by the Civil Power.

Now, before proceeding to discuss the law on the subject, I think it necessary to refer shortly to the circumstances under which this commitment was made. It appears from the affidavit of Mr. Beadon that he received from the Adjutant of the 2-22nd Regiment, on the 15th May, a letter, informing him that Private Taylor, a soldier in the Regiment, had been shot by a comrade on the previous night; and Mr. Beadon treated that (and I think he was fully justified in so treating it) as a request to him, as a Magistrate, to take the usual proceedings in the matter. He replied to that letter immediately, acknowledging its receipt, and re-

<sup>1</sup> 1 B. L. R. O. Cr. 15 (see p. 24 of this book).

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requesting that the culprit should be made over to the custody of the police in order that he might be conveyed to the European Penitentiary, and that the case should be brought up for preliminary enquiry on the following day, that is, on the 16th May. He also asked that the witnesses and the prisoner should be produced before him on that day for this purpose. The prisoner and the witnesses were produced accordingly, and the commitment was at once made. Under these circumstances, I think we must take it that these proceedings were taken at the request, and with the assent and concurrence, of the Military Authorities; and the question which we have to determine is whether the proceedings so taken are void as being in contravention of the provisions of Regulation XX. of 1825.

Now, the first objection taken on the part of the prisoner is that Regulation XX. of 1825 is not in force in Hazaribagh, where this offence was committed. It appears that, by Regulation XIII. of 1833, certain parts of the country, which were formerly included in the districts of Ramghur, Jungle Mehals, and Midnapore, were separated from those districts; and by s. 3 of that Regulation, it is declared that the operation of the rules for the administration of civil and criminal justice, as well as the rules for the collection of the land-revenue and other matters, together with all other rules contained in the Regulations printed and published in the manner prescribed by Regulation XLI. of 1793, were suspended, and were to cease to have effect therein from the date specified in the preamble of the Regulation, except as hereinafter provided. Then all that is thereafter provided is, that the Governor-General may, by an order in Council, make such rules as he thinks proper. Now, I think it can scarcely be contended that the portion of Regulation XX. of 1825, which is now relied on, and which is said to prescribe the course to be taken in dealing with a European British subject who has committed an offence, is not a rule for the administration of criminal justice. Therefore it falls clearly within the provisions of s. 3. But it is contended that the preamble of the Act shows that the only object was that special rules for the administration of civil and criminal justice should be provided in order to prevent the mischief there spoken of, namely, the disturbed condition of the country, which could have no reference whatsoever to the administration of criminal justice so far as the European British subjects were concerned. But I think we must apply to this Regulation the rule which I believe to be a well established rule for the construction of Acts of the Legislature, namely, that the preamble of the Statute can only restrict the words of the Statute itself where there is any ambiguity in those words; and I must say that it appears to me that the words of s. 3 are perfectly clear, and that it is not possible to raise upon them any ambiguity whatsoever. It seems to me that the operation of the rules for the administration of civil and criminal justice is by that section wholly suspended. It is said, however, that it is quite impossible that the country should be left in that condition, and that something must have been substituted for the rules which were suspended by this Regulation; and that it is quite possible that those rules, although rescinded by this Regulation, may have been restored by the Governor-General in Council under the powers reserved to him by the Act. Now, it is well known that the state of the law in these Non-Regulation districts is one which it is extremely difficult to ascertain. As a matter of fact, what I believe generally took place was that no attempt was made formally to legislate for these Non-Regulation districts; but the questions which arose there were dealt with as, what I may call, executive matters; and, with reference to the questions which from time to time arose, directions, sometimes in a general form, and sometimes having reference only to the particular case which had arisen, were issued by the Governor-General or some other executive authority. No doubt, it is also well known

that all these rules were recognized, and I may say legalized, by the Indian Councils Act, and so have become part of the law of the land. But at the same time we must say that we are not aware of any rule made by the Governor-General, or any other authority, which has restored this particular Regulation XX. of 1825. On the other hand, Mr. Beadon, who is an able and competent officer in the district, has informed us that, in his opinion, this Regulation is not now in force in this district. That is really the only information which we have upon this subject, and therefore it seems to me that, as far as we have any information before us, we must hold that Regulation XX. of 1825 has been rescinded in Hazaribagh.

But I do not wish to rest my judgment solely upon that. It will, I think, be more satisfactory if we give our opinion upon the construction of the Regulation, and it seems to me, upon the best consideration which I have been able to give to this Regulation, that, even if it is applicable to this district, the proceedings taken in this case are not in contravention of it, bearing, of course, always in mind that we take it, as I have already said, that those proceedings were taken at the request of, and were assented to, by the Military Authorities.

The jurisdiction of the Civil Magistrate in a case of this kind can only be taken away by the express words of the Legislature, and in coming to a conclusion as to whether or no that has been done by this Regulation, I think we ought to see what were the provisions of the English Statute which led, as it appears from the preamble, to the passing of this Regulation. It is contended for the Crown that, even upon the English Statutes, the jurisdiction of the Civil Magistrate is taken away; but certainly I am unable to come to that conclusion. The Statute 4 Geo. IV., c. 81, which led to the passing of Regulation XX. of 1825, no doubt, does say, in s. 3, that if any person liable to be tried by a Court Martial for an offence alleged to have been committed at a place in India above one hundred and twenty miles from the Presidencies of Fort William, Fort St. George, and Bombay respectively, and for which no proceeding shall have been commenced in any ordinary Court of competent civil or criminal jurisdiction, shall be apprehended by the authority of, or brought before, any Magistrate for such offence, it shall and may be lawful for such Magistrate, and he is hereby required to deliver over such accused person to the commanding officer of the regiment, and so forth. No doubt, the words, "he is hereby required," are imperative words, and, so far as regards the matter to which they relate, they undoubtedly compel the Magistrate to comply with this Act. But, then, I think it is quite clear upon these words, and looking to the words of the 16th section, that the jurisdiction of the Civil Magistrate is not altogether excluded, because the 16th section says that "nothing in this Act contained shall extend or be construed to exempt any officer or soldier whatsoever from being proceeded against by the ordinary course of law, unless such officer or soldier shall have been tried by a Court Martial in manner hereinbefore provided in respect of offences committed within the territories of any foreign state, or in any country under the protection of Her Majesty or the said United Company, or at any place in the territories of the said United Company, situate above one hundred and twenty miles from the said Presidencies of Fort William, Fort St. George, and Bombay respectively." I think, therefore, that it is clear upon this Statute that the state of things which was intended to be introduced was this that, if the Military Authorities desire to do so, they have power to require persons to whom this provision relates to be handed over to them, and can deal with them for the offences which they have committed; but if they do not choose to do so, or if they desire it, then the Civil Magistrate can deal with such cases. The words of 3 & 4 Vic., c. 37, are not

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identically the same as those of c. 81, 4 Geo. IV.; but I think the words of that Act also give not exactly concurrent jurisdiction, but rather (I would say) preferential jurisdiction to the Military Authorities, in cases occurring more than one hundred and twenty miles from the Presidency town. Now, that being so upon the English Statutes, we have now to consider the words of Regulation XX. of 1825. Of course, it may very well be that the authorities here might choose to restrict the power of the Civil Magistrate within narrower limits than the Imperial Parliament thought fit to do. I have, however, come to the conclusion that in substance the provisions are the same. The first clause of the second section of the Indian Statute provides that, if any European British subject who shall be apprehended by or brought before a Magistrate on a charge of murder, rape, robbery, theft, or other criminal offence, shall be found to have been a soldier, and that the offence was committed at a place above one hundred and twenty miles from the Presidency town, then it shall be the duty of the Magistrate by whom such person may be apprehended, instead of proceeding to hear evidence to the charge as directed in such cases in the Regulations, to deliver over such person so charged, together with a statement of the charge brought against him, to the commanding officer, and so forth. There, again, the words of the section are, as in the English Acts, imperative upon the Magistrate. But the question still remains, whether these words do entirely exclude him from all jurisdiction whatsoever in the matter. Now, there is no doubt that this Act in one respect is stronger against the jurisdiction of the Magistrate than the English Act. It does not contain anywhere any express saving of the authority of the Civil Power as is contained in the Acts of the Imperial Parliament. But in the fourth clause of that section, where the Magistrate was intended to be entirely prohibited, the prohibition is contained in express terms. That clause says that "the several Zilla and City Magistrates are hereby prohibited from receiving and inquiring into any criminal charge of the nature described in s. 2 of Statute 4 Geo. IV., c. 81, which may be preferred to them against any British commissioned or non-commissioned officer, soldier, or other person attached to the army, who may have been regularly brought to trial under the provisions of the said Act, and acquitted or convicted by the sentence of a Court Martial of such offence." Now, the only case in respect of which the Act contains an express prohibition altogether to the Magistrate from interfering is the case in which the accused has been regularly tried, and either acquitted or convicted by a Court Martial; and that seems to me to indicate that this was the only prohibition intended. Then there follows a proviso, which, no doubt, at first sight, might seem to point out that in all other cases the Magistrate is also prohibited, but on consideration it appears to me that it is not so. The proviso is this: that in any case wherein it may be ascertained by the Magistrate on due enquiry that any person accused of such criminal offence, who may be subject to trial by Court Martial, has not been brought to trial, and that no effectual proceedings have been taken, or have been ordered to be taken, against him, then the Magistrate is to refer the matter to the Governor-General in Council, who will give him proper directions how to proceed; and the Magistrate, if so authorized, shall be competent to proceed against the offender. Now, I think that that proviso was put in to meet this class of cases. The second section provides what the Magistrate is to do when the prisoner has been apprehended by or brought before him, and then it is clearly his duty to hand him over to the Military Authorities, if they are willing to take him. The fourth clause, on the other hand, I think provides for the cases in which the prisoner has not been apprehended by or brought before the Magistrate; but if the Magistrate finds upon inquiry that an offence has been committed, and that the Military Authorities have not taken and are not about to take any steps to

bring the offender to trial, then he can refer the matter to the Governor-General in Council. I think that that proviso was put in to prevent, on the one hand, the offender from being let go unpunished; and at the same time not to allow the Magistrate to assume any power which might bring him in conflict with the Military Authorities.

I do not wish to deny that I have come to this conclusion upon the Regulation with considerable hesitation, because, if this Regulation stood alone, and it was now for the first time that it had to be considered, there are, every one must admit, some expressions in it which might seem to show that the Civil Authority was entirely to be excluded. But that that was not the intention of the Imperial Statute, and that this Regulation was only intended to carry out in India, in a convenient way, the principle which had been already laid down by the Imperial Act, is, I think, shewn by the way the Regulation has always been understood in India. We must recollect that this Regulation has now been in force for nearly fifty years, and, as far as we have been able to discover, the construction which has been put upon it, not by express decision (because, as far as I am aware, the question has never been expressly decided until now), but by the practice of the Courts in the administration of criminal justice, I believe to be that the jurisdiction of the Civil Magistrate is not thereby entirely ousted. It is certainly within my own knowledge that several soldiers have been sent up to this Court to be tried from places situate above one hundred and twenty miles from Calcutta, and it was not denied that many prisoners so sent up had also been tried by the late Supreme Court.

Now, with regard to the prisoners who were tried by the Supreme Court, it was argued, and I think correctly argued, that there the jurisdiction would not be touched by Regulation XX. of 1825, and that, therefore, in the Supreme Court, and also in the High Court, down to the year 1865, when the Grand Jury was abolished, there might be no objection to the trial of such prisoners under this Regulation. But, nevertheless, until the year 1865, it is perfectly well known that, as a matter of fact, no trial except on very very rare occasions—that is, no ordinary trial—did take place merely upon the presentment of the Grand Jury; and that the prisoners were always sent up here to be tried under the commitment of a Magistrate. We therefore cannot escape from this, that, if the construction which is now sought to be put upon this Regulation is a correct one, then in every one of these cases, at any rate, until the prisoner arrived at this Court, the custody was illegal, and all the proceedings were illegal; and if the construction which was sought to be put upon the Imperial Statute is also correct, as far as I can see, all the proceedings in the Supreme Court and the High Court would have been illegal; because, if the English Statute were to be taken as containing a prohibition of the Civil Power, then that would apply to the High Court and Supreme Court just as much as to the Magistrate of the District. The words "Civil Magistrate" in the English Acts are the words which are always used in these Acts to express the Civil Power as distinguished from the Military Authorities, and do not refer to a Magistrate holding inferior power as distinguished from Courts having full jurisdiction to deal finally with the case. It will be found that prisoners are constantly spoken of as being tried and convicted or acquitted for such crimes as theft, robbery, or murder, &c., by the Civil Magistrates. Now, if the contention that the English Statute prohibits the Civil Magistrate is good, it prohibits the jurisdiction of the High Court just as much as the jurisdiction of a Magistrate, and all such trials were without jurisdiction. But, even if the prohibition depends upon the Regulation, then all the proceedings up to commitment were illegal, and every

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trial which has taken place since the Grand Jury were abolished has been upon an illegal foundation ; because, since that time, the commitment by the Magistrate and the charge drawn up by him are the foundation of the trial by the High Court, and they were all illegal. I think that we may well hesitate before coming to any such conclusion. And, under these circumstances, it appears to me that, having regard to the principles laid down by the Imperial Statute, and the course of practice which has been adopted in this country, we should not be justified in saying more than that the Military Authorities can require a Magistrate to hand over to them any prisoner who may be apprehended and brought before him for an offence committed at a place more than one hundred and twenty miles from Calcutta; but that the proceedings before a Magistrate, when they are taken at the request of, and are assented to by, the Military Authorities, are not absolutely void, and that a commitment so made is not an invalid commitment. That seems to me to be a reasonable construction of the Regulation and of the Statutes. If the Military Authorities choose to assert their claim to deal with the case and punish the offender, they can do so at the proper time. But if they choose to hand the prisoner over to the Civil Power, they can do that also ; and I can hardly conceive that the Military Authorities would so long have continued the practice of handing over prisoners to the Civil Power, unless it were that in a certain class of cases, or under certain circumstances, they found it convenient to do so.

For these reasons I think that the rule must be discharged.

On the two other points taken in this case, it is unnecessary for us to express any opinion whatever. The one is whether, having regard to s. 33 of the Code of Criminal Procedure, a commitment can be quashed at the request of the Crown. We express no opinion whatever upon this point, nor do we express any opinion whatsoever upon the other point that was raised, namely, whether the Indian Legislature had power to pass the Regulation XX. of 1825.<sup>1</sup>

*Rule discharged.*

Solicitor for the Crown : *The Government Solicitor.*

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<sup>1</sup> The prisoner was tried at the ensuing Criminal Sessions of the High Court, convicted, and executed.

APPENDIX.

Before Mr. Justice Phear and Mr. Justice Morris.

THE QUEEN v. PIRAN, alias GUNZAI, alias KURREEMUN.<sup>1</sup>

*Criminal Procedure Code (Act X. of 1872), s. 67, Illustration (a)—Indian Penal Code (Act XLV. of 1860), ss. 499 & 503.*

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Where an offence was alleged to have been committed during a journey from Bombay to Calcutta, and was in fact committed between Bombay and Allahabad, at which latter place the complainant and the person by whom the offence was alleged to have been committed separated and proceeded to Calcutta by different trains,—*Held* that the Magistrate of Howrah had no jurisdiction to try the charge. To bring the matter within his jurisdiction, the journey should have been continuous from one terminus to the other without any interruption by either party.

THE prisoner Piran was charged in the Court of the Magistrate of Howrah on the two following charges, *viz.* :—

“1st, that she, on or about the 25th day of February 1874, near Allahabad, and when travelling from Bombay to Calcutta by rail, criminally intimidated Mrs. Florence Field, and thereby caused her alarm, and that she has thereby committed an offence punishable under s. 503 of the Indian Penal Code and within the cognizance of the said Magistrate of Howrah. And 2nd, that she, between the 27th February and 11th March 1874, published imputations against Mrs. Field’s character of such a nature as to harm her reputation.”

From the evidence for the prosecution it appeared that the accused had been engaged by Mrs. Field to serve her as ayah on a journey from London to Calcutta; that while travelling on the railway between Bombay and Calcutta, and before reaching Allahabad, the accused had used threatening language to Mrs. Field, who in consequence dismissed her on their arrival at Allahabad; that Mrs. Field stayed two days, and the accused one day at Allahabad, and that they subsequently proceeded by different trains to Calcutta; and that both Mrs. Field and the accused were residing in Calcutta when the charge was made. To support the second charge there was only the evidence of a peon, who stated that he had brought several servants to his master’s (Mr. Field’s) house, but none would stop longer than a few days in service.

The accused was convicted upon both charges, and was sentenced to a fine of Rs. 15 on the first charge, or a month’s rigorous imprisonment, and six weeks’ rigorous imprisonment on the second.

The prisoner thereupon applied to the High Court under its revisional jurisdiction to have the conviction quashed on the following grounds: 1st, that the acts imputed to the defendant did not constitute the offences with which she was charged; and, that the Court had no jurisdiction to try the case; and, 3rd, that there was no evidence to support the charges.

The High Court ordered the proceedings in the case to be sent for, and notice to be given to the Magistrate. On the case coming on for hearing,

Mr. Piffard (with him Mr. Ameer Ali), for the defendant, submitted that the Howrah Court had no jurisdiction to try either charge, and that both charges were unsupported by the evidence. The case of *Queen v. Malony*<sup>2</sup> was referred to.

<sup>1</sup> Criminal Motion against the order of the Officiating Magistrate of Howrah, dated the 16th March 1874.

<sup>2</sup> 1 Mad. H. C. Rep. 193.

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Mr. *Bourke*, for the Crown, contended that, under illustration (a) to s. 67 of the Criminal Procedure Code, the interruption of the journey at Allahabad was not sufficient to prevent the Howrah Court having jurisdiction.

Mr. *Piffard* was not called upon to reply.

The judgment of the Court was delivered by

PHEAR, J. (who, after stating the charges as above, continued) :—It is somewhat unfortunate that these charges should be so defective as they are in the non-statement of material facts : and it is still more unfortunate that we have not before us the formal conviction or finding come to by the Magistrate upon these charges which might possibly have the effect of remedying these defects. According to the judgment which has been sent up to us by the Magistrate, it appears that the Magistrate found Piran Ayah guilty of both these charges ; that is, in general terms, first, that she committed criminal intimidation ; and, secondly, that she committed defamation against Mrs. Field ; and the Magistrate sentenced her on the first charge to pay a fine of Rs. 15, leviable under s. 307 of the Criminal Procedure Code, and in default thereof to one month's rigorous imprisonment ; and the Magistrate further sentenced her on the second charge to six weeks' rigorous imprisonment.

It is objected before us upon the present application that these two convictions are both bad upon two grounds, first, that they were come to without jurisdiction ; and, secondly, that there was no evidence before the Magistrate sufficient in law to establish either of them.

We are of opinion that the first objection is good in respect of both the convictions. We also think that there was no evidence before the Magistrate upon which the second conviction could be sustained in law.

It is clear that the offence of criminal intimidation was not, according to the account of the prosecution, committed within the actual territorial limits of the ordinary jurisdiction of the Magistrate of Howrah. In the words of the charge itself, it is stated as having been committed somewhere near Allahabad. If the Magistrate of Howrah had jurisdiction to entertain the first charge preferred against the petitioner, admittedly this must be by reason of the special enactment of s. 67 of the Criminal Procedure Code. That section runs in these words : " When it is uncertain in which of several districts an offence was committed ; or where an offence is committed partly in one district and partly in another ; or where the offence is a continuing one, and continues to be committed in more districts than one ; or where it consists of several acts done in different districts, it may be inquired into and tried in any one of any such districts."

Now, under the words of this section alone, it would be impossible to hold that an offence which was committed locally in the neighbourhood of Allahabad, and unquestionably far outside of the district of Howrah, could be entertained by the Magistrate of the district of Howrah. But there is a certain enlargement of the words of this section applicable to the case which is now before us, effected by the illustration (a) which is appended to the section. This illustration is the first of several illustrations appended to the section, and may be reasonably taken as a rider to the first paragraph of the section itself. It is in these words : " An offence committed on a journey or voyage may be inquired into and tried in any district through which the person by whom the offence was committed, or the person against whom, or the thing in respect of which, the offence was committed, passed in the course of that journey or voyage."

This illustration is plainly larger than the first paragraph or any other enacting portion of the section itself, and we ought not therefore to carry it further than its own words go. It is directed to meet a particular difficulty which is very analogous to, but not, strictly speaking, comprehended within, those covered by the general description of the section. When an offence is committed during a journey or voyage, even if the place of the occurrence is single and completely known, yet, practically, in most cases it would be impossible for the complainant to have recourse to a tribunal on the actual spot. The illustration to the section affords relief by giving jurisdiction to the local tribunal at the place where the offender either stops or is made to stop, or at the place where the complainant stops. But we think this means where either of them first stops or breaks his journey or voyage. Any greater extension of meaning is not needed to meet the exigency of the case, and would be calculated to produce much mischief. It appears therefore to us that the journey spoken of in this illustration is a continuous journey from one terminus to another terminus, regard being had, for the purpose of estimating the continuity, to all the ordinary incidents affecting journeys of the particular kind which may be under consideration. Now, according to the evidence which has been sent up to us by the Magistrate, the journey on which the offence which is the subject of the first charge is alleged to have been committed was a journey by railway effected by Mrs. Field, the prosecutrix, or, at any rate, by the petitioner Piran Ayah, from Bombay to Calcutta. But it is also perfectly plain from that evidence, and it has been admitted by the learned Counsel who appears in this case on the part of the Crown, that that journey was not effected continuously either by Mrs. Field or by the ayah: both of them stopped at Allahabad after the occurrence had taken place which is the foundation of the first charge, that is, after the offence as alleged had been committed—Mrs. Field for at least a space of two days, and the ayah for the space of at least one day. And this stoppage was not a stoppage due to the nature of the journey itself; because the journey might have been completed without any appreciable stoppage whatever, simply by continuing in the train in which these persons were passengers before they came to Allahabad, and which, after it reached Allahabad, proceeded with continuity to complete the journey to Calcutta. Mrs. Field, instead of continuing her journey, stopped at Allahabad, and remained there certainly for two days, and Piran Ayah, who, it is material to remark, had been discharged by Mrs. Field, and forbidden to continue her journey with her, also remained at least one day. We are of opinion, on this state of facts, that the case does not fall within the illustration (a) of s. 67, and that the Magistrate had no jurisdiction to entertain the charge of criminal intimidation committed, according to the story of the prosecution, somewhere near Allahabad, and certainly at some place external to the territorial limits of his own jurisdiction.

The construction which we have thus placed upon the words of the illustration (a), s. 67, is not a novel construction, for it was given by the Madras High Court in the case of *Queen v. Malony*.<sup>1</sup>

It is not, perhaps, necessary for us to explain the grounds upon which we are of opinion that the Magistrate had no jurisdiction to entertain the charge of defamation upon which he convicted the petitioner, because the Magistrate himself, in the return which he has made to this Court upon notice given to him of this application, has admitted that he had no jurisdiction to entertain

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QUEEN  
v.  
PIRAN,  
13 B. L. R.  
Ap. 4.  
[21 W. R. 66.]

<sup>1</sup> 1 Mad. H. C. Rep. 193.

1874.

QUEEN

v.

PIRAN,

13 B. L. R.

Ap. 4.

[21 W. R. 66.]

the charge, inasmuch as the evidence did not serve to show that the offence was committed within the area of his ordinary jurisdiction, and this matter was not within the scope of s. 67, Criminal Procedure Code. We will, however, say that not only was there no evidence before the Magistrate upon which he could, with any sort of reason, come to the conclusion that he had jurisdiction to entertain that charge, but there was no evidence whatever before him upon which a charge of defamation of Mrs. Field by Piran Ayah could be maintained anywhere. There is no evidence upon the record which has been sent up to us of Piran Ayah's having anywhere spoken defamatory words of Mrs. Field, unless it be of her having done so at the same place and as part of the same transaction which constituted the foundation of the charge of criminal intimidation near Allahabad. If the charge of defamation had been properly drawn, the Magistrate would have perceived without difficulty that there was not an iota of evidence before him upon which it could be sustained for a moment. Indeed, there was nothing in the information, or otherwise before him, on which he could even frame a proper charge.

We therefore, as I have already said, are of opinion that both these convictions are bad for want of jurisdiction, and we think that we ought not, upon the ground put forward in s. 70 of the Criminal Procedure Code, to forbear from setting the conviction aside. That section says: "No sentence or order of any Criminal Court shall be liable to be set aside merely on the ground that the investigation, inquiry, or trial, was held in a wrong district or Sessions Division, unless it is proved or appears that the accused person was actually prejudiced in his defence, or the prosecutor in his prosecution by such error, in either of which cases a new trial may be ordered."

It is obvious from the last words which I have read that this section contemplates such an error only of jurisdiction as may arise from a case being tried in one District or Sessions Division, say of Bengal, when it ought properly to have been tried in the neighbouring District or Sessions Division of the same province; because it evidently contemplates the possibility of the Court being able to direct a new trial. It does not apply to cases such as that of the first charge in which the right local jurisdiction is a jurisdiction foreign to the Court which has power to order a new trial, and lying entirely outside the province to which the local Division or District belongs, and in which the charge was actually entertained.

And, again, as to the second charge, we think that there is enough in this case to lead us reasonably to conclude that the error made in the matter of jurisdiction prejudiced the accused in her defence, because we think she never ought to have been called upon to answer that charge at all, and the Court, which would have disposed of the charge in Calcutta, where the defamation is supposed to have taken place, would have been substantially different both as regards constitution and procedure from that of the Magistrate of Howrah.

For all these reasons, we are of opinion that not only were the convictions bad without jurisdiction, but that in respect to one charge at any rate the conviction could not be in any degree supported, and that both convictions ought to be set aside. We accordingly set aside both the convictions and the sentence, and remit the fine; and if the fine or any portion of it has been paid, it must be refunded.

Before Mr. Justice Macpherson and Mr. Justice Morris.

QUEEN v. SHAM BAGDI AND OTHERS.<sup>1</sup>

*Criminal Procedure Code (Act X. of 1872), s. 263—Verdict of Jury.*

THE judgment of the Court was delivered by

MACPHERSON, J.—The evidence against the prisoners, in whose interest the Judge has referred this case to the High Court under s. 263, is certainly not very strong, inasmuch as it consists solely of the statement of the prosecutrix. Nevertheless the evidence is quite sufficient, if believed. The jury did believe it: and how can we say that they were wrong in doing so? It is as likely as not that they were right. And is the High Court to set aside a verdict in such a case?

I think we ought not to interfere with a verdict, unless we can say decidedly that we think that it is clearly wrong. If we are to interfere in every case of doubt—in every case in which it may with propriety be said that the evidence would have warranted a different verdict—then we must hold that real trial by jury is absolutely at an end, and that the verdict of a jury is of no more weight than the opinion of assessors. I presume that, if this were the intention of the Legislature, it would have said so. But the Legislature has not said so.

As it is, I consider that the Court should exercise the powers vested in it by s. 263 only in cases in which it finds the verdict of the jury clearly and undoubtedly wrong. This is not such a case, although I may admit that there may be room for doubts being entertained as to the facts. Therefore I think the verdict of the jury should remain undisturbed, so far as this Court is concerned, and that the Sessions Judge must pass sentence on the prisoners.

Before Mr. Justice Macpherson and Mr. Justice Morris.

QUEEN v. NOBIN CHUNDER BANERJEE.<sup>2</sup>

*Criminal Procedure Code (Act X. of 1872), s. 263—Verdict of Jury—Murder—Insanity.*

Baboo Juggadanund Mookerjee for the Crown.

Mr. Bonnerjee (with him Baboo Bacharam Mookerjee) for the prisoner.

THE facts are sufficiently stated in the judgment of the Court, which was delivered by

MACPHERSON, J.—The jury in this case have found that the prisoner caused the death of his wife, but that he is not guilty of murder, because, when he killed her, he, by reason of unsoundness of mind, was incapable of knowing that he was doing an act which was wrong or contrary to law. The Sessions Judge, disagreeing with the verdict of the jury as regards the unsoundness of the prisoner's mind, was of opinion that he ought to have been convicted of murder; and he has (under s. 263, of the Criminal Procedure Code) submit-

<sup>1</sup> Reference to the High Court, under s. 263 of Act X. of 1872 of the Criminal Procedure Code, by the Officiating Sessions Judge of Hooghly, dated the 13th September 1873.

<sup>2</sup> Reference to the High Court under s. 263 of the Code of Criminal Procedure by the Officiating Sessions Judge of Hooghly, dated the 11th September 1873

1873.

Oct. 8.

13 B. L. R.

Ap. 19.

[20 W. R. 73.]

1873.

Oct. 24.

13 B. L. R.

Ap. 20.

[20 W. R. 70.]

1873.

QUEEN

v.

NOBIN

CHUNDER

BANERJEE,

13 B. L. R.

Ap. 20.

[20 W. R. 70.]

ted the case to the High Court, considering it necessary for the ends of justice to do so. It thus becomes necessary for us to deal with the case submitted to us as with an appeal, which we read as meaning an appeal by the prosecution : and by the provisions of s. 263, we have authority to convict the accused person on the facts, and to pass sentence accordingly.

In the "grounds" recorded by the Judge as required by s. 464, he says that, in his opinion, the verdict is opposed to the evidence on the record ; that the accused was not of unsound mind ; and that he committed the offence of murder.

There is really but one question before us—that as to the state of the prisoner's mind at the time he caused his wife's death. That he did cause her death cannot be seriously doubted. The jury have found as a fact that he did, and the Sessions Judge agrees with them as to this. And that this finding is correct is, we think, conclusively shown by the evidence.

The learned Counsel for the prisoner has contended that as, under s. 257 of the Criminal Procedure Code, it is the duty of the jury (as distinguished from the duty of the Judge) to decide which view of the facts is true, this Court cannot disturb, or at any rate ought not to disturb, the verdict of the jury, if there is on the record any evidence whatever in support of it. But s. 257 must be read as qualified by s. 263, the effect of which is that, if the Judge disagrees with the jury, and submits the case to the High Court, the whole matter is opened up, the High Court must treat the case as before it on appeal, may convict the accused person on the facts, and, if it does convict him, shall pass the proper sentence upon him. We quite agree, however, that the powers given to this Court by s. 263 are not to be lightly exercised ; and that the unanimous verdict of a jury ought not to be set aside, even if the Sessions Judge disagrees with it, unless that verdict is clearly and patently wrong and unsustainable on the evidence. If there were any substantial doubt in this case, we should certainly not disturb the verdict. It appears to us, however, that there can be no reasonable doubt about the matter. Without saying that there is on the record absolutely nothing which could be said to afford some evidence of unsoundness of mind, we have no hesitation in saying that there is scarcely any such evidence, and that, such as it is, it is wholly unreliable and worthless for the particular purpose of proving insanity. Witnesses speak of the intensity of the prisoner's rage and grief when he heard of his wife's alleged infidelity a day or two before the murder ; of his rolling on the ground in his passion ; of his eyes being red or blood-shot ; and of his skin being hot. They also tell how, when he had struck down his wife, he came out of the house, calling aloud that he had killed her, and voluntarily giving himself up to a choudidar that he might be dealt with according to law for what he had done. These points are relied on as showing insanity. It may be that, if there had been substantial evidence of the prisoner's unsoundness of mind, these facts, or some of them, might have been deemed to be corroborative of it. But in themselves these facts, whether taken singly or together, are no real evidence of unsoundness of mind, for there is not one of them which might not, in the natural course of events, have been found to exist in the case of a man who was perfectly sane, but was labouring under the influence of great grief and passion.

It is not because a man commits a very horrible murder, or because he commits it while labouring under strong passions and feelings, that therefore the world is to assume that he must have been insane when he committed the deed. The fact of unsoundness of mind is one which must be clearly and distinctly proved, before any jury is justified in returning a verdict under s. 84

of the Penal Code. Every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes until the contrary is proved.

Here it is not attempted to be proved that, prior to this occurrence, the prisoner ever, at any time, showed any symptoms of insanity; it is not even suggested that the prisoner was of unsound mind until he heard the reports which caused him two days afterwards to take his wife's life. Nor is it alleged that he was of unsound mind subsequently, at the time he was tried, or at any other time. And not a single medical witness, nor even the jailor who has had him in custody since the murder (which took place in the end of May), has been called to speak as to the prisoner's mind being unsound. The case proved is simply that the prisoner, who was employed in a Government Printing Press in Calcutta, and up to that time was of sound mind, went from Calcutta on the 24th May to visit his wife who was living in her father's house; that almost immediately after reaching his father-in-law's house, he became aware of certain rumours as to his wife's infidelity; that he (and apparently not without cause) believed these rumours to be true, and considered that her father was very much to blame in the matter; that he was passionately angry and greatly grieved at what he heard, and removed his wife from her father's house to that of an aunt (*didī-mā*) who lived close by; that he resolved to bring his wife away with him back to Calcutta, but was afraid (and very likely with good reason) that he would be prevented from doing so by those who had led his wife astray; that he took his wife back to her father's house on the 27th, saying that on the next day he would take her to Calcutta; that the same evening, seizing the opportunity of his being in the house alone with his wife, he murdered her; and that, having murdered her, he ran out of the house, crying aloud that he had done so, and went and delivered himself up to a *chaukidar*, saying he had killed his wife, and he might deal with him as the law directed.

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[20 W. R. 70.]

The prisoner has confessed the whole matter at length before the Deputy Magistrate, and subsequently before the Magistrate. And the statements made by him are borne out in all substantial respects by the evidence of the witnesses who have been examined. It is clear that the murder was committed owing to the unhappy position in which the prisoner considered his wife and himself to be placed. He did the deed under the influence of anger, jealousy, and grief. No doubt, any person placed in the position in which he was, or believed himself to be placed, is much to be commiserated. But there is absolutely nothing on the facts before us from which any reasonable person can conclude that the prisoner was "incapable of knowing the nature of the act," or that he was incapable of knowing that he was doing what was wrong or contrary to law. On the contrary, all the evidence shows that he knew the nature of the act perfectly well, and knew that it was wrong and that it was contrary to law.

On the whole, we think the verdict of the jury so utterly wrong, and so entirely against the evidence, that we consider that the Judge acted rightly in submitting the case under s. 263, and that it is our duty to convict the prisoner on the facts.

We find that the prisoner has committed culpable homicide amounting to murder, and we sentence him (under s. 302 of the Penal Code) to transportation for life.





*Before Mr. Justice Kemp and Mr. Justice Pontifex.*QUEEN *v.* SOFFIRUDDI PALWAR AND ANOTHER.<sup>1</sup>

1874.

*April 22.*

13 B. L. R.

Ap. 23.

[22 W. R. 5.]

*Criminal Procedure Code (Act X. of 1872), s. 280—Enhancement of Punishment.*

In this case, Noimuddi, Suffiruddi, and Basiruddi, were committed to take their trial for the murder of one Shomasdi. The Sessions Judge, in concurrence with the opinion of the assessors, convicted the prisoner Noimuddi under s. 325 of the Penal Code, and sentenced him to be rigorously imprisoned for seven years and to pay a fine of Rs. 100; convicted the prisoner Soffiruddi under s. 201, and sentenced him to five years' rigorous imprisonment; and acquitted Basiruddi on account of his youth, and because he believed he acted under the coercion of his father, the prisoner Soffiruddi.

Noimuddi and Soffiruddi appealed from prison, and their appeal now came on for hearing, but no one appeared on their behalf.

The judgment of the Court was delivered by

KEMP, J. (who, after stating the facts as above, continued):—The Sessions Judge observes that he considers "that it has been established by the evidence that the prisoner Noimuddi caused the death of Shomasdi by throttling him," but he convicts him of "grievous hurt" because the body of Shomasdi has not been found. In another part of his judgment, in remarking upon the case of the prisoner Soffiruddi, the Sessions Judge observes that it is clearly proved that this prisoner assisted Noimuddi to make away with the body of the deceased, and from the circumstance of his death he, the prisoner Soffiruddi, must have believed that the offence committed was murder; but this is wholly inconsistent with the Judge's finding that Noimuddi has committed the offence of grievous hurt.

It appears clear to us, after a careful consideration of the evidence, that the prisoner Noimuddi is guilty of the offence of murder. It is proved that he went to the house of the deceased at night, and that there was a squabble and a struggle between the prisoner, the deceased, and the witness Hakima; that they were separated by the prisoners Soffiruddi and Basiruddi; and that the whole party, including the deceased, then went to the house of Soffiruddi, where the deceased threatened the prisoner Noimuddi with reporting his conduct the next morning to their zemindar. Upon this words ensued between Noimuddi and the deceased, when the former pressed the latter down upon a log of wood which was lying in the court-yard of the house, and throttled him. When it was found that Shomasdi was dead, the witness Idrale, whose evidence before the Deputy Magistrate has been put in under s. 33, Act I. of 1872, was sent for, and consulted as to what was to be done. After ascertaining that Shomasdi was dead, he declined to have anything to do with the matter. Upon this the body of the deceased was taken by Noimuddi, Soffiruddi, and Basiruddi to a river, described by the Deputy Magistrate who committed the case as flowing near the house of the prisoner and with a rapid stream, and thrown into it. The body has not been found, but from the evidence and the admissions of the two prisoners, Soffiruddi and Basiruddi, before the Deputy Magistrate, it is clear that the dead body of Shomasdi was disposed of as stated above.

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<sup>1</sup> Criminal Appeal against an order of the Sessions Judge of Jessore, dated the 11th February 1874.

We therefore think that this is a case in which we ought to exercise the powers conferred upon us by s. 280 of the Code of Criminal Procedure, and to alter the finding of the Court below, and also to enhance the punishment awarded by it. We convict the prisoner Noimuddi of murder under s. 302, and sentence him to be transported for life. We convict the prisoner Soffiruddi under s. 201, and, inasmuch as he knew that the offence which was committed was punishable with death, we sentence him to seven years' rigorous imprisonment.

1874.  
QUEEN  
v.  
SOFFIRUDDI  
PALWAR,  
13 B. L. R.  
Ap. 23.  
[22 W. R. 5.]

*Before Mr. Justice Kemp and Mr. Justice Birch.*

IN THE MATTER OF THE PETITION OF SARDHARI LAL.<sup>1</sup>

1874.  
April 28.  
13 B. L. R.  
Ap. 40.  
[22 W. R. 10.]

*Criminal Procedure Code (Act X. of 1872), ss. 435 & 436—Registration Act (Act VIII. of 1871), s. 82—Evidence Act (I. of 1872), s. 3—Sub-registrar—Offence committed during a Judicial Proceeding—Meaning of Word "Court"—Indian Penal Code, s. 228.*

A was charged before an Assistant Magistrate by a sub-registrar with having committed an offence under s. 228 of the Penal Code, and fined. Held that the sub-registrar should have tried the matter himself under ss. 435 and 436 of the Criminal Procedure Code, and as the Magistrate acted without jurisdiction, the order must be quashed.

By s. 82 of the Registration Act, a sub-registrar is a public officer, and proceedings before him are judicial proceedings within the meaning of s. 228 of the Penal Code, and as he is legally authorized to take evidence, he is a "Court" as defined by the Evidence Act, s. 3.

SARDHARI LAL, a pleader of the Bhaugulpore Court, was charged by the sub-registrar of that district with having committed an offence under s. 228 of the Indian Penal Code. The charge was laid before the Assistant Magistrate, who fined the accused Rs. 10. The Magistrate in his judgment stated that the accused had in words admitted the offence; that he had reasoned unbecomingly with a public officer in the course of a proceeding which the law says shall be held to be a judicial proceeding, and had threatened to publish his conduct in the newspaper—a speech most unbecoming to make in his presence. The Magistrate expressed his regret that he should have to punish a man in the position of the accused, and thought that the nominal fine of Rs. 10 would be sufficient to meet the case. Sardhari Lal now appealed.

Mr. Sandel and Boboo Doorga Mohun Doss for the appellant.

No one appeared to support the Magistrate's decision.

The arguments urged on behalf of the appellant sufficiently appear from the judgment of the Court, which was delivered by

KEMP, J.—This is a very petty case, but several points of law have been raised in the course of the argument, which must be decided. (The learned Judge proceeded to state the facts as stated above, and continued):—It is now contended in this Court that the conviction is illegal, inasmuch as, if the sub-registrar be considered to be a public officer, and if his proceedings be considered to be judicial proceedings, and if he is to be considered to be a Court, then the Assistant Magistrate had no jurisdiction, inasmuch as the said sub-registrar did not proceed under ss. 435 and 436 of the Criminal Procedure Code; and there is also an objection that the Magistrate has not examined the witnesses

<sup>1</sup> Criminal Appeal against an order of the Assistant Magistrate of Bhaugulpore, dated the 31st December 1873.

1874.  
 IN THE  
 MATTER OF  
 THE PETI-  
 TION OF  
 SARDHARI  
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of the accused, or given him an opportunity of adducing any evidence on his behalf. We think that there can be no doubt that the sub-registrar is a public officer; that point is clear under the Registration Act. We also think that the proceedings of a sub-registrar are judicial proceedings within the meaning of s. 228 of the Penal Code. That also is set at rest by the Registration Act, s. 82. Then, on turning to the Criminal Procedure Code, we find that offences under s. 228 are triable by "the Court," using the word "Court" generally, in which the offence was committed, subject to the provisions contained in ch. xxxii., that is to say, the Court in which the offence is committed is to try the offence, but that the procedure is to be restricted by the provisions of ch. xxxii. Now, in the new Evidence Act a "Court" is described thus: "A Court includes all Judges and Magistrates, and all persons, except arbitrators, legally authorized to take evidence." There is no doubt that the sub-registrar under the Registration Act is legally authorized to take evidence, and therefore his Court is a Court under the interpretation put upon that word by the Evidence Act; and sch. 4 to the Code of Criminal Procedure, col. 7, says that an offence under s. 228 is triable by the Court in which the offence is committed under ch. xxxii., s. 435. Now, s. 435 refers to offences under several sections, and amongst other offences to offences under this very s. 228 of the Indian Penal Code, and enacts that the Court may take cognizance of such offences, "and adjudge the offender to punishment by fine not exceeding Rs. 200, and in default of payment by imprisonment in the civil jail for a period not exceeding one month, unless such fine be sooner paid," and that "in every such case the Court shall record the facts constituting the offence, with any statement the offender may make, as well as the finding and sentence." Then s. 436 goes on to say that, if the Court in any case considers that the person accused of any such offence should be imprisoned otherwise than in default of payment of fine, or that a fine exceeding Rs. 200 should be imposed upon him, such Court, after recording the facts constituting the offence and the statement of the accused person as before provided, shall forward the case to a Magistrate." Now, in this case, the sub-registrar has proceeded neither under s. 435 nor under s. 436. We think therefore that the Assistant Magistrate had no jurisdiction in the case. We quash his order, and direct the fine to be refunded.

## BENGAL LAW REPORTS.

## [APPELLATE CRIMINAL.]

*Before Mr. Justice Kemp and Mr. Justice Birch.*THE QUEEN *v.* MUSSAMUT ITWARYA.<sup>1</sup>1874.  
May 9.

*Evidence of Child, Admissibility of—Competent Witness—New Trial—Act X. of 1873 (Oaths Act), ss. 5, 13—Evidence Act (Act I. of 1872), s. 118—Criminal Procedure Code (Act X. of 1872), Ch. XV.* <sup>14 B. L. R. 54.  
[22 W. R. 14.]</sup>

The accused was charged with throwing *B* and *C* down a well. She was charged with the murder of *B* under s. 302 of the Penal Code, and on that charge she was tried and acquitted. Thereupon the Joint-Magistrate, without holding any further preliminary enquiry, committed her on a charge under s. 307 of attempting to murder *C*. The only eye-witness of the offence, according to the Sessions Judge, was a child, and as she did not understand the nature of an oath or solemn affirmation, her evidence was taken on simple affirmation. The jury found the prisoner guilty, and she was sentenced to ten years' transportation. *Held*, that the omission to administer either an oath or solemn affirmation, although knowingly made, did not render the child's evidence inadmissible. *Held* also that the omission by the Joint-Magistrate to hold a preliminary enquiry on the charge under s. 307 being an irregularity which prejudiced the prisoner in her defence, the proceedings should be quashed, and a new trial held.

THE accused was charged with throwing two children into a well, one a girl, aged about nine, and the other a boy, about two-and-a-half years of age, on the 31st December 1873. The prisoner was committed to the Sessions on the charge of the murder of the boy, and on the 6th February 1874 she was acquitted of that charge. On the 7th February 1874 the Joint-Magistrate added to his former judgment, or reasons of committal, the following remarks: *Mussamut Itwarya* is also committed to take her trial before the Sessions Judge on a charge of attempting to murder the girl *Ramkoori* under s. 307." The prisoner was not put on her defence, and no witnesses were examined on the second charge. The Magistrate simply enquired of her whether she wished to examine any further witnesses before the Sessions Judge, to which she intimated she did not require any further witnesses, but would examine the witnesses named in the former charge. On the 11th February 1874 she was tried for attempt to murder the girl, found guilty by the majority of the jury, and sentenced to ten years' transportation.

The girl *Ramkoori* was examined, and the Sessions Judge being of opinion that she did not understand the nature of an oath allowed her to give her testimony without oath or solemn affirmation, and her evidence was taken on simple affirmation only. The Judge found that she was the only eye-witness of the offence.

*Mussamut Itwarya* appealed. The record of the case having been sent for by the High Court (*Kemp and Glover, JJ.*), and notice given to the Magistrate, the matter now came on for argument.

*Mr. Collis* (*Baboo Kalikissen Sen* with him) for the prisoner.—The evidence of the girl is inadmissible; it ought to have been given on oath or solemn affirm-

<sup>1</sup> Criminal Appeal, No. 201 of 1874, against an order of the Sessions Judge of Patna, dated the 6th February 1874.

1874. ation ; see Act X<sub>4</sub> of 1873 (the Indian Oaths Act), s. 5. That section lays down that all witnesses must be affirmed or sworn; that is the particular enactment in the Act. S. 13 contains a general enactment, *vis.*, that no omission to take an oath or affirmation will invalidate the proceedings. Where there is a particular enactment and a general enactment in the same statute, and the latter taken in its most comprehensive view would overrule the former, the particular enactment must prevail—*Pretty v. Solly*,<sup>1</sup> *De Winton v. The Mayor of Brecon*,<sup>2</sup> see also the *Queen v. Piran*,<sup>3</sup> therefore it is submitted that a limited construction should be put on s. 13, and that “no omission” in that section must mean no unintentional omission, but in this case the omission was intentional. No one reading the Oaths Act can doubt that the intention of the Legislature was to make an oath or affirmation compulsory on persons testifying in Court, and regard must be had to the intention of the Legislature—*Hawkins v. Gathercole*.<sup>4</sup> Under s. 118 of the Evidence Act, a child can be a competent witness, but he must give his evidence according to law, that is, according to provisions of the Oaths Act; the old law, Act II. of 1855, s. 15, was different as to children’s testimony. If this child’s evidence is excluded, there is nothing proved against the prisoner. Again, there has been no preliminary enquiry made by the Magistrate into the present charge; this he was bound to make under Ch. XV. of the Criminal Procedure (Act X. of 1872). [KEMP. J.—We can direct a new trial.] It is submitted that there is no sufficient ground for such a course in the present case, there being no evidence whatever against the prisoner except that of the girl Ramkoori.

The Magistrate did not appear.

The judgment of the Court was delivered by—

KEMP. J.—This prisoner has been convicted under s. 307 of the Indian Penal Code, and has been sentenced to transportation for ten years. The trial was by jury. The points taken are, first, that the Judge was wrong in not permitting the jury to refer to the evidence in a case in which this prisoner was committed for an offence under s. 302, and of which she has been acquitted, inasmuch as the evidence in both trials is the same, and refers to the same occurrence and to the same party accused; second, that the evidence of the witness Ramkoori is not legal evidence, as s. 118 of the Evidence Act does not obviate the necessity of an oath or solemn affirmation.

Another point of law has been taken before us by the learned Counsel who appears for the prisoner, namely, that no preliminary enquiry was held by the Joint-Magistrate with reference to the charge of an offence under s. 307, that the prisoner was not put upon her defence upon that charge, and that she has been prejudiced by this irregularity in the procedure, inasmuch as she had no opportunity of cross-examining the witnesses on this charge, and has been deprived of the benefit of testing the accuracy of their evidence by comparing their depositions in the Sessions Court with the evidence which they gave before the Joint-Magistrate.

With reference to the objection taken as to the inadmissibility of the evidence of the girl Ramkoori under s. 15 of Act II. of 1855, the old evidence law, this evidence would have been admissible. S. 15 enacts that “any person who,

<sup>1</sup> 26 Beav. 606.

<sup>2</sup> *Id.* 533.

<sup>3</sup> 13 B. L. R. App. 4 (see p. 663 of this book).

<sup>4</sup> 6 De G. M. & G. 1; see p. 21.

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by reason of immature age or want of religious belief, or who, by reason of defect of religious belief, ought not, in the opinion of the Court, to be admitted to give evidence on oath or solemn affirmation, shall be admitted to give evidence on a simple affirmation, declaring that he will speak the truth, the whole truth, and nothing but the truth." Now, in this case Ramkooori is a child of immature age; she has been examined on simple affirmation, and her evidence would have been admissible under Act II. of 1855. We have now to consider whether under the new law her evidence is admissible. Under s. 118 of the Evidence Act, this little girl is a competent witness, for the Court below has considered that she understood the questions put to her, and was able to give rational answers to those questions. But it has been contended that, although she is a competent witness, her statement is inadmissible, inasmuch as it is not a statement on oath or solemn affirmation, and we have been referred to Act X. of 1873. S. 5 enacts that oaths or affirmations shall be made by the following persons, namely, "all witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give, evidence by or before any Court or person having by law or consent of parties authority to examine such persons or to receive evidence." The learned Counsel, therefore, contends that, inasmuch as this girl has not been examined on oath or solemn affirmation, her evidence is inadmissible; but under s. 13 of the same Act, it is enacted that "no omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding, or render inadmissible any evidence whatever, in or in respect of which such omission, substitution, or irregularity took place, or shall affect the obligation of a witness to state the truth." Now, it is clear that, in this case, the Sessions Judge, being of opinion from the answers given by this little girl that she was not aware of the responsibility of an oath, examined her on simple affirmation. Therefore the omission to examine the witness on oath or solemn affirmation was an omission which was knowingly made by the Judge, and it cannot be said that, because the omission was knowingly made, it renders the evidence inadmissible under s. 5, for s. 13 says that no omission of any kind, whether made knowingly or otherwise, shall render the evidence of a witness inadmissible. We, therefore, do not think, on the first point, that the child's evidence was inadmissible, and the Judge has properly left the amount of credibility to be attached to her evidence to the consideration of the jury.

Then with reference to the second point—namely, that the Judge ought to have allowed the jury to refer to the evidence of the former trial for murder in which this prisoner was acquitted—we observe that the Judge in his charge to the jury remarked "that that case was not before them, and that they must be governed solely by the evidence in the case before them," that is, the present case, in which the prisoner is charged with an offence under s. 307. With reference to this point we would refer to the remarks made by the late Chief Justice, Sir Barnes Peacock, in the case of the *Queen v. Dwarkanath Dutt*,<sup>1</sup> to the effect that a Court before which a second trial is held has nothing to do with the evidence given on the former trial, except for the purpose of ascertaining whether the offence which formed the subject of the first trial is the same as that which forms the subject of the second charge. If the offence is the same, the former conviction or acquittal is a bar to the second trial, whether the second Court considers that the former conviction or acquittal was warranted by the evidence given

<sup>1</sup> 7 W. R. Cr. 15; see p. 21.

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in the first trial or not. If the offence is not the same, the former conviction or acquittal is no bar to the trial upon the second charge, notwithstanding that the evidence given in the two cases is the same; and the Court, whether the same as that which tried the prisoner for the first offence or a different Court, is bound to apply its own judgment to the evidence before it, and to give a verdict according to its own conviction. Now, in this case it is clear that the offence is not the same on which the prisoner Itwarya had been committed on a charge of murder of the boy Juggernath under s. 302. In the present case, she is committed on a charge of attempting to murder the girl Ramkoori under s. 307; and, therefore, we do not think that the Judge was wrong in that part of his charge to the jury.

Then we come to the third point, and we think that there must be a re-trial for the following reasons: On the 31st December 1873 the Officiating Joint-Magistrate of Patna drew up a charge against the prisoner Itwarya, charging her with the murder of Juggernath under s. 302; the prisoner was called upon to enter upon her defence; she did so, and on the same day, namely, on the 31st of December, a charge was drawn up, and she was committed on that charge alone, and she was acquitted of that charge on the 6th of February. On the 7th of February we find that the Magistrate adds the following remarks to his former judgment or reasons of committal, *viz.*, "Mussamat Itwarya is also committed to take her trial before the Sessions Judge on a charge of attempting to murder the girl Ramkoori under s. 307." The prisoner Itwarya was not put upon her defence, no witnesses were examined with reference to the second charge under s. 307, and all that was done was to ask her on the 7th of February whether she wished to examine any further witnesses before the Sessions Judge, on which date she intimated that she did not require any further witnesses to be sent for, but would examine the witnesses she had already named on the former charge. Now, under s. 283 of the Code of Criminal Procedure, no finding or sentence passed by a Court of competent jurisdiction can be reversed or altered on appeal on account of any error or defect either in the charge or in the proceedings on or before the trial, or on account of the improper admission or rejection of any evidence, or by any misdirection in any charge to a jury, unless such error or defect has occasioned a failure of justice either by affecting the due conduct of the prosecution or by prejudicing the prisoner in his defence. Now, in this case it is clear that the procedure in the Joint-Magistrate's Court has prejudiced the prisoner in her defence; she has not had the opportunity which she ought to have had of cross-examining the witnesses, and in this case there were none examined in the matter of the charge made against her under s. 307.

We therefore think that, looking to the irregularity in the proceedings of the Joint-Magistrate in this case, the trial of the prisoner Itwarya on a charge under s. 307 of the Indian Penal Code must be quashed. The Joint-Magistrate will be directed to hold a preliminary enquiry according to law, giving the prisoner an opportunity of cross-examining the witnesses who may be adduced in support of the charge under s. 307, and if he is satisfied with that evidence, he can recommit her to take her trial in the Sessions Court. The Magistrate will be directed to proceed at once with the new trial.<sup>1</sup>

*Appeal allowed.*

<sup>1</sup> *Post*, Ap. 1 (or p. 685 of this book).

## [APPELLATE CRIMINAL.]

*Before Sir Richard Couch, Kt., Chief Justice, Mr. Justice Phear, and Mr. Justice Morris.*

QUEEN v. GERALD MEARES.<sup>1</sup>

*Jurisdiction—European British Subject—Criminal Procedure Code, Act X. of 1872—24 & 25 Vic., c. 104, s. 9—26 Vic., c. 67 (Indian Councils Act), ss. 22 and 42—Letters Patent, 1862, cl. 21—Letters Patent, 1865—34 & 35 Vic., c. 34.*

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A European British subject in the mofussil was convicted by a Magistrate under the provisions of Ch. VII. of Act X. of 1872. He appealed to the High Court on the ground (*inter alia*) that the Magistrate had no jurisdiction to try the case, inasmuch as the Governor-General in Council had not the power under 24 & 25 Vic., c. 67, to subject a European British subject to any jurisdiction other than that of the High Court, and therefore the provisions of Act X. of 1872, under which the prisoner had been tried, were *ultra vires* and illegal. *Held* that the jurisdiction of the High Court as given by the Letters Patent is subject to the legislative powers of the Governor-General in Council, and therefore the Magistrate had jurisdiction to try the case.

THE prisoner Gerald Meares, a European British subject, was convicted by the Magistrate of Jessore of the offence of causing hurt without grave or sudden provocation to one Panchoo, and was sentenced to two months' rigorous imprisonment. From this sentence the prisoner appealed to the High Court under the provisions of s. 79 of the Criminal Procedure Code, Act X. of 1872. Objection was taken to the conviction on the ground, amongst others, that the Magistrate had no jurisdiction to try the case.

The case came on for hearing before Phear and Morris, JJ., who differed in opinion on the merits, and the case was re-argued before the Chief Justice and Phear and Morris, JJ.

Mr. Lowe and Mr. Evans for the appellant.

The *Junior Government Pleader* (Baboo Juggadanund Mookerjee) for the Crown.

Mr. Lowe contended that the case against the appellant was not made out by the evidence.

Mr. Evans on the same side.—The High Court has exclusive jurisdiction over Her Majesty's European subjects. The provisions of Act X. of 1872, Ch. VII., by which the Governor-General in Council has given jurisdiction to Magistrates who are also Justices of the Peace over European British subjects were *ultra vires*. The Indian Councils Act (24 & 25 Vic., c. 67) vests the Governor-General in Council with legislative powers over all India, but s. 22 of that Act expressly provides that he shall not have the power to pass any law or regulation which shall affect the provisions of any Act passed in the same session with the Indian Councils Act. The Charter Act (24 & 25 Vic., c. 104) establishing the High Court was passed in the same session with the Indian Councils Act. S. 9 of this Act provides that the High Courts established under it shall exercise all the powers possessed by the abolished Courts, subject only to the provisions of the Letters Patent. Cl. 21 of the Letters Patent of 1862 provides that the High Court "shall have ordinary original criminal jurisdiction within the local limits of its ordinary original civil jurisdiction, and in respect of all persons beyond such limits over whom the said Supreme Court at Calcutta now has criminal jurisdiction." This is a substantive part of s. 9 of the Charter Act.

<sup>1</sup> Criminal Appeal, No. 101 of 1874, from an order passed by the Magistrate of Jessore, on the 29th June 1874.



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The Governor-General in Council is therefore prevented by the very Act which vested him with legislative powers over all India from making any law or regulation affecting the exclusive jurisdiction of the High Court over European British subjects, which it has received from the old Supreme Court. That the Imperial Legislature never intended the Governor-General in Council to have the power to derogate from the exclusive jurisdiction of the High Court, appears from the circumstances which followed upon the decision in the case of *Reg. v. Reay*.<sup>1</sup> In that case the conviction was set aside by the High Court of Bombay, who held that the Bombay Act VII. of 1867, under s. 31 of which the prisoner had been convicted, was *ultra vires*, the Governor in Council having no power to pass any measure by which the exclusive powers of the High Court, among them the jurisdiction which the said Court possessed through the Supreme Court over Her Majesty's European British subjects. In consequence of this decision the Supreme Government passed a special Act in order to remedy the defect. Act XXII. of 1870 declared that the Acts passed by the Local Governors in Council, making British European subjects liable to tribunals other than the High Courts, shall be deemed as valid as if such Acts were passed by the Governor-General of India in Council. But there were strong doubts whether the Governor-General had the power to pass any law, declaring such Acts to be valid; and accordingly the Imperial Legislature was called upon to confirm them as valid by 34 & 35 Vic., c. 34. [Couch, C.J.—That Act was passed merely to make the powers of the Local Governors co-extensive with those of the Governor-General.] It provides simply for the extension of the power of making laws and regulations conferred on Governors of Presidencies in India in Council by the Indian Councils Act, 24 & 25 Vic., c. 67, s. 42. There is no mention here that the legislative powers of the Local Governors in Council shall be co-extensive with those of the Governor-General of India in Council so far as the jurisdiction of the High Court is concerned. The Governor-General had not the power of making any law which might affect the jurisdiction of the High Courts, nor could he declare that the Local Governors in Council should have the power which he had not. The Imperial Legislature conferred this power on the Local Governors to meet a special need. The powers of the Governor-General in Council remained as limited as before. The provisions of Act X. of 1872, Ch. VII., by which the Governor-General in Council has vested Magistrates, who are also Justices of the Peace, with jurisdiction over Her Majesty's European British subjects, are therefore *ultra vires*. I submit, therefore, that the conviction is bad, and ought to be quashed.

The *junior Government Pleader* (Baboo Juggadanund Mookerjee), on behalf of the Crown, contended that the conviction was proper and legal, inasmuch as it was preposterous to suppose that the Imperial Legislature should vest the Local Governors with the powers which it denied to the Governor-General. Besides, cl. 44 of the Letters Patent, 1865, expressly declares that all the provisions of the Letters Patent were to be subject to the legislative powers of the Governor-General in Council. Hence, if there was any defect, it has been cured, and the powers of the High Court have become subject to the legislative powers of the Governor-General. The provisions of Act X. of 1872 are perfectly valid, and the conviction under that Act proper and legal.

Mr. Evans in reply.

*Cur. adv. vult.*

<sup>1</sup> 7 Bom H. C. Rep. Cr. 6.

The Judges differed in opinion on the merits of the case, Morris, J., being of opinion that the conviction should be quashed, and Couch, C.J., and Phear, J., that it should be upheld.

MORRIS J. (after giving his decision on the evidence, said as to the point of jurisdiction): In the view which I take on the merits, it is unnecessary for me to say more on the question of jurisdiction that has been raised than that, in my opinion, the Magistrate had jurisdiction to try the case.

COUCH, C.J. (PHEAR, J., concurring)—Before giving my opinion as to whether the conviction ought to be reversed, I will dispose of the question of the jurisdiction of the Magistrate.

By the Indian Councils Act, 1861 (24 & 25 Vic., c. 67), s. 22, it is provided that "the Governor-General in Council shall have power at meetings for the purpose of making laws and regulations, and subject to the provisions therein contained, to make laws and regulations for repealing, amending, or altering, any laws or regulations whatever then in force, or thereafter to be in force in the Indian territories then under the dominion of Her Majesty, and to make laws and regulations for all persons, whether British or native, foreigners or others, and for all Courts of Justice whatever, and for all places and things whatever within the said territories, and for all servants of the Government of India within the dominions of Princes and States in alliance with Her Majesty."

These words are as general as they can well be, and undoubtedly gave to the Legislative Council of the Governor-General power to make laws for all Courts of Justice, including the High Court, and for all persons, whether British or native. It is then provided that the Governor-General in Council should not have the power of making any laws or regulations which shall repeal, or in any way affect, any of the provisions of that Act, or any provisions of certain other Acts which are named, or of any Act passed in that session of Parliament, or thereafter to be passed, in anywise affecting Her Majesty's Indian territories or the inhabitants thereof.

Now, the Act for establishing the High Courts was passed in the same session of Parliament, and the question is whether the provisions in the new Criminal Procedure Code giving jurisdiction to Magistrates over European British subjects come within the words "affecting the provisions of any Act" passed in the session of Parliament in which the Indian Councils Act was passed. The 9th section of 24 & 25 Vic., c. 104, the Act for establishing High Courts of Judicature in India, provides that "each of the High Courts to be established under the Act shall have and exercise all such civil, criminal, admiralty and vice-admiralty, testamentary, intestate, and matrimonial jurisdiction, original and appellate, and all such powers and authority for, and in relation to, the administration of justice in the Presidency for which it is established, as Her Majesty may, by Letters Patent, grant and direct, subject, however, to such directions and limitations as to the exercise of original civil and criminal jurisdiction beyond the limits of the Presidency-towns as may be prescribed thereby; and save as by such Letters Patent may be otherwise directed, and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council, the High Court to be established in each Presidency shall have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same presidency abolished under the Act at the time of the abolition of such last-mentioned Courts." Accordingly, to the grammatical construction of this section the words, "subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council," apply

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to the provision that the High Court shall have and exercise the jurisdiction of the Supreme Court which was abolished under the Act. They do not apply to the former part of the section. The question then arises whether the provisions in the Letters Patent as to the jurisdiction of the High Court are to be considered as provisions of the Act, and therefore coming within the proviso which I have read, that the Governor-General in Council should not have the power of making any laws or regulations which should repeal, or in any way affect, any of its provisions. Now, the Letters Patent which were issued after the passing of this Act provide in the 21st clause that the High Court shall, in respect of all persons beyond the limits of its ordinary original civil jurisdiction, have the jurisdiction which the Supreme Court at Calcutta then had. The Letters Patent did no more than would have been done by the latter part of s. 9, if they had been silent as to the jurisdiction beyond the local limits of the ordinary original jurisdiction.

If Her Majesty had said nothing about the jurisdiction beyond those limits, the jurisdiction of the High Court over European British subjects would have been given by the Act by the words which say that the High Court shall have and exercise all jurisdiction which was vested in the abolished Courts; and by the very words of s. 9, if that had been the case, the jurisdiction over European British subjects would have been subject to the legislative powers of the Governor-General in Council. It appears to me to be unlikely that the Legislature intended that, if the jurisdiction was given by the Letters Patent, it should not be subject to the legislative powers of the Governor-General in Council, and could only be altered by an Act of the Imperial Legislature; but if the Letters Patent omitted to mention it, and it was given by the High Court's Act itself, that it should be subject to those legislative powers. That appears to me to be unlikely: still if we gather from the Act that this was the intention, and it appears plainly to be so, we should be obliged to give effect to it. After consideration of this question, I think that the meaning of the words "any provisions of any Act passed in the present session of Parliament, or hereafter to be passed," is provisions in the Act itself. For instance, there is the qualification of the Judges of the High Court. The Governor-General in Council has not power to make an alteration in that. There is an express provision of the Act upon the subject. So also in s. 15, there is a provision giving to the High Court superintendence over the Courts which are subject to its appellate jurisdiction. That, again, is a provision in the Act which cannot be affected or altered by the Governor-General in Council. But I am of opinion that the words "provisions in the Act" do not apply to what is not in the Act itself, but only in the Letters Patent, which the Act authorizes to be issued, and which can only be said to be a "provision of the Act" by relation—by what is rather a forced construction, namely, that as the section says that the Courts shall have all the jurisdiction which shall be given by the Letters Patent, whatever is given by them becomes fixed, and is in the same state as if the words in the Letters Patent had been in the Act itself. I think that was not the intention of the Legislature, and what has occurred subsequently confirms me in that opinion. By s. 42 of the Indian Councils Act, power to make laws and regulations was given to the Governors in Council of the other two Presidencies, and it was provided that they should not "have the power of making any laws or regulations which shall in any way affect any of the provisions of that Act, or of any other Act of Parliament in force or thereafter to be in force in such Presidency;" the difference with respect to them being that they cannot pass an Act which will affect any Act of the English Legislature in force in India, whereas the Governor-General in Council can do so.

Two of the Judges of the High Court at Bombay, in the case of *Queen v. Reay*,<sup>1</sup> held that the Legislative Council of Bombay had not power to confer criminal jurisdiction upon Magistrates in the mofussil over British-born subjects. One of them considered that the jurisdiction over British-born subjects was given exclusively first to the Recorder's Court, and through that to the Supreme Court, by 37 Geo. III., c. 142, s. 10; and he held that the Act of the Bombay Legislative Council affected the provisions of that Act. The other learned Judge, Sir Charles Sargent, appears to have rested his decision upon the ground that the Act of the Bombay Legislative Council affected the provisions of the High Court's Act. But they both agreed in holding that the Act of the Bombay Legislative Council was void. Upon this an Act was passed by the Legislative Council of the Governor-General (Act XXII. of 1870). In that it is recited that "the Governors of the Presidencies of Fort St. George and Bombay in Council, and the Lieutenant-Governor of Bengal in Council, have severally passed divers Acts purporting to apply generally to all persons within the local extent of the said Acts," and "that doubts have been raised as to the validity of such Acts in so far as they affect to render European British subjects liable to be convicted and punished by tribunals other than the High Courts of Judicature at Fort William, Madras, and Bombay, and "for the purpose of removing such doubts," it is enacted as follows: "Every such Act passed by the Governor of the Presidency of Madras in Council, or by the Governor of the Presidency of Bombay in Council, or by the Lieutenant-Governor of Bengal in Council, shall, so far as regards the liability of European British subjects to be convicted and punished thereunder, be and be deemed to have been as valid as if it had been passed by the Governor-General of India in Council at a meeting for the purpose of making laws and regulations." The Legislative Council of India, doubts having arisen in consequence of the decision of the Bombay High Court as to the power of the Local Legislature to make European British subjects liable to be convicted and punished by other tribunals than the High Courts, by declaring those Acts to be as valid as if they had been passed by the Governor-General in Council, assumes that it has the power to subject British subjects to a jurisdiction other than that of the High Courts. This having been done, but there being still a difficulty as to the further exercise of the power by the Local Legislatures, Act XXII. of 1870 only making valid Acts which had been passed, an Act of the Imperial Legislature was passed, namely, the 34 & 35 Vic., c. 34. This recites that "it is expedient that the power of making laws and regulations conferred on Governors of Presidencies in India in Council by the Indian Councils Act, 24 & 25 Vic., c. 67, s. 42, should, in certain respects, be extended," and it provides in the 1st section that "no law or regulation heretofore made or hereafter to be made by any Governor or Lieutenant-Governor in Council in India in manner prescribed by the aforesaid Act shall be invalid only by reason that it confers on Magistrates, being Justices of the Peace, the same jurisdiction over European British subjects, as such Governor or Lieutenant-Governor in Council, by regulations made as aforesaid, could have lawfully conferred or could lawfully confer on Magistrates in the exercise of authority over natives in the like cases." Now, if it had been supposed by the Imperial Legislature that the Legislative Council of the Governor-General had not the power which it had to alter or affect the jurisdiction over European British subjects, we should expect to find it conferred by this Act, because it cannot be supposed that the Imperial Legislature would give to the Governors in Council of Madras and Bombay a power which it did not in-

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tend the Governor-General in Council to have. But not only is this not done, but the Act XXII. of 1870 of the Governor-General in Council is noticed in s. 3, and its validity is recognized by its being provided that the Governors of Madras and Bombay and the Lieutenant-Governor of Bengal in Council shall have power to repeal or amend any of the Acts declared by it to be valid. So there is in this Act, 34 & 35 Vic., c. 34, to my mind a clear recognition of the existence of the power of the Governor-General of India in Council to subject European British subjects to a jurisdiction other than that of the High Courts. It appears to me to be a legislative exposition of the meaning of the words in the Indian Councils Act "provisions of the Act or of any Act hereafter to be passed."

I am, therefore, of opinion that there was power to make the provisions in the new Code of Criminal Procedure relating to European British subjects.

An allusion was made in the course of the argument to a clause in the second Letters Patent of this Court issued in 1865, by which Her Majesty declared that the provisions of that Charter are subject to the legislative powers of the Governor-General in Council. It appears to me, as I intimated in the course of the argument, that this is only a declaration what the law was, inserted perhaps for the purpose of clearly showing that the jurisdiction was subject to the Indian Legislature. If the decision of the question depended upon whether Her Majesty had power to make this provision, and to subject the provisions in the Letters Patent to the legislative powers of the Governor-General, there would be much greater difficulty in it. But my judgment is not founded upon that. I think it is no more than a declaration of what was the state of the law, and what it would have been whether that clause had not been in the Letters Patent.

*Conviction upheld.*

[FULL BENCH.]

*Before Sir Richard Couch, Kt., Chief Justice, Mr. Justice Kemp, Mr. Justice Jackson, Mr. Justice Phear, & Mr. Justice Markby.*

THE QUEEN v. SEWA BHOGTA.<sup>1</sup>

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Dec. 22.

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[23 W. R. 12.]

*Act X. of 1873, s. 13—Omission to take Evidence on Oath or Affirmation.*

The word "omission" in s. 13 of Act X. of 1873 includes any omission, and is not limited to accidental or negligent omissions.

JACKSON, J., dissented.

THE prisoner in this case was convicted of murder, and sentenced to death. The principal witness against him was his nephew, a boy of ten years of age, who was examined at the trial before the Judicial Commissioner of Hazaribagh on simple affirmation only.

The prisoner appealed to the High Court. The case came on before Couch, C.J., and Ainslie, J., who referred to a Full Bench the question whether the word "omission," in s. 13 of Act X. of 1873, includes any omission, and is

<sup>1</sup> Criminal Reference, No. 508 of 1874, from the Judicial Commissioner of Chota Nagpore, dated the 28th August 1874.

not limited to accidental or negligent omissions. The reference was made in consequence of the decision in *Queen v. Anunto Chuckerbutty*.<sup>1</sup>

The parties were not represented.

The following judgments were delivered by the Full Bench :—

COUCH, C.J., (KEMP, PHEAR, and MARKBY, JJ., concurring) :—We are of opinion that the word “omission,” in s. 13 of Act X. of 1873, includes any omission, and is not limited to accidental or negligent omissions. In this case the affirmation was in fact omitted to be made, although it was done deliberately and, under the direction of the Judge. The intention appears to have been to provide for every omission, substitution, or irregularity. There is therefore no objection to the validity of the conviction, but under the circumstances, and considering the evidence in the case, we think the sentence of death should not be confirmed. Instead thereof we pass a sentence of transportation for life.

JACKSON, J.—I am unable to concur in the opinion of the majority, as I cannot take the same view of the intention of the Legislature in using the word “omission.”

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<sup>1</sup> Before Mr. Justice Kemp and Mr. Justice Birch.

The 20th April 1874.

THE QUEEN v. ANUNTO CHUCKERBUTTY AND OTHERS (a).

Act X. of 1873, s. 13—Omission to take Evidence on Oath or Affirmation.

S. 13 of Act X. of 1873 does not render the evidence of a child of nine years of age inadmissible, if the evidence has been advisedly, and not by an omission, recorded without any oath or affirmation.

THE prisoners were charged with abducting one Prosonno, a girl, nine years of age, from the lawful guardianship of her uncle Luckhynarain Dey, for the purpose of marrying her to the prisoner Anundo Sen. Upon the trial, the evidence of the child was advisedly, and not by omission, recorded without any oath or affirmation.

The prisoners, having been found guilty, and sentenced to various terms of imprisonment, appealed to the High Court.

Mr. Reily (Baboo Juggut Chunder Banerjee with him) for the appellants.

The judgment of the Court was delivered by

KEMP, J.—Anunto Chuckerbutty, Anundo Sen, Haradhun Dey, and Aduri, have been convicted by the Sessions Judge of Midnapore under s. 363 of the Indian Penal Code, and the prisoners Anunto Chuckerbutty and Anundo Sen have been sentenced to four years' rigorous imprisonment, and Haradhun Dey and the female prisoner Aduri to two years' rigorous imprisonment. The Sessions Judge also finds the prisoners guilty of an offence under s. 366 of the Code, but he passes sentence under s. 363 for the offence of kidnapping.

The first point taken by the learned Counsel who appears for the prisoner is, that the evidence of the witness Prosonno, the niece of the prosecutor, or rather of the principal witness in this case, Luckhynarain Dey, is not admissible, inasmuch as that evidence has not been recorded on oath or solemn affirmation. Under s. 118 of the Evidence Act, all persons are competent to testify, unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions by tender years, extreme old age, disease, whether of body or mind, or any other cause

(a) Criminal Appeal, No. 230 of 1874, against the order of the Sessions Judge of Midnapore, dated the 19th March 1874.

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It seems to me that, in framing the 13th section of the Oaths Act, it was intended to obviate the effect of any evasion on the part of witnesses or mistake on the part of officers of the Court, and not to give a power to Judges or Magistrates to render the whole Act as it were ineffectual by perversely or erroneously ordering that witnesses should not take an oath or affirmation. It will be borne in mind that the oath is not merely imposed in criminal cases by the Act X. of 1873; but the Code of Criminal Procedure, s. 331, expressly requires that witnesses shall be examined on oath or affirmation, &c., according to the provisions, &c.

It seems to me, therefore, that the Judge in this case having been directed by law to examine the witness in question upon affirmation, and having determined that he would not administer such affirmation, the witness has been examined contrary to law, and the evidence is inadmissible.

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of the same kind. This witness would come under the description of a witness of tender years, being only nine years of age, but the Judge says that she appeared to be a very intelligent girl, and thoroughly understood what she was about when questions were put to her. Therefore, this witness would be a competent witness, although of course the amount of credence to be given to her evidence is quite another matter; but the learned Counsel further objects that, although the girl is a competent witness under s. 118, yet, inasmuch as all witnesses, that is to say, all persons, who may lawfully be examined, or give, or be required to give, evidence by or before any Court or person having by law or consent of parties authority to examine such persons, or to receive evidence, should be examined on oath or solemn affirmation, the witness Prosonno ought to have been so examined. S. 13 of the Oaths Act says that no omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever in or in respect of which such omission, substitution, or irregularity took place, or shall affect the obligation of a witness to state the truth. Now, this appears to me to apply, for instance, to the case of a person who has made a statement which is subsequently found to be a false statement, that he shall not get rid of the obligation of stating the truth by setting up a plea that there has been an omission on the part of the Court to administer to him an oath or solemn affirmation. It does not appear to me that this section would render the evidence of a child nine years old, whose evidence, as in this case, has been advisedly, and not by omission, recorded without any oath or affirmation, admissible as evidence; but, be that as it may, there is independent evidence in this case of the aunt of the child, of the uncle of the child, of two neighbours, and, I may say, the statement of Aduri herself, the grand-aunt of the child, and of Haradhun Dey, who is also one of the accused, before the Magistrate. (The learned Judge then went into the other evidence in the case, which, in the opinion of the Court, proved that the child Prosonno was, while in the lawful guardianship of her uncle Luckhynarain, and during his temporary absence from home, enticed away by her grand-aunt Aduri, and married against her will, and without Luckhynarain's consent, to Anundo Sen. He continued):—Looking to the time at which the offence was committed during the absence of the girl's legal guardian, and to the fact that the girl was married against her will, we think the offence is a very serious one, and we are therefore not disposed to mitigate the sentence which has been passed upon the prisoners by the Sessions Judge. The appeal is rejected.

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## APPENDIX.

*Before Mr. Justice Phear and Mr. Justice Morris.*THE QUEEN *v.* MUSSAMUT ITWARYA.<sup>1</sup>*Criminal Procedure Code (Act X. of 1872), s. 263—Verdict of a Jury, when to be set aside.*1874.  
July 3.14 B. L. R.  
Ap. 1.

In accordance with the order of the High Court, dated 9th May 1874 (see *ante* p. 54, or p. 673 of this book), the prisoner was again put on her trial on a charge, under s. 307 of the Penal Code, of an attempt to murder the girl Ramkooi by pushing her into a well. The matter came on the 6th June 1874, and the jury returned a unanimous verdict of acquittal. The Judge, however, disagreed with that verdict, and referred the case to the High Court under s. 263. In his reference, the Judge stated that "they (the jury) have explained their verdict by saying that they found her (the prisoner) not guilty, because there was no eye-witness to the fact, and because the evidence was contradictory. As I think the evidence of the witness Ramkooi is trustworthy, and clearly proves the offence with which accused is charged, that there is also corroborative evidence to a certain extent, and that no reasonable motive has been shown for attributing the charge to falsehood or mistake, I have dissented from the verdict, and think the case should be submitted to the High Court."

Mr. Collis (Baboo Kally Kishen Sen with him) for the prisoner.—Upon the Judge's own showing, this is not a case for the interference of the High Court, as it appears the evidence was contradictory; the jury are the judges of the inferences to be drawn from the evidence, and they have refused to infer the guilt of the prisoner from it. The High Court will only interfere when the jury are undoubtedly wrong—*The Queen v. Sham Bagdi*.<sup>2</sup> The powers given to this Court under s. 263 are not to be lightly exercised, and the unanimous verdict of a jury ought not to be set aside, even if the Sessions Judge disagrees with it, unless the verdict is patently wrong and unsustainable—*The Queen v. Nobin Chunder Banerjee*;<sup>3</sup> see also *The Queen v. Hurro Manji*.<sup>4</sup>

Again, Ramkooi's statement that she saw the prisoner throw her in is simply an inference, because she says the prisoner was behind her, and she was pushed in from behind.

The judgment of the Court was delivered by

PHEAR, J.—We think that we ought not to interfere with the verdict of the jury in this case.

<sup>1</sup> Criminal Reference by the Officiating Sessions Judge of Patna, dated the 8th June 1874.

<sup>2</sup> 13 B. L. R. Ap. 19 (see p. 667 of this book).

<sup>3</sup> 13 B. L. R. Ap. 20 (see p. 667 of this book).

<sup>4</sup> *Before Mr. Justice Phear and Mr. Justice Morris.*

*The 20th November 1873.*

THE QUEEN *v.* HURRO MANJI (a).*Criminal Procedure Code (Act X. of 1872), s. 263—Verdict of Jury, when to be set aside*

PHEAR, J.—In regard to this reference, made to this Court under the provisions of s. 263 of the Criminal Procedure Code, we may say that we entirely concur in the opinion

(a) Criminal Reference from the Officiating Sessions Judge of Hooghly, dated the 18th September 1873.



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The principle which should govern this Court in references of this kind was first explained in the case of *The Queen v. Nobin Chunder Banerjee*,<sup>1</sup> and was afterwards expressly adopted by another Bench of this Court in the case of *The Queen v. Hurro Manji*.<sup>2</sup> And we understand that it has been generally acted upon ever since.

Now, in the present case there is no evidence upon which a conviction could be sufficiently based, unless it be the evidence of the child Ramkooori. And she does not pretend to say that she saw the prisoner push her into the well. When she states that the prisoner was the person who pushed her into well, she plainly makes that statement as an inference of fact, because she goes on to describe that she was pushed in by some one from behind, and the last time that she had actually seen the prisoner, according to her own story, the prisoner was at some distance from her in the house. The first reason, therefore, which the jury give for their verdict is strictly applicable—namely, that there were no eye-witnesses of the principal fact.

In the absence of direct evidence that the prisoner did, in fact, push the child into the well, no doubt it was competent to the jury nevertheless to come to that conclusion from circumstantial evidence that the prisoner did do so. But the jury have refused to come to that conclusion upon the circumstantial evidence. And, unquestionably, it is possible, taking the facts of the occurrence to be precisely those which Ramkooori herself describes, that she may have been mistaken when she says that she was pushed into the well by the prisoner. There are indeed reasons which have been placed before us by the learned Counsel who has appeared on the part of the prisoner, which might lead to the inference that the child's story cannot be, in all respects, very accurate. But even assuming for the moment that it is accurate, so far as she describes the facts from her own observation, still it may well enough be that the cause which made her fall into the well, and the little child Jaggernath after her, was not a push given by the prisoner.

The jury also state that the evidence was contradictory; and this remark seems to be just.

On the whole, we feel impossible to say that they were so entirely mistaken in their verdict—that they were so patently wrong—that we ought to exercise the extraordinary powers which are given to us under s. 263, and, setting aside their verdict, convict the prisoner accordingly. We think their verdict must stand, and we direct that the prisoner be acquitted of this charge and set at liberty.

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lately expressed by this Court in a recent case—namely, “that the powers given to this Court by s. 263 are not to be likely exercised; and that the unanimous verdict of a jury ought not to be set aside, even if the Sessions Judge disagrees with it, unless that verdict is clearly and patently wrong, and unsustainable on the evidence.” It seems to us that the verdict in this case, with which the Sessions Judge disagrees, cannot be said to be “clearly and patently wrong, and unsustainable on the evidence.” If the statement which was made by the prisoner in Court is true—and the jury have, no doubt, believed that it was true (indeed, according to the reference made to us by the Judge, they informed him that they did so)—then their verdict was probably right in fact. We therefore think that there is not sufficient reason to interfere with the verdict which they gave. That verdict will consequently stand, and the record must be sent back again.

<sup>1</sup> 13 B. L. R. Ap. 20 (see p. 667 of this book).

<sup>2</sup> This case is reproduced in the preceding page.

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## [APPENDIX.]

*Before Mr. Justice Phear.*1875.  
July 20, 26,  
& Aug. 2.15 B. L. R.  
Ap. 14.

IN THE MATTER OF J. LOUIS, AND IN THE MATTER OF BENG. ACT VI. OF 1866.

*Act X. of 1875, s. 147—Transfer of Case to High Court—Costs—Police Magistrates—Notes of Evidence.*

In a case transferred to the High Court under s. 147, Act X. of 1875, the Court has no power to give costs.

*Semble.*—The case may be transferred after final determination by the Magistrate.

Notes of the proceedings before them should be taken in all cases by the Judicial Officers of all Criminal Courts subject to the Act.

CASE transferred to the High Court in its Original Criminal Jurisdiction under Act X. of 1875, s. 147, from the Court of the Magistrate for the Southern Division of the town of Calcutta. In this case a summons was issued to Mr. Louis to appear before the Magistrate to answer a charge of neglecting to give information to the Registrar of the district of the birth of a child. The hearing before the Magistrate resulted in Mr. Louis being fined Rs. 20. He thereupon applied to the High Court to have the case removed, alleging in the affidavit in support of his application that he had been prejudiced in making his defence by certain irregularities which he alleged had been committed in the course of the proceedings against him. The case was ordered to be brought up to the High Court, and on 26th July it came on for hearing before Phear, J.

Mr. *Lowe* on behalf of the prosecution.

Mr. *Wood* for Mr. Louis.

For the prosecution an objection was raised that s. 147, Act X. of 1875, only applied to cases in course of being heard by the Magistrate, and not to cases finally decided by him, in which sentence had been given; but the objection was overruled. The case was adjourned for the purpose of having the notes of the evidence before the Magistrate sent up, but after adjournment it appeared that no notes of the evidence were taken before the Magistrate, and the conviction was ordered to be quashed, and the fine refunded. The Court remarked that it was incumbent on the Police Magistrates, and all other Criminal Courts from which cases might be transferred under Act X. of 1875, to take notes of the evidence, so that, in the event of the case being transferred, the Court might have the substance of the proceedings before the Magistrate.

An application by Mr. *Wood* for costs was refused, the Court being of opinion that it had no power under the Act to give costs.



# BENGAL LAW REPORTS.

## SUPPLEMENTAL VOLUME.

[FULL BENCH.]

*Before Sir Barnes Peacock, Kt., Chief Justice, Mr. Justice Bayley, Mr. Justice Norman, Mr. Justice Pundit, and Mr. Justice Campbell.*

1866.

Feb. 7.

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THE QUEEN *v.* LALCHAND KOWRAH, CHOWKEEDAR, AND OTHERS.<sup>1</sup> [5 W. R. 23.]

*Evidence, Uncorroborated—Perjury—Act II. of 1855, s. 28—Penal Code (Act XLV. of 1860), s. 193.*

A person cannot be convicted in the mofussil of giving false evidence upon the uncorroborated evidence of a single witness.<sup>2</sup>

*Campbell, J., dissenting.*

THIS was an appeal from a conviction before the Sessions Judge of Hooghly.

The prisoner Lal Chand was convicted and sentenced to three months' imprisonment, under s. 193 of the Penal Code, on a charge of giving false evidence in a stage of a judicial proceeding, by falsely asserting to the Joint-Magistrate that he had not told the Inspector of Police that he had taken bamboos from Kartick Ghose, Rakhal Sahee, and others.

The proceedings before the Joint-Magistrate showed that a charge was pending before him against one Nissa Ahmed, the head-constable of Kulsinee, to whom a sum of money had been entrusted for the purpose of building a hut, that he had obtained materials without paying for them. The prisoner stated before the Joint-Magistrate: "I received from the head-constable the price of all the bamboos I collected; I did not tell the Inspector that I received bamboos from Kartick Ghose, Rughoo Sahee, and others named."

The evidence of Inspector Cavanagh was as follows:—

"I was investigating the conduct of the Kulsinee head-constable regarding the accounts of the zemindary dak-building at Nobogram. I remember that the prisoner told me that he had collected some bamboos for the purpose of that building. Lal Chand told me the names of certain persons from whom he had received some bamboos. I don't remember the names he mentioned, but I wrote them down, from his mouth at the time, in a memorandum." Producing memoranda A and B, he said: "These are the memoranda I wrote with my own hands." Refreshing his memory from them, he said: "Lal Chand told me he received bamboos from Kartick Ghose, Rakhal Sahee, and others. I took the names down at the time in my memoranda as the prisoners mentioned the names. They, of their own accord, gave the names. I am quite certain that this is the prisoner who made the assertion. I am quite certain that I made no mistake; and as each prisoner mentioned the names, I wrote them down." Pointing to another document, he said: "This is the original diary written by me from the memoranda, and is the report referred to in my deposition before the Joint-Magistrate."

<sup>1</sup> Committed by the Joint-Magistrate, and tried by the Sessions Judge of Hooghly.

<sup>2</sup> See Act I. of 1872, s. 134.

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The Judge, in summing up the case to the jury, said :—

" You have to determine whether you believe the Inspector or the prisoners; if the former, you must convict ; if the latter, if you think that the prisoner un-intentionally made the false assertions, you must acquit. It is nothing to you whether the alleged false evidence was or was not on a point material to the issue of the case in which it was given, or whether it was on a trifling or an important point, or whether there is any valid reason for their making a false statement. You have to decide whether the prisoners have falsely stated in their depositions as witnesses in the case against the head-constable as to the matter of the building of the zemindary dāk-house, that they did not state as recited in the charge. There is only one witness for the prosecution, but under s. 28 of Act II. of 1855,<sup>1</sup> the evidence of that one witness, if you believe it, is sufficient for the conviction of the prisoner ; for there is no law or practice of the Mofussil Sessions Courts which requires evidence corroborative of such single evidence in cases of false evidence."

The jury convicted the prisoner of giving false evidence before the Joint-Magistrate, and the Judge sentenced him to three months' rigorous imprisonment.

On appeal to the High Court, the case was heard before Norman and Campbell, JJ.

NORMAN, J., was of opinion that the conviction must be quashed on the ground that the evidence required corroboration, but Campbell, J., was of a contrary opinion. Therefore the following question was referred to a Full Bench :—

" Whether a person can be convicted in the mofussil of perjury upon the evidence of a single witness uncorroborated."

The opinions of the Full Bench were as follow :—

PEACOCK, C.J. (after stating the question, and reciting s. 28 of Act II. of 1855)—It is said that s. 28 does not extend to the Mofussil Court ; and that it applies only to the High Court on its Original Side, inasmuch as the Act was intended to apply only to Her Majesty's Supreme Courts. That depends upon the construction which is to be put upon the words, in the general rule laid down in s. 28, " in any such Court," or " before any such person." Now, it so happens that s. 27, which immediately precedes the section in question, says : " The rules of evidence in Her Majesty's Supreme Courts as to matters of Ecclesiastical or Admiralty Civil Jurisdiction shall be the same as they are on the Plea Side of the said Courts ;" and it is argued from that that, when s. 28 uses the words " in such Courts," it means in any such Court as is lastly above-mentioned, *viz.*, Her Majesty's Supreme Courts. But it appears to me that that construction is not correct. S. 27 was not intended to alter the rules of evidence in every branch of the Supreme Courts, but only to make the rules of evidence in matters of Ecclesiastical or Admiralty Civil Jurisdiction the same as those on the Plea Side of the said Courts. That was the sole object of s. 27, and it did not apply to matters of Criminal Jurisdiction. But s. 28 applies to cases of treason and perjury, and to all cases of every kind ; and it appears to me that the words " before any such Courts" were intended to refer to all Courts of Justice

<sup>1</sup> Act II. of 1855, s. 28.—" Except in cases of treason, the direct evidence of one witness, who is entitled to full credit, shall be sufficient for proof of any fact in any such Court or before any such person. But this provision shall not affect any rule or practice of any Court that requires corroborative evidence in support of the testimony of an accomplice or of a single witness in the case of perjury."

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in the territories then in the possession and under the government of the East India Company, as mentioned in s. 2 of the Aft. The words "or before any such person" cannot refer to persons mentioned in s. 27, as no persons are mentioned therein. They in like manner refer to the persons mentioned in s. 2, *viz.*, all persons having, by law, or consent of parties, authority to take evidence. Ss. 3, 5, 7, 11, and other sections, use the words "all such Courts and persons aforesaid," and ss. 6, 9, 12, and other sections, use the words "all such Courts and persons aforesaid," referring to the Courts and persons mentioned in s. 2. The Aft passed was for the improvement of the law of evidence, not only in the Supreme Courts, but in all the Courts of the country. Neither the title nor the preamble limit the Aft to the Supreme Courts.

If the words "such Courts," in s. 28, refer to the Supreme Courts, because those were the Courts last-mentioned, ss. 30, 41, and 45, which use the words "such Court or person," must, upon the same reasoning, be construed to refer to the Supreme Courts. The Aft recites that it is expedient, further, to improve the law of evidence, and then proceeds to enact "that, within the territories in the possession and under the government of the East India Company, all Courts of Justice, and all persons having, by law, or consent of parties, authority to take evidence, shall take judicial notice," &c. Further, the proviso in s. 28 shows that "any such Court" was not intended to refer simply to the Supreme Courts; it say: "But this provision," that is, the provision that the evidence of one witness, who is entitled to full credit, shall be sufficient for proof, and "shall not affect any rule or practice of any Court that requires corroborative evidence in support of the testimony of an accomplice or of a single witness in the case of perjury."

Now, the words "of any Court" would not have been used in the proviso of the preceding part of the section had they been intended to apply only to the Supreme Courts; whereas, if my construction is correct that the words "such Courts" and "such person" refer to the Courts and persons mentioned in the second section of the Aft, the words "of any Court," &c., are applicable and correct. According to the law as administered in the exercise of Original Criminal Jurisdiction, the evidence of only one witness, uncorroborated, is not sufficient to convict of perjury, because it is governed by the rules of the law of England. I do not mean to say that every rule of the law of evidence as administered in England applies to the mofussil, but I cannot think that we ought to put such a construction upon s. 28, Aft II. of 1855, as would allow a person to be convicted of perjury at Alipore, or in other parts of the mofussil, upon the uncorroborated testimony of a single witness, when such evidence would be insufficient for a conviction in Calcutta before the High Court in the exercise of its Original Criminal Jurisdiction. Such a construction would not be very consistent. But, if the law is so, we are bound by it. If there was any rule or practice in the Sudder Court or in the Courts in the mofussil, which, before Aft II. of 1855, prevented a conviction for perjury upon the evidence of a single witness without any corroboration, it appears to me that such Courts fall within the proviso in s. 28. Now, there is a case which was decided by Mr. Samuells in the Sudder Court, *Government v. Goreeb Peadah*,<sup>1</sup> in which the rule was laid down as follows: "Perjury is not to be assumed, because the story of one man appears to be more credible than that of another. There must be certain proof adduced, independent of the oath of one of the parties, that the deposition of the other is false;" that is to say, the oath of one man is not sufficient to convict another of perjury, when he has sworn to the contrary; that you are not to take the evi-

<sup>1</sup> 9 Niz. Ad. Rep. 210.

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dence which, by an accident, is the more credible for the purpose of convicting of perjury, but you must bring something corroborative or something more than the evidence of one witness. This rule, which was laid down by the Sudder Court in this case, is supported by other cases, and is in accordance with the principle of the English law. Indeed, I think, I may safely say that it was the practice of the Sudder Nizamut and of the Mofussil Courts not to allow a conviction of perjury upon the uncorroborated evidence of a single witness. Consequently, the case does not fall within the general rule of s. 28, inasmuch as it is taken out of that rule by the provision which says that the rule is not to affect any rule or practice of any Court that requires corroborative evidence of a single witness in a case of perjury.

We do not sit here to make the law, nor to exercise the functions of Legislatures, but to administer the law, as in our consciences we believe it to exist. It is unnecessary, therefore, to enquire whether the rule of English law or the rule of practice of the Mofussil Courts are founded upon sound and correct principles or not.

BATLEY, J.—In this case I would distinctly confine myself to the case as one of perjury. The question then is whether, when A has deposed one way, and B has deposed exactly the contrary, and upon this B is accused of perjury, the statement of A on oath, which is one statement against that of B also on oath, will require some corroboration before B can be convicted of perjury. I think that the principle laid down in the decision of Mr. Samuells in the case of *Government v. Goreeb Peadah*<sup>1</sup> is that which should be followed. That case is very analogous to this. The principle I would follow here is enunciated in the following words: "The conviction, which is founded simply on the oath of the persons accused by the prisoner, cannot stand. If I were to affirm such a conviction, no person bringing a charge against a darogah, who happened to enjoy the good opinion of the Judge and Magistrate of that district, would be safe. Perjury is not to be assumed, because the story of one man appears to be more credible than that of another. There must be certain proof adduced, independent of the oath of one of the parties, that the deposition of the other is false." As I said before, the case before us is a case of perjury, and therefore I would not go beyond it, or enter into any other question of the construction or application of Act II. of 1855, irrespective of this case of perjury.

NORMAN, J. (after stating the facts as above).—I may observe that the prisoner was called before the Joint-Magistrate to prove that by the desire of the head-constable he had taken bamboos, without paying for them, from Kartick Ghose and other villagers. He denied it. The question, whether he had not told the Inspector that he had not done so, was apparently put to him, in order to show that his statement before the Magistrate was at variance with the statement made by him to the Inspector, and, consequently, that his evidence in exculpation of the head-constable was not to be relied on, as opposed to that which it was expected that Kartick Ghose and the other villagers would give. It was clearly material as affecting his credit and the credibility of his statement on oath before the Magistrate. It is, therefore, not necessary for me to express any opinion as to whether a false statement made by a witness on a point wholly immaterial to the issue in a cause is a giving of false evidence, and, as such, punishable under the 193rd section.

The only other point is, that the prisoner was convicted of giving false evidence, the only proof that the testimony was false being that of a single witness. S. 28, Act II. of 1855, enacts (*reads*). An accomplice can hardly be said to be

<sup>1</sup> 9 Niz. Ad. Rep. 216.

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a witness entitled to full credit. I am disposed to think that, by the law of evidence in this country, and the practice of the late Sudder Court, the testimony of an accomplice required confirmation (see Regulation X. of 1824). I think that by the rule and practice of the late Sudder Court some corroborative evidence was required to prove the falsehood of the statement on which perjury is assigned: that a conviction for perjury was not allowed to stand where there was the mere uncorroborated oath of the prosecutor against the oath of the prisoner. See a case in Beaufort's Digest, para. 4508, in which, however, the rule was probably misapplied. See also *Government v. Goreeb Peadah*,<sup>1</sup> *Vakeel of Government v. Mussumat Kukha*,<sup>2</sup> and *Government v. Khooman*.<sup>3</sup>

I am sure that the rule rested on sound policy.

After a very careful consideration, I am disposed to think that the evidence of two witnesses, or at least some corroborative evidence of the oath of a single witness, is still necessary to prove the falsehood of any statement charged to be false evidence. But I feel considerable diffidence on the subject. My view is, however, apparently in accordance with the opinion of Mr. Norton in his *Work on Evidence*, s. 622. The cases of the other prisoners, who were tried at the same time, are precisely similar. I would quash the conviction. I should regret the acquittal of the prisoners on this ground, the less because of the shape which the charge in the present instance has assumed. The substantial offence of which the prisoners were apparently guilty was that of giving false evidence in order to screen an offender. In order to punish them for that offence, of which there was no sufficient proof, they are charged with having spoken falsely, by denying that they made a particular statement to the police-officer. The confessions of persons accused, made before police-constables, are not admitted as evidence of guilt; and it would certainly seem to be a dangerous practice that one who has made such a statement or confession before a single police-constable should be compellable to repeat or admit that he made the confession before the Magistrate or Judge, on pain of being charged with perjury if he retracts and denies that he made the statement. If the statements of the prisoners made to the Inspector are true, they are probably liable to be charged as guilty of, or of abetting, offences under the 105th or the 409th section of the Penal Code.

The case having been referred to the Full Bench on the second point, as the majority of such Court agree with me, the convictions will be quashed.

PUNDIT, J.—I believe that in the late Sudder Nizamut the Judges almost invariably convicted prisoners tried for perjury, when the oath against the former oath of the prisoner was corroborated, and so I should hold in this case that the testimony of one witness is not sufficiently legal to convict the prisoner.

CAMPBELL, J.—The question arising in this case is a point of law in a criminal appeal, from a conviction by jury for false evidence, first heard by Norman, J., and myself. There was a difference of opinion, on account of which we thought it necessary to refer the case to a Full Bench.

If I were charging a jury, or advising an inexperienced Judge, I should probably say that, in ninety-nine cases out of a hundred, a single witness would not suffice for a conviction in a case of this kind. As a matter of credibility, I have no doubt that it is so. But we are now called on to determine the matter

<sup>1</sup> 9 Niz. Ad. Rep. 210.

<sup>2</sup> 1 Niz. Ad. Rep. ed. by Macnaughten 314.

<sup>3</sup> 2 Niz. Ad. Rep. ed. by Macnaughten 168.



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simply as a dry point of law, and of law only. The prisoner has been convicted of false evidence in a trial by jury in the Sessions Court, upon the evidence of one witness, which the jury and the Judge deemed worthy of entire credit; and my learned colleague and myself, who sat on the Division Bench, were agreed that, as a question of fact, we neither had the power to interfere, nor saw any reason for interfering, with that conviction; that in this respect the appeal could not be sustained. The only question is whether, that being so, we are, as a matter of technical law, bound to quash the conviction; to say, we have no doubt of the truth of the evidence for the prosecution, we have no doubt of the guilt of the prisoner, we have no power to interfere with the finding of a jury on the facts, but still we are, in a case of perjury, bound by a technical rule to release the prisoners, because the evidence of one witness is, in law as distinguished from fact, insufficient for a conviction, and the jury cannot legally find a verdict upon it. I concur in the view of Act II. of 1855, s. 28, which has been taken by my learned colleagues. The first sentence of that section lays down the general law of British India, *viz.*, that one witness of unimpeached credit is (if believed by the Court) sufficient for a conviction in a case of perjury, or in any other case. The second sentence makes an exception in regard to Courts where a contrary rule or practice is already established. It is not, I think, necessary here to discuss whether, in English Courts, there is really on this subject a rule of legal effect; whether, in a case of perjury proved by a single witness, the question is one for the jury or for the Judge. I have no doubt that since the English law prevailed in the late Supreme Courts, and it was not in 1855 thought necessary to go beyond that law for the purpose of rendering the law of those Courts uniform with that of British India in general, the second sentence of s. 28 was intended to reserve the law of England in those Courts in regard to the point now before us, whatever the Judges might construe that law to be. Up to the present moment, the Criminal Procedure is entirely different within and without the limits of the original jurisdiction of the High Court; and it seems to me that, in 1855, the Legislature recognised and contemplated a very wide difference in the Criminal Law and Procedure within and without the Mahratta ditch. But the wording of the second sentence of s. 28, even if specially designed for the Supreme Courts, in terms extends to all Courts in which there had been previously established a rule or practice requiring corroborative evidence in support of the testimony of a single witness in the case of perjury. The question is, therefore, narrowed to this, *viz.*, whether in the Courts of Bengal such a legal rule or practice had been established. I think, however, that when the Legislature had laid down a broad and liberal rule for British India, and allows only of exception in regard to certain Courts, then, before we establish the exception in the Courts of Bengal, before we give effect to a highly technical rule at variance with the general law of British India, we must be satisfied that, in reality, such a rule was clearly, distinctly, and definitely established as matter of law. Previous to the Penal Code, the criminal law of the Mofussil Courts was very vague and uncertain. It may be that, both in criminal and civil matters, single Judges may occasionally have somewhat loosely quoted what they supposed to be the rules of English law. But I cannot think that two or three isolated instances of such references, culled from a vast number of decisions extending over very many years, would suffice to establish a rule of law. In this instance, so far as I have seen, even such *dicta* are quite wanting. A great deal depends on the way in which the word "practice" is understood. I quite admit that it may be found that, in practice, in a very great many cases, a single witness, uncorroborated, was not deemed sufficient for a conviction for perjury. But that is, in my view, a question of the credibility, not of the ad-

missibility, of the evidence. The question is whether there is a practice elevated to the dignity of an absolute rule of law, *vis.*, that though we may, to the fullest extent, believe the evidence, we cannot convict upon it, and must set aside the verdict of a jury. Such a rule of law must, it seems to me, have been clearly enunciated and consistently acted on before it can be binding upon us under the terms of the statute. I cannot see that it has been so. I do not find it clearly and broadly expressed in unambiguous terms in a single case which has come to my notice.

Beaufort quotes one case in which the Judge refused to convict for perjury on the evidence of two witnesses, because it was oath against oath; that can hardly be applicable. One or two other cases have been examined, and especially one is relied on, decided by Mr. Samuells—*Government v. Goreeb Peadah*<sup>1</sup>—in which it seems to me that the expressions used mean that, in the particular case, the Judge did not think, and in similar cases would not think, the unsupported testimony of one or two witnesses interested in the matter sufficiently credible. In truth, on examining that case, I find that there were two witnesses who directly swore to the perjury—"the darogah and a burkundaz named Meheeroollah." Mr. Samuells also says: "The only evidence against the prisoner is that of the darogah and the burkundaz whom he had accused, and the conviction, founded simply on the oath of the persons accused by the prisoner, cannot stand." It is evident that this case is not in point, nor have I seen any other more so. I cannot see that any rule of law on the subject was established in the Courts of Bengal, and, therefore, I would not give effect to such a technical rule in opposition to the general law of India.

The appellants having been convicted by the jury, I would dismiss the appeal.

*Before Sir Barnes Peacock, Kt., Chief Justice, Mr. Justice Trevor, Mr. Justice Seton-Karr, Mr. Justice L. S. Jackson, and Mr. Justice Macpherson.*

### THE QUEEN v. GODAI RAOUT.<sup>2</sup>

*Review of Judgment in Criminal Cases—Criminal Procedure Code (Act XXV. of 1861), ss. 404, 405, 439—Reg. IX. of 1793, s. 73—Reg. XIV. of 1870, ss. 3 & 4—Act XVII. of 1862.*

The High Court cannot review its judgment passed in a criminal case before it on appeal.

THE prisoner in this case was tried by a jury, and convicted. He appealed to the High Court, and was heard, by Counsel, before Seton-Karr and Macpherson, JJ., who dismissed the appeal, confirming the conviction and sentence.

Mr. *Cochrane*, for the prisoner, applied for a review of judgment on the ground that it was wrong in law.

Upon this application the Court referred the following question to a Full Bench:—

"Whether the Court has any power to entertain an application to review its judgment passed in a criminal case before it on appeal."

<sup>1</sup> 9 Niz. Ad. Rep. 210.

<sup>2</sup> Committed by the Magistrate and tried by the Sessions Judge of 24-Pergunnas. See *In the Matter of the Petition of the Government of Bengal*, 9 B. L. R. 346 & 347 (or p. 355 of this book).

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In referring the question the Court said: Without entering at all into the merits of that judgment, it appears to us that the application ought to be rejected, on the simple ground that this Court, having given judgment in a criminal case regularly brought before it on appeal, has no power to review its judgment. Cl. 38 of the Charter provides that "the proceedings in all other criminal cases shall be regulated by the Code of Criminal Procedure prescribed by an Act passed by the Governor-General in Council, and being Act No. XXV. of 1861, or by such further or other laws in relation to criminal procedure as may have been or may be made by such authority as aforesaid." Now, Act XXV. of 1861 gives no power to review a judgment passed on appeal in a criminal case, nor does any other enactment now in force, so far as we are aware, give any such power. A review of judgment in civil cases is given by the express provisions of the Civil Procedure Code; but in the absence of any such provision as regards criminal cases, in our opinion there is no review.

We find, however, that in the case of *The Queen v. Pursoram Doss*<sup>1</sup> a review was admitted, apparently without question or argument, by Kemp and Glover, JJ. As our opinion conflicts with that which those learned Judges must have entertained, and as the point is one of importance, we refer the question for the decision of a Full Bench.

Mr. Cochrane for the petitioner.

The opinion of the Full Bench was delivered by

PEACOCK, C.J.—The Court is clearly of opinion that a review of judgment will not lie from a sentence or judgment pronounced by the High Court or by a Division Bench of the High Court in a criminal case upon appeal. By cl. 38 of the Charter of the High Court, it is ordained (*reads*).

Regulation IX. of 1793, s. 73, has been relied upon in support of the argument in favour of a review of judgment. By that section it was enacted that the Nizamut Adawlut should exercise all the powers which were vested in it whilst it was stationed at Moorshedabad, and superintended by the late Naib Nazim, the Nawab Mahomed Reza Khan. It appears to the Court that the proceedings in criminal cases in the High Court are not regulated by the provisions of s. 73, Regulation IX. of 1793, even if that section has not been virtually repealed by the Code of Criminal Procedure. When the Letters Patent declared that the proceedings in all criminal cases shall be regulated by Act XXV. of 1861, it clearly could have been intended to vest the High Court with the powers of the Nizamut Adawlut whilst it was stationed at Moorshedabad and superintended by the Nawab Nazim. It is not shown, and it is not likely, that the Nawab Nazim ever granted reviews of judgment. This is an answer to that portion of the argument of the learned Counsel which depends upon s. 73, Regulation IX. of 1793.

The next argument to be considered is that which depends upon Regulation XIV. of 1810. In the course of his able argument, the learned Counsel, Mr. Cochrane, referred to ss. 3 and 4 of that Regulation. But it appears to us that those sections had a very different object from that of conferring a mere power to review a judgment upon the ground of error, as regards either the facts or the law. As we understand Regulation XIV. of 1810, it merely allowed the Court to grant a remission or mitigation of punishment, whenever they should be of opinion that a prisoner, according to the *fatwa* of the Mahomedan law-officers, or according to the Regulations, was declared liable to a more severe punish-

<sup>1</sup> 3 W. R., Cr. Rul. 45.

ment than the case warranted. S. 3 says: "In all criminal trials before the Court of Nizamut Adawlut (except for crimes against the State, in which cases the proceedings held upon the trials are required by s. 5, Regulation IV., 1799, and s. 5, Regulation XX., 1803, to be submitted, with the sentence of the Court, for the orders of the Government), if the *fatwa* of the law-officers of the Nizam Adawlut, or the sentence of an assembly of hill-chiefs in Zillah Bhoglepore (held under the provisions of Regulation I., 1796), shall declare a prisoner or prisoners liable to a more severe punishment than on due consideration of the evidence, and all the circumstances of the case may appear to the Court of Nizamut Adawlut to be just; or if a prisoner or prisoners (not charged with a crime against the State) shall, in any case before the Court of Nizamut Adawlut under the provisions of the laws and regulations in force, be liable to a more severe punishment than may appear to the Courts equitable, though not specifically declared by the *fatwa* of the law-officers, or sentence of the hill-chiefs in Zillah Bhoglepore; it shall be competent to two or more Judges of the Court of Nizamut Adawlut to grant such remission, or mitigation of punishment, as may appear just and proper, according to the evidence and circumstances of the case, and to pass sentence accordingly; provided that in all such cases the Court of Nizamut Adawlut shall record the grounds upon which a remission or mitigation of punishment may be adjudged under the discretion hereby vested in that Court, and shall communicate the same to the Court of Circuit (or Magistrate of Zillah Bhoglepore) before whom the trial may have been held, with directions to cause the same to be made known, in open Court, to the prisoner or prisoners concerned." That Regulation did not give the lower Courts the power of reviewing their own judgments on the grounds therein mentioned. The power was conferred upon the Nizamut Adawlut alone. But if this Court has power to review a judgment under the Code of Criminal Procedure, the lower Court must have that power also. S. 4 of the Regulation did not carry the case further than s. 3. It declares that "the powers vested in the Nizamut Adawlut by the preceding section shall be considered applicable to all cases in which that Court" (meaning the Nizamut Adawlut) "may revise a sentence passed by a Court of Circuit, or Zillah or City Magistrate, or assistant to a Magistrate, in pursuance of s. 24, Regulation IX. 1807, or under any other provision in the Regulations. It is also declared applicable to any cases in which the Court of Nizamut Adawlut may see reason to revise a sentence passed by that Court, and to remit any part of the punishment adjudged. But this discretion shall not be exercised without strong and sufficient grounds to be recorded at large upon the proceedings of the Court." Now, the words "by that Court" have been very properly argued to mean the Nizamut Adawlut itself. But, then, the only power of that Court is that given by the 3rd section, *viz.*, the power to grant a remission or mitigation of a sentence where the *fatwa* of the law-officer, or the general laws and regulations in force, declared a prisoner liable to a more severe punishment than, upon a due consideration of the evidence, and all the circumstances of the case, might appear to the Court equitable or just. These sections have been altogether repealed by the repealing Act XVII. of 1862, and, therefore, no longer exist. But it has been argued by the learned Counsel that there has been one uninterrupted series of authorities, for fifty-two years, to show that the Nizamut Adawlut exercised the power of review under the general powers of the Court. No doubt, when this Regulation existed, the Court had the power to revise sentences for the purpose of mitigating them. But a practice, even for fifty-two years under a particular law, does not show that a right existed independently of that law, or continues to exist after it has been repealed. The sections above referred to did not confer a power upon the Criminal Courts of reviewing their own judgment,

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upon the ground of their having coming to an erroneous conclusion upon the evidence given before the lower Courts, or of their having committed a mistake on a point of law.

The Code of Criminal Procedure does not contain any section expressly authorizing a review of judgment in a criminal case after the judgment has been recorded. The Code of Criminal Procedure was passed after the Code of Civil Procedure. The latter contains a section expressly authorizing a review of judgment, but the former contains no corresponding section. From this it may reasonably be inferred that the Legislature did not intend to confer in criminal cases a power similar to that which they had given in civil cases.

There were certainly one or two cases cited in which the Nizamut Adawlut did grant a review, not simply under the Regulation of 1810, but generally upon the merits of the case. The cases, however, were not so numerous as to show that there was a uniform uninterrupted practice of granting reviews upon the general merits of the case. There are only three or four cases to which our attention has been called. One of the Circular Orders of the Nizamut Adawlut was referred to by the learned Counsel. The one of 9th May 1861 has also been brought to our notice. The learned Counsel contends that the ruling in that Circular Order is not correct, inasmuch as it was opposed to the principles of Regulation XIV. of 1810. The Circular Orders are certainly not authorities binding on the Court. But they are useful for the purpose of showing what was the opinion of the Court as to whether there had been an uninterrupted practice or series of authorities on a particular subject. In the Circular Order of 9th May 1861, the Sudder Court (Messrs. Raikes, Trevor, Loch, and Steer) declared that the power vested in the Court by s. 4, Regulation XIV. of 1810, was "a power of revision with a view of a remission of part of the punishment, and did not extend to the granting a review of judgment or rehearing a whole case, which might eventually end in a sentence opposed to that originally passed." The Circular Order goes on to say that "it is questionable whether the power exists under Regulation law; and should a case come to the notice of the Court in which the sentence originally passed appears erroneous, and the prisoner entitled to acquittal, the proper course, it seems to the Court, would be to report the case to Government, in order that a pardon might be granted to the prisoner."

It appears, therefore, that, as late as May 1861, there was a Circular Order of the Sudder Court, stating that the power vested in the Court by virtue of Regulation XIV. of 1810 did not allow a review of judgment generally upon the merits, but merely for the purpose of remitting a portion of the punishment when it was considered too severe. Surely that is not (as it was contended in the argument) contrary to Regulation XIV. of 1810. It is clearly in accordance with the words of ss. 3 and 4 of that Regulation.

But a further question remains to be considered, *viz.*, whether, even supposing the Sudder Court did, before the passing of Act XXV. of 1861, allow a review, was the same power of granting reviews in criminal cases continued to the High Court by the Charter, of which cl. 38, which has already been read, directs that its proceedings in criminal cases shall be regulated by the last-mentioned Act XXV. of 1861?

Whether those cases were correct or not, is not material; even supposing that they were correct, and that the Sudder Court had the power to grant reviews for the purpose of re-considering their judgments pronounced in appeal, it appears to us that power no longer exists, for the High Court was required by cl. 38 of its Charter to regulate its proceedings in criminal cases by Act XXV. of 1861.

Now, the next question is, does Act XXV. of 1861 contain any express or implied power to this Court to review its judgment in criminal cases? We have already pointed out that, notwithstanding there is an express clause in the Code of Civil Procedure providing for cases in which reviews of judgment may be allowed, the Code of Criminal Procedure is wholly silent upon the point; and, therefore, if the power is given by the Act, it is simply by inference from certain sections, and those are the sections to which the learned Counsel has alluded. First, he has referred to s. 404. That section contains the following enactment: "The Sudder Court may, on the report of the Court of Session, or of a Magistrate, or whenever it thinks fit, call for the record of any criminal trial, or the record of any judicial proceeding of a Criminal Court, other than a criminal trial, in any Court within its jurisdiction, in which it shall appear to it that there has been error in the decision on a point of law, or that a point of law should be considered by the Sudder Court, and may determine any point of law arising out of the case, and thereupon pass such order as to the Sudder Court shall seem right." That is, that in those cases where an appeal is not expressly given by law, the Sudder Court may, of its own authority, or on the report of a Court of Session or of a Magistrate, call for the record of any criminal case for the purpose of setting the judgment right upon any point of law. But that does not apply to setting a judgment right upon questions of fact; whereas, if the learned Counsel is right in his contention, the Court has the power of altering, upon review, not only a judgment of a subordinate Court, but also its own judgments, upon a matter of fact as well as upon a matter of law. S. 405 was also referred to. It says: "It shall be lawful for the Sudder Court to call for and examine the record of any case tried by any Court of Session for the purpose of satisfying itself as to the legality or propriety of any sentence or order passed, and as to the regularity of the proceedings of such Court. If it appear to the Sudder Court that the sentence passed is too severe, the Sudder Court may pass any mitigated sentence warranted by law. If the Sudder Court shall be of opinion that the sentence or order is contrary to law, the Sudder Court shall reverse the sentence or order, and pass such judgment, sentence, or order as to the Court shall seem right, or, if it deem necessary, may order a new trial." The Court has two jurisdictions: firstly, as a Court of Revision to set right matters of law, even though there may be no appeal; and, secondly, as a Court of Appeal, where an appeal is properly preferred before it. S. 405 applies to the Court as a Court of Revision. There is another section (439) which deals with cases whether brought before the Court as a Court of Revision, or brought before the Court as a Court of Appeal. That section enacts: "No trial held in any Criminal Court shall be set aside, and no judgment passed by any Criminal Court shall be reversed, either on appeal, or otherwise, for any irregularity in the proceedings of the trial, unless such irregularity have occasioned a failure of justice." It is contended that the words "or otherwise" show that it is intended that the Court should have the power of reviewing its own judgment. But the section is not an affirmative one, giving jurisdiction, but a negative one, directing that a judgment shall not be set right, unless the grounds are such as show that a failure of justice has been occasioned. It appears to us, therefore, that none of the sections which have been cited show impliedly that it was the intention of the Legislature to give to the High Court a power of reviewing its own judgments after they have been duly recorded. We do not mean to say that, if, before a judgment has been recorded, the attention of the Court be called to any matter, showing that there is an error or mistake in the judgment pronounced, the Court has not the power of correcting such error or mistake; nor do we mean to say that the Court has not power to correct clerical errors in its judgments after they are recorded. But

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we are speaking of cases where the judgment has been recorded, and the Court is called upon to grant a review of its judgment, for the purpose of showing that it ought to have come to a different conclusion, either upon the facts or upon the law. The learned Counsel has pointed out that the consequences would be monstrous if this power of review were not given. But the same argument would apply to trials in the Courts of England. Suppose a jury should find a party guilty, there would be no appeal or writ of error, nor could the prisoner tender a bill of exceptions. The only mode of remedying the evil would be by appealing to the mercy of the Crown. So, in the present case, if it should be discovered that the Court has come to a wrong conclusion, either upon a matter of fact or upon a matter of law, the case may be brought to the notice of the Executive Government, either for the purpose of mitigating the sentence, or of pardoning the offender, as the case may require. There would be no end to cases of this kind, if, after the Court has duly recorded its judgment, the matter is to be re-opened on the ground that the Court has come to an erroneous conclusion. In civil cases, if an erroneous judgment could not be set right upon a review, there would be no one to appeal to for relief except the opposite party; but in criminal cases the Executive Government can always grant relief where an error has been committed. It appears to us that it was the intention of the Legislature that the Court should not exercise the power of reviewing its own judgments in criminal cases. In civil cases, where such a power was intended to be given, it was conferred by express words in the Code of Civil Procedure. We understand that, since the High Court has been in existence, there has been one case of a review by a Division Bench; but that case was never argued, and one of the Judges who granted the review (Kemp, J.), when he declared that he did not wish to prevent the case from being reheard, expressly stated that he had doubts as to the power of granting a review. That, therefore, is no precedent: even if it were, it does not preclude the Court from considering the question in Full Bench.

*Before Sir Barnes Peacock, Kt., Chief Justice, Mr. Justice Trevor, Mr. Justice Norman, Mr. Justice Campbell, Mr. Justice E. Jackson, and Mr. Justice Glover.*

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THE QUEEN v. GORACHAND GOPE AND OTHERS.<sup>1</sup>

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[5 W. R. 45.]

1 Ind. Jur.

N. S. 177.]

*Code of Criminal Procedure (Act XXV. of 1861), ss. 403, 404, 405, 407, & 419—Revision by High Court—Enhancement of Punishment—Murder—Culpable Homicide.*

Under s. 404 of the Criminal Procedure Code<sup>2</sup> the High Court may set aside a judgment of acquittal for error in law. The High Court, as a Court of Revision, has power to enhance a punishment. The High Court may send the case back to the Court of Sessions with an order to pass the proper sentence.

The High Court may act as a Court of Revision after it has acted as a Court of Appeal in order to correct an error which cannot be set right by appeal.

Culpable homicide and murder distinguished.

<sup>1</sup> Committed by the Magistrate and tried by the Sessions Judge of Mymensingh. See *Queen v. Chundrakant Chuckerbutty*, 1 B. L. R. A. Cr. 8 (or p. 5 of this book) and *Queen v. Gorachund Ghose*, 3 B. L. R. F. B. 1 (or p. 79 of this book).

<sup>2</sup> *Act X. of 1872, s. 297.*—"If, in any case, either called for by itself or reported for orders, or which comes to its knowledge, it appears to the High Court that there has been a material error in any judicial proceeding of any Court subordinate to it, it shall pass such judgment, sentence, or order thereon as it thinks fit.

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THE prisoners were convicted by the Sessions Judge of Mymensingh of abetment of the culpable homicide of Amordi, not amounting to murder, and were sentenced to seven years' rigorous imprisonment in transportation. They appealed from that sentence to the High Court. The appeal was heard before Campbell, E. Jackson, and Glover, JJ., by whom it was afterwards referred to a Full Bench.

The evidence proved that the prisoners went with a large body of men, in the middle of the night, to the house of one of the witnesses, Fagu; that they seized Fagu, his brother Foggo, his stepson Kalu, and Amordi, who, with his family, was living in Fagu's compound, and carried them all away to a village called Bungatal, two or three miles distant; that as they left Fagu's compound, all the houses in it were set on fire and burnt; that in Bungatal, they took the above four persons to the house of one Boidonath, and tied their hands behind their backs, and severely beat them, so as to break the arms of Fagu, and to make Amordi senseless; that they then took these four persons to the house of Faridha, Chowkidar of Bungatal, and charged them with theft; that they carried Amordi on a bamboo with his hands and feet tied together, the result being that he was found, on reaching Faridha's house, to be dead; and that they satisfied themselves that he was dead, by jumping on the bamboo which was lying across Amordi's body, and finding that he did not cry out. The Civil Surgeon deposed that Amordi had two of his ribs broken and his spleen ruptured, the latter injury being the cause of his death. The Judge of Mymensingh acquitted several persons charged before him with having been concerned in the outrage, but convicted the prisoners.

JACKSON, J. (after stating the facts as above, continued): I see no reason to doubt the truth of the evidence against these men. The cause of the attack was, in the Judge's opinion, some suspicion that the prisoners entertained that Fagu and his relatives had been guilty of some theft, but there is nothing to show where or when any theft took place. It appears to me far more probable that the cause was, as the witnesses depose, enmity between the prisoner Gorachand and the witness Fagu, in consequence of the latter having been success-

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"If it considers that an accused person has been improperly discharged, it may order him to be tried, or to be committed for trial.

"If it considers that the charge has been inconveniently framed, and that the facts of the case show that the prisoner ought to have been convicted of an offence other than that of which he was convicted, it shall pass sentence for the offence of which he ought to have been convicted:

"Provided that, if the error in the charge appears materially to have misled and prejudiced the accused person in his defence, the High Court shall annul the conviction and remand the case to the Court below with an amended charge, and the Court below shall thereupon proceed as if it had itself amended such charge.

"If the High Court considers that any person convicted by a Magistrate has committed an offence not triable by such Magistrate, it may annul the trial, and order a new trial before a competent Court.

"If it considers that the sentence passed on the accused person is one which cannot legally be passed for the offence of which the accused person has been convicted, or might have been legally convicted upon the facts of the case, it shall annul such sentence, and pass a sentence in accordance with law.

"If it considers that the sentence passed is too severe, it may pass any lesser sentence warranted by law; if it considers that the sentence is inadequate, it may pass a proper sentence."

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ful in obtaining the farm of his village against Gorachand, who had also applied for it. But whether there was any suspicion of theft or not, the attack made by these prisoners, the burning of the witnesses' houses, their seizure and severe beating, and the forcible carrying them off for several miles, as well as the manner in which Amordi was carried, resulting in his death, are all clearly proved; and I would, therefore, dismiss the prisoner's appeal.

But there still remains for consideration the question whether this Court ought, looking to the judgment of the Sessions Judge of Mymensingh, and the gross nature of the outrage which has been committed, for which the punishment inflicted appears to me most inadequate, to exercise the powers vested in it under ss. 403 and 405 of the Procedure Code. The prisoners were charged before the Sessions Judge with murder and culpable homicide, but the Judge acquitted them of those offences, and convicted them of a charge which he directed to be added to the calendar, *viz.*,—abetment of culpable homicide. He acquitted them of the charge of murder, because, as he stated, "there is not the smallest reason to suppose that the prisoners with *malice prepense* killed Amordi." He acquitted them on the charge of "culpable homicide, because none of the witnesses can state which of the prisoners actually struck Amordi and caused his death," but convicted them of abetment of culpable homicide, "because it is proved that some of the prisoners beat Amordi and caused his death, and that the prisoners who beat Amordi caused his death by culpable homicide, as he was, doubtless, beaten with the intention of causing such bodily injury as was likely to cause death; and that the prisoners were actually present, assisting in taking away Amordi, and assisting by their presence in the beating of him; but it is not clear at whose instigation the crime was committed." The Judge is wrong in law on each separate point. It is not necessary, under the Penal Code, to prove *malice prepense* to constitute the crime of culpable homicide amounting to murder. The words "*malice prepense*" do not appear in the Penal Code, and the Judge should, as far as possible, confine himself on his trials to the language of the Code. S. 299 of the Penal Code lays down that whoever causes death by doing an act with the intention of causing such bodily injury as is likely to cause death commits the offence of culpable homicide. S. 300 lays down that culpable homicide is murder, if the act by which the death is caused is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, except in certain special cases. The Sessions Judge finds the offence which has been committed exactly in the above terms of the law which constitute the offence of murder, and still records that the offence committed was only that of culpable homicide not amounting to murder. Here, then, it appears to me that there has been an error in the decision on a point of law, and that, in the express words of the Sessions Judge's judgment, the prisoners should have been convicted of abetting murder, and not culpable homicide. But the Judge is equally wrong in finding the prisoners guilty of abetment. S. 114 of the Penal Code lays down that "whenever a person who, if absent, would be liable to be punished as an abettor, is present when the act or offence for which he would be punishable in consequence of the abetment is committed, he shall be deemed to have committed such an act or offence." The Sessions Judge distinctly finds that the prisoners were present when the offence was committed, and still convicts them of abetment.

The Court has authority, under ss. 403 and 405 of the Procedure Code, to consider these points of law, and, where it finds that there has been error in the decision of the Sessions Judge on a point of law, to determine that point of law,

and to pass such order as to the Court shall seem right. I would then annul the conviction of the Sessions Judge on the charge of abetment of culpable homicide, and convict the prisoners of the offence of murder : and as it is not clear which of the offenders took the leading part in the crime, and caused the actual death, I would sentence them all to transportation for life.

GLOVER, J.—That the Sessions Judge was altogether wrong in law, there can be no doubt ; he has convicted and sentenced the prisoners for abetment of culpable homicide not amounting to murder, whilst his finding, expressed in his own words, shows, as clearly as words can do, that the crime they had committed, and which he himself considered proved, was not culpable homicide not amounting to murder, but murder itself. His reasons contradict his judgment. He is equally wrong in convicting of abetment. He finds that the prisoners were all engaged in the assault, and they were, therefore, equally principals. But the question is, whether this Court has power to amend the Sessions Judge's conviction and sentence, and to substitute one that is legal and proper *proprio motu*. The words of ss. 403 and 405 of the Criminal Procedure Code are, doubtless, very wide, and under them I have no doubt that we have power to amend the lower Court's finding, as being altogether opposed to the evidence and to the Judge's own reasoning, and, therefore, illegal ; but we are only, as it seems to me, empowered "to pass such order as may seem right" on the point of law, and I do not see how we could go the length of amending the conviction in the present case, because we could not do it without, at the same time, enhancing the punishment from seven years' imprisonment to transportation for life, which would be contrary to the spirit of s. 419.

The proper order, I conceive, would be to annul the Sessions Judge's conviction and sentence as illegal, and direct him to pass a legal order on the evidence, and to sentence the prisoners accordingly. For this Court to pass such an order would, I think, be contrary to regulations, and contrary to the opinion I have already expressed in a somewhat similar case—*Queen v. Jan Mohamed*.<sup>1</sup>

CAMPBELL, J. (after stating the facts)—The Court has not seen sufficient reason to interfere with the finding of the facts ; the appeal of the prisoners is rejected. The only question is as regards the legality of the finding and sentence, which we consider as a Court of Revision. The judgment of the Sessions Judge is full of illegality ; and it also appears that the lenient sentence is not only the result of an exercise of a discretion allowed by law to the Sessions Judge, but the direct result of a misapprehension of the law. The Sessions Judge has awarded the *maximum* sentence allowed by law for the offence of which (under his misview of the law) he has convicted the prisoners under s. 115 of the Penal Code, *viz.*, "abetting of the commission of an offence punishable with transportation for life, if that offence be not committed in consequence of the abetment," or, as he puts it, "the said offence having been committed not in consequence of that abetment." The "not" might be supposed to be a clerical error, but it seems to be intentional, for the section quoted refers exclusively to the case when the offence is not committed ; and in another place the Sessions Judge says : "As it is not clear at whose instigation the said crime was committed." What he means by saying that the offence was not committed in consequence of the abetment, after his circumstantial statement that the convicted parties were actively participating in it, or how he convicts of abetment, when the "instigation" is not proved, no one can

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guess: but setting aside other illegalities and absurdities, one illegality is quite patent in the judgment, which is directly at variance with s. 114. That section most clearly provides that a person who, if absent, would be liable to be punished as an abettor, if present when the offence is committed, shall be deemed to have committed such offence; that is, he is not an abettor, but a principal. The Sessions Judge finds in so many words that the prisoners were present; therefore the conviction for abetment is illegal.

The question, then, is what can we do? S. 419 of the Criminal Procedure Code, occurring in Chapter XXX.—“Appeals,”—and relating to the “Appellate Court,” does not affect Chapter XXIX., regarding revisions; it is merely intended to limit the power of an Appellate Court, upon the appeal of the party, by the provision that the order passed in appeal shall be “not so as to enhance any punishment that shall have been awarded.” Thus, then, the appeal of the prisoner is simply dismissed. But the mere fact of an appeal having been preferred does not take away the power of the Court to act as a Court of Revision, and as a Court of Revision, when a sentence is clearly illegal, we can, under ss. 403, 404, and 405, revise the sentence, and pass a legal sentence, whether the legal sentence be more severe or less severe than the sentence illegally passed by the District Judge. For instance, if the Court below had in so many words convicted the prisoners of murder, and the Sessions Judge had thereupon sentenced them to seven years’ imprisonment, then I think that the said sentence being wholly illegal, this Court might have reversed the sentence, and passed one of the sentences warranted by law, *viz.*, death or transportation for life. Whether in the case of the Court below specifically finding that the prisoner had committed certain acts in the exact words used by the Penal Code to define one offence, and then, choosing to call that act another offence, we could sentence for the right offence, might be more doubtful; probably, however, we might. But in the present instance we cannot follow this course for several reasons. *First.*—The Sessions Court is not composed of the Judge alone, but of the Judge and assessors. The prisoner is entitled to the opinion of the assessors, and to the influence of that opinion. In this case, the illegality is confined to the judgment of the Judge. There is nothing to show whether the assessors were or were not misled by the same error of law, or whether they took another view of the facts. Their opinion, after a legal and proper charge, is necessary. *Second.*—It is not exactly the case that the Judge has found the facts necessary to make up the definition of murder. In regard to the difference between culpable homicide and murder, the Code itself is somewhat obscure. There seems to be some repetition and tautology in ss. 299 and 300. We may put the exceptions out of the question for the present. Supposing that the culpable homicide comes within none of the exceptions, is it then necessarily murder? It appears not. By s. 299, whoever causes death by doing an act with the intention of causing death commits culpable homicide. By s. 300 “culpable homicide is murder, if the act is done with the intention of causing death.” So far the definition seems simply to repeat the same provision regarding intention a second time. Then, in the second case, it is culpable homicide, if the act is done “with the intention of causing such bodily injury as is likely to cause death;” but in the second case of murder, in adding nearly the same proviso to culpable homicide, there is a slight variation in the words, the culpable homicide must be done “with the intention of causing such bodily injury as the offender knows to be likely to cause death;” the words “offender knows” are added. It would seem that, if a man scalps another, knowing that he will thereby probably or very likely cause death, he is guilty of murder; but if he is a savage who intends to scalp, but has no distinct knowledge that

death will probably ensue, and death does ensue as a likely consequence, he is guilty of culpable homicide not amounting to murder. In the latter case also, if the injuries inflicted are so severe as not only to be likely to cause death, but almost of necessity to cause death in the ordinary course of nature, then again the case comes within the third class of murder, even without the knowledge. The difference seems to be when, in addition to want of knowledge of the probable ulterior results, the injuries intended to be inflicted are such as are likely to cause death, but not such as in the ordinary course of nature must necessarily cause death. Thus, the difference is, in fact, not very broad, that is, in the absence of the exceptions. Still it must be supposed that the law intended to make some difference, and the words used by the Judge, "he was doubtless beaten with the intention of causing such bodily injury as was likely to cause death" by omitting the words "the offender knew to be," tally more exactly with the definition of culpable homicide than with that of murder. If the facts of this case be so, and the prisoners did not know that death would be the probable or likely result, they would have the benefit of that difference or doubt, subject to the additional question—were the injuries intended to be inflicted such that, in the ordinary course of nature, they must almost necessarily have caused death to a man in ordinary health? *Third*.—The finding of the facts by the Judge being so contradictory and unintelligible, it would be most unsafe to assume that he has found anything distinctly.

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The judgment and sentence, being contrary to law, must be reversed. The Judge having left, we cannot order him to charge the assessors again, record a legal judgment, and pass a legal sentence; and, therefore, annulling the proceedings, we must order a new trial. The Judge will, on the trial, consider, *1st*—Did the prisoners, either by their own hands or by such conduct, when present, as would have amounted to abetment if absent, intentionally inflict or cause to be inflicted such bodily injury as was likely to cause death; *2nd*—If so, had they the knowledge that they were likely to cause death? *3rd*—If they had not the knowledge, were the injuries intended to be inflicted so severe as, in the ordinary course of nature, must cause death to a healthy man? If the first question is answered in the affirmative, the prisoners will be guilty of culpable homicide. If, further, either the second or third question be answered in the affirmative, the offence will be murder.

If both the second and third questions are answered in the negative, then the offence will be culpable homicide not amounting to murder.

GLOVER, J.—As Mr. Dodson, the Sessions Judge who tried the case, has left Mymensingh, I concur with Campbell, J., in quashing the conviction, and ordering a new trial.

Before issuing final orders, it was thought desirable by Campbell and Glover, JJ., to take the opinion of the Full Bench on the points of law involved. The case was accordingly referred to a Full Bench.

The opinion of the Full Bench was delivered by

PEACOCK, C.J.—There are, in my opinion, several important distinctions between murder and culpable homicide; an offence cannot amount to murder, unless it falls within the definition of culpable homicide, for s. 300 merely points out the cases in which "culpable homicide is murder." But an offence may amount to culpable homicide without amounting to murder. Culpable homicide is not murder, if the case falls within any of the exceptions mentioned in s. 300. The causing of death by doing an act with the intention of causing

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death is culpable homicide. It is also murder, unless the case falls within one of the exceptions in s. 300. Causing death with the intention of causing bodily injury to any person, if the bodily injury intended to be inflicted is sufficient, in the ordinary course of nature, to cause death, in my opinion, falls within the words of s. 299, "with the intention of causing such bodily injury as is likely to cause death," and is culpable homicide. It is also murder, unless the case falls within one of the exceptions; see s. 300, cl. 3. Causing death by doing an act with the knowledge that such act is likely to cause death is culpable homicide, but it is not murder, even if it does not fall within any of the exceptions mentioned in s. 300, unless it falls within cl. 2, 3, or 4 of s. 300; that is to say, unless the act by which the death is caused is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient, in the ordinary course of nature, to cause death, or unless the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death. In speaking of acts, I, of course, include illegal omissions. There are many cases falling within the words of s. 299—"or with the knowledge that he is likely by such act to cause death"—that do not fall within the 2nd, 3rd, or 4th clauses of s. 300, such, for instance, as the offences described in ss. 279, 280, 281, 282, 284, 285, 286, 287, 288, and 289, if the offender knows that his act or illegal omission is likely to cause death, and if, in fact, it does cause death. But although he may know that the act or illegal omission is so dangerous that it is likely to cause death, it is not murder, even if death is caused thereby, unless the offender knows that it must, in all probability, cause death, or such bodily injury as is likely to cause death, or unless he intends thereby to cause death or such bodily injury as is described in cl. 2 or 3 of s. 300.

As an illustration, suppose a gentleman should drive a buggy in a rash and negligent manner, or furiously, along a narrow crowded street. He might know that he was likely to kill some person, but he might not intend to kill any one, or to cause bodily injury to any one. In such a case, if he should cause death, I apprehend, he would be guilty of culpable homicide not amounting to murder, unless it should be found, as a fact, that he knew that his act was so imminently dangerous that it must, in all probability, cause death, or such bodily injury, &c., as to bring the case within the 4th clause of s. 300. In an ordinary case of furious driving, the facts would scarcely warrant such a finding. If found guilty of culpable homicide not amounting to murder, the offender might be punished to the extent of transportation for life or imprisonment for ten years, with fine (see ss. 304 and 59); or, if a European or American, he would be subject to penal servitude, instead of transportation. It would not be right in such a case that the offender should be liable to capital punishment for murder. The first part of s. 304 would not apply to the case. That applies only to cases which would be murder, if not falling within one of the exceptions in s. 300. If a man should drive a buggy furiously not merely along a crowded street, but intentionally into the midst of a crowd of persons, it would probably be found, as a fact, that he knew that his act was so imminently dangerous that it must, in all probability, cause death, or such bodily injury, &c., as in cl. 4, s. 300. From the fact of a man's doing an act with the knowledge that he is likely to cause death, it may be presumed that he did it with the intention of causing death, if all the circumstances of the case justify such a presumption; but I should never presume an intention to cause death merely from the fact of furious driving in a crowded street, in which the driver might know

that his acts would be likely to cause death. Presumption of intention must depend upon the facts of each particular case. Suppose a gentleman should cause death by furiously driving up to a railway station. Suppose it should be proved that he had business in a distant part of the country, say at the opposite terminus; that he was intending to go by a particular train; and that he could not arrive at his destination in time for his business by any other train; that at the time of the furious driving, it wanted only two minutes to the time of the train's starting; that the road was so crowded that he must have known that he was likely to run over some one and to cause death. Would any one, under the circumstances, presume that his intention was to cause death? Would it not be more reasonable to presume that his intention was to save the train. If the Judge or jury should find that his intention was to save the train, but that he must have known that he was likely to cause death, he would be guilty of culpable homicide not amounting to murder, unless they should also find that the risk of causing death was such that he must have known, and did know, that his act must, in all probability, cause death, &c., within the meaning of cl. 4, s. 300. If they should go further, and infer from the knowledge that he was likely to cause death, that he intended to cause death, he would be guilty of murder, and liable to capital punishment.

It appears to me the rules contained in ss. 407 and 419 of the Code of Criminal Procedure are not applicable to a case which the Court, as a Court of Revision, thinks it right to make up. An appeal is matter of right in all cases in which an appeal is given; but a revision is in the discretion of the Court. An appeal is for matter of fact as well as for matter of law. A revision is only on matter of law. The two cases, therefore, are very different. When s. 407 says that an appeal shall not lie from a judgment of acquittal, it means that the prosecutor shall not, as a matter of right, be entitled to apply to reverse the judgment of acquittal, either upon the facts or upon the law. But s. 404 authorizes the Court to call for and examine the record of any criminal trial in which it shall appear that there has been error in the decision upon a point of law, and may determine any point of law arising out of the case, and thereupon pass such order as to the Court may seem right. S. 405 enacts that "it shall be lawful for the Sudder Court to call for and examine the record of any case tried by a Court of Session, for the purpose of satisfying itself as to the legality or propriety of any sentence or order passed, and as to the regularity of the proceedings of the Court. If it appear to the Sudder Court that the sentence passed is too severe, the Sudder Court may pass any mitigated sentence warranted by law. If the Sudder Court shall be of opinion that the sentence or order is contrary to law, the Sudder Court shall reverse the sentence or order, and pass such judgment, sentence, or order as to the Court shall seem right, or, if it deem necessary, may order a new trial." The word "sentence" in the latter section may mean the award of punishment merely, or the whole judgment, including the finding. If it refers only to the award of punishment, the finding would stand; and I can scarcely see the necessity or use of the words "or may order a new trial." The words "sentence or order" are in many sections used as including the finding, and not merely the awards of punishments—ss. 415, 416, 417, 420. But, whatever may be the construction of the word "sentence" in s. 405, there can be no doubt that, under s. 404, the Court may set aside a judgment of acquittal for error in point of law. Suppose the decision of a judge should be monstrously absurd; suppose, upon an indictment for murdering a child, the Judge and the Assessor should find that the prisoner caused the death of the child by doing an act with the intention of causing its death, and that the case did not fall within any of the exceptions mentioned

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1866. in s. 300 of the Penal Code ; but suppose they should also find that the child  
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 v. murder to kill a child under that age, and should therefore acquit the prisoner  
 GORACHAND and order him to be discharged—could it be contended that the judgment of  
 GOPH, acquittal could not be set aside, and that the prisoner should go free for ever ?  
 Sup. Vol. 443. I apprehend that the Court, as a Court of Revision, would clearly have the pow-  
 [5 W. R. 45.] or to set aside the judgment of acquittal, and declare that, upon the facts found,  
 the prisoner was guilty of murder, and send the case back to the Judge, order-  
 ing him to apprehend the prisoner (if he had been discharged), and to pass the  
 proper sentence upon him. If, in the case above supposed, the Judge were to  
 say, it is not necessary to try whether death was caused by an act done with the  
 intention of causing death, because if it was so caused, the prisoner was not  
 guilty of murder : I find that the child was under the age of six months, and,  
 therefore, acquit the prisoner—in such a case there would be no finding on  
 the facts, and the Court, as a Court of Revision, would merely set aside the ac-  
 quittal, and order a new trial. I have supposed an error in law, which is not  
 likely to occur. I put it merely as an illustration ; there are many constructions  
 of law equally erroneous, though not so clearly so. Again, suppose a Magis-  
 trate, in a case triable by him, should convict of an offence, and the Sessions  
 Judge, on appeal, should, without going into the facts, reverse the decision upon  
 a point of law, and order the prisoners to be discharged, stating that, assuming  
 the facts to be as found by the Magistrate, the prisoner was not guilty of an  
 offence, this Court, if the Judge were wrong in point of law, could, as a Court  
 of Revision, reverse his decision, and direct him to try the appeal upon its me-  
 rits. If a Judge, on appeal, should uphold the finding of a Magistrate on the  
 facts, and reverse his decision in point of law, and pronounce a judgment of  
 acquittal, and order the prisoner to be discharged, then, as the acquittal would  
 be merely on a point of law, this Court, as a Court of Revision, might reverse  
 the judgment of acquittal, and order the sentence of the Magistrate to stand.

There are also cases in which, notwithstanding s. 419,<sup>1</sup> the Court, as a Court of Revision, could enhance a punishment.

In the case of *The King v. Bourne*,<sup>2</sup> it was held that a sentence of trans-  
 portation for an offence, for which the only punishment was death, was erroneous,  
 and must be reversed. The Court held that they could merely reverse the  
 erroneous sentence, but could not pass the right one, and the prisoners were  
 discharged. The law was amended by 11 and 12 Vic., c. 78, by which the  
 Court, upon reversing an erroneous sentence, may give the proper judgment.  
 Here, under s. 405 of the Criminal Procedure Code, the Court, as a Court of  
 Revision, has a similar power ; but in order to do so, it may be necessary to en-  
 hance the punishment. In the case suggested by Campbell, J., if a Sessions  
 Judge should pass sentence of rigorous imprisonment for fourteen years for  
 murder, such a sentence would be bad ; for it is not authorized by law—s. 302  
 of the Penal Code ; or if he should pass sentence of transportation for seven  
 years for the offence of murder, committed by a person under sentence of trans-  
 portation for life, the sentence would be contrary to law ; see s. 303, by which  
 death is the only punishment which can be awarded. In such cases the Court,  
 as a Court of Revision, could, under s. 405, reverse the sentence, and pass the

<sup>1</sup> Act XXV. of 1861, s. 419.—“The Appellate Court, after perusing the proceedings of the lower Court, and after hearing the plaintiff or his counsel or agent if they appear, may alter or reverse the finding and sentence or order of such Court, but not so as to enhance any punishment that shall have been awarded.”

<sup>2</sup> 7 A. & E. 58.

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proper sentence, notwithstanding that in such a case the sentence must be enhanced in order to pass a legal sentence, in the former case from four years' rigorous imprisonment to death or transportation for life, and in the latter from transportation for seven years to sentence of death. S. 405 says, if the Court shall be of opinion that the sentence or order is contrary to law, it "shall reverse the sentence or order, and pass such judgment, sentence, or order as to the Court shall seem right, or, if it deem necessary, may order a new trial." In the case supposed, in which a prisoner under sentence of transportation for life should be found guilty of murder, and sentenced to transportation for seven years, the Court might think the finding right upon the evidence, and there would, therefore, be no necessity for ordering a new trial. In such a case a question might arise, whether the Court would be bound to pass the only legal sentence, *viz.*, death, or might send the case back to the Sessions Judge to pass the sentence. I am of opinion that the Court might send the case back with an order to pass the proper sentence, under the words "shall pass such judgment, sentence, or order," &c. In the case supposed of a prisoner being sentenced to fourteen years' rigorous imprisonment for murder, upon setting aside the erroneous sentence, the right sentence would be a discretionary one, *viz.*, "death or transportation for life." In such a case, I think the Court ought to send the case back for proper sentence to be passed, in the same manner as it would do under s. 402.

By the Statute 11 and 12 Vic., c. 78, s. 5, the Court, when it reverses a judgment, may either pass a proper judgment, or remit the case to the lower Court, in order that such Court may pass the proper judgment. It appears to me that in all cases in which the Court, as a Court of Revision, thinks it right to reverse an acquittal on a point of law, or to reverse, as erroneous, a sentence, in order that the right sentence may be passed, if the right sentence would enhance the one already passed, the offender should have an opportunity of being heard by himself or his pleader or agent, either before the lower Court, if the case is remitted to it, or before the High Court, if the Judges pass the proper sentence themselves.

The Court may act as a Court of Revision after it has acted as a Court of Appeal, if it find it necessary to do so, in order to correct an error in law which cannot be set right on appeal. For instance, if a man should be found guilty of a murder, and sentenced to seven years' transportation, if the prisoner should appeal on the facts the Court might uphold the finding of guilty of murder on appeal, and afterwards, as a Court of Revision, might set aside the sentence of seven years' transportation, and pass a legal sentence for murder, or send it back to the lower Court to pass such sentence, pointing out, as they would in a case under s. 402, what is the proper punishment. As a Court of Revision the Court cannot reverse the finding of a jury.

In the present case, the attention of the Judge should, I think, be called to another error which he committed. He says, the prisoners who were present, assisting in taking away Amordi, and assisting by their presence in the beating of him, abetted the commission of culpable homicide, &c.

It does not follow that, because they were present with the intention of taking him away, that they assisted by their presence in the beating of him to such an extent as to cause death. If the object and design of those who seized Amordi was merely to take him to the thannah on a charge of theft, and it was no part of the common design to beat him, they would not all be liable for the consequence of the beating merely because they were present. It is laid down that, when several persons are in company together engaged in one com-



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mon purpose, lawful or unlawful, and one of them, without the knowledge or consent of the others, commits an offence, the others will not be involved in the guilt, unless the act done was in some manner in furtherance of the common intention. It is also said, although a man is present when a felony is committed, if he take no part in it, and do not act in concert with those who commit it, will not be a principal, merely because he did not endeavour to prevent it or to apprehend the felon. But if several persons go out together for the purpose of apprehending a man, and taking him to the thannah on a charge of theft, and some of the party in the presence of the others beat and ill-treat the man in a cruel and violent manner, and the others stand by and look on without endeavouring to dissuade them from their cruel and violent conduct, it appears to me that those who have to deal with the facts might very properly infer that they were all assenting parties and acting in concert, and that the beating was in furtherance of a common design. I do not know what the evidence was: all that I wish to point out is, that all who are present do not necessarily assist by their presence every act that is done in their presence, nor are consequently liable to be punished as principals.

*Before Sir Barnes Peacock, Kt., Chief Justice, Mr. Justice Kemp,  
Mr. Justice Seton-Karr, and Mr. Justice Phear.*

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*Accomplice, Testimony of—Corroboration—Criminal Procedure Code (Act XXV. of 1861), ss. 419 & 426—Reversal of Finding.*

The uncorroborated testimony of one or more accomplice or accomplices is sufficient in law to support a conviction.<sup>3</sup>

The evidence of accomplices should not be left to the jury without such directions and observations from the judge as the circumstances of the case may require, pointing out to them the danger of trusting to such evidence when it is not corroborated by other evidence. The omission to do so is an error in law in the summing up by the Judge, and is, on appeal, a ground for setting aside the conviction, when the Appellate Court thinks that the prisoner has been prejudiced by such omission, and that there has been a failure of justice.

The nature and extent of the corroboration requisite explained and illustrated.

The word "reverse" in ss. 419 and 426, Code of Criminal Procedure, means to make void, to set aside or annul, and not merely to change or turn into the contrary.<sup>4</sup>

THE prisoner in this case was tried before a jury on a charge of dacoity, and was convicted. He appealed to the High Court chiefly on the ground that

<sup>1</sup> Criminal Appeal No. 75 of 1866.

<sup>2</sup> See *Queen v. Gagal Magalu*, 4 B. L. R. App. 50 (or p. 184 of this book).

<sup>3</sup> See Act I. of 1872, s. 133.

<sup>4</sup> Act X. of 1872, s. 297, provides as follows:—

"If, in any case either called for by itself or reported for orders, or which comes to its knowledge, it appears to the High Court that there has been a material error in any judicial proceeding of any Court subordinate to it, it shall pass such judgment, sentence, or order thereon as it thinks fit.

"If it considers that an accused person has been improperly discharged, it may order him to be tried, or to be committed for trial:

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the Judge, in summing up, failed to warn the jury that the evidence against him was that of approvers and accomplices, not corroborated in any way, and that this omission amounted to a misdirection and an error in law, so as to vitiate the conviction.

The appeal was heard before L. S. Jackson and Glover, JJ., who referred the following questions to a Full Bench :—

1. "Whether a conviction can be had on the uncorroborated evidence of one or more accomplices?"

2. "If not, what is the nature of the corroboration required?"

The questions were referred with the following remarks by

JACKSON, J.—The Judge ought to have directed the jury that the evidence of approvers, and especially of such approvers, ought to be received with great caution, and that, under no circumstances, would it be legally sufficient evidence, unless it were in some way or other corroborated; and he ought further to have told them that it was not corroborated in any way. Instead of thus directing the jury, the Judge simply left it to them to decide whether the approvers were speaking the truth or not. This misdirection we consider to have been an error of law, the result of which has been to convict Elahi Bax on what is not legal evidence. We think, therefore, that the finding and sentence should be reversed, and the prisoner released.

But it has been brought to our notice that there are conflicting decisions on the point, and that a Divisional Bench of this Court have ruled in the case of *The Queen v. Godai Raout*<sup>1</sup> that a jury may convict upon the evidence of an accomplice, though not corroborated, so as to show the prisoner's participation in the offence. They also ruled that s. 28 of Act II. of 1855 did not apply to Mofussil Courts. And another Divisional Bench, consisting of three Judges, ruled, in the case of *The Queen v. Dwarka*,<sup>2</sup> that the uncorroborated testimony of an accomplice was not sufficient for conviction. It has, moreover, it appears, since been laid down by a Full Bench of this Court in *The Queen v. Lal Chand Kowrah*<sup>3</sup> that s. 28, Act II. of 1855, refers to all Courts, Mofussil included.

"If it considers that the charge has been inconveniently framed, and that the facts of the case show that the prisoner ought to have been convicted of an offence other than that of which he was convicted, it shall pass sentence for the offence of which he ought to have been convicted :

"Provided that, if the error in the charge appears materially to have misled and prejudiced the accused person in his defence, the High Court shall annul the conviction, and remand the case to the Court below with an amended charge, and the Court below shall thereupon proceed as if it had itself amended such charge.

"If the High Court considers that any person convicted by a Magistrate has committed an offence not triable by such Magistrate, it may annul the trial, and order a new trial before a competent Court.

"If it considers that the sentence passed on the accused person is one which cannot legally be passed for the offence of which the accused person has been convicted, or might have been legally convicted upon the facts of the case, it shall annul such sentence, and pass a sentence in accordance with law.

"If it considers that the sentence passed is too severe, it may pass any lesser sentence warranted by law; if it considers that the sentence is inadequate, it may pass a proper sentence."

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<sup>1</sup> 5 W. R. Cr. 11.

<sup>2</sup> 5 W. R. Cr. 18.

<sup>3</sup> *Ante*, p. 417 (or p. 689 of this book).

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Under these circumstances, we are not, we conceive, at liberty to pass final orders in this case until the point in question, *viz.*, whether or not the uncorroborated evidence of an accomplice is legally sufficient for conviction, be settled authoritatively, and we accordingly direct that this case be laid before a Full Bench of this Court for the purpose. As the prisoner Elahi Bax is under sentence of transportation, the Sessions Judge will be directed to suspend the execution of his sentence until the result of this reference be known.

Messrs. *R. T. Allan, T. Barrow, R. E. Twidale, and C. Gregory*, and Baboo *Ramanath Bose*, Munshi *Amir Ali*, and Moulvi *Marhamat Hossein* for the prisoner.

The following judgments were delivered :—

PEACOCK, C.J.—I am of opinion that a conviction upon the uncorroborated testimony of an accomplice is legal. This is not new law, nor founded upon a new principle. The point was decided in England as far back as the 10th December 1662, after conference with all the Judges. Several cases to that effect are cited by Sir Mathew Hale in his "*Pleas of the Crown*," Vol. I., pp. 303-304. He, however, remarks: "Yet though such a party be admissible as a witness in law, yet the credibility of his testimony is to be left to the jury, and truly it would be hard to take away the life of any person upon such a witness, that swears to save his own, and yet confesseth himself guilty of so great a crime, unless there be very considerable circumstances, which may give the greater credit to what he swears." In *The King v. Attwood*,<sup>1</sup> which is a leading case upon the subject, two prisoners were convicted of highway robbery upon the uncorroborated evidence of an accomplice as to their identity. The question was referred for the opinion of the twelve Judges, who were unanimously of opinion that an accomplice alone is a competent witness; and if the jury, weighing the probability of his testimony, think him worthy of belief, a conviction supported by such testimony alone is perfectly legal. In sentencing the prisoners, Buller, J., made the following remarks: "Prisoners, you were convicted of a highway robbery at the last summer Assizes at Bridgewater. The material circumstances of the trial were these: The prosecutor gave in evidence that he was robbed by three men on the day laid in the indictment, mentioning the conversation that passed during the robbery, and proving all the facts that are necessary in law to constitute that offence; but as it was dark, he could not swear to the person by whom it was committed. The accomplice was then called, who swore that he and you had, in company of each other, committed this robbery; and he mentioned all the circumstances that passed, which exactly corresponded with those which the prosecutor had before related. On the testimony of these two witnesses the jury found you guilty; but on a doubt arising in my mind respecting the propriety of this conviction, I thought it proper to refer your case to the consideration of the twelve Judges. My doubt was, whether the evidence of an accomplice, unconfirmed by any other evidence that could materially affect the case, was sufficient to warrant a conviction? And the Judges are unanimously of opinion that an accomplice alone is a competent witness; and that, if the jury, weighing the probability of his testimony, think him worthy of belief, a conviction, supported by such testimony alone, is perfectly legal. The distinction between the competency and the credit of a witness has been long settled. If a question be made respecting his competency, the decision of that question is the exclusive province of the Judge; but if the ground of the objection go to his credit only, his testimony must be

<sup>1</sup> 2 Lea. 521.

received and left with the jury, under such directions and observations from the Court as the circumstances of the case may require, to say whether they think it sufficiently credible to guide their decision on the case. An accomplice, therefore, being a competent witness, and the jury in the present case having thought him worthy of credit, the verdict of guilty, which has been found, is strictly legal, though found on the testimony of the accomplice only." His Lordship then passed sentence of death upon the prisoners, but intimated that it was his intention to recommend them to mercy. In the case of *Rex v. Jones*,<sup>1</sup> Lord Ellenborough says: "No one can seriously doubt that a conviction is legal, though it proceed upon the evidence of an accomplice only. Judges, in their discretion, will advise a jury not to believe an accomplice, unless he is confirmed, or only in as far as he is confirmed; but if he is believed, his testimony is unquestionably sufficient to establish the facts which he deposes: it is allowed that he is a competent witness, and the consequence is inevitable that, if credit is given to his evidence, it requires no confirmation from another witness. Within a few years a case was referred to the twelve Judges, where four men were convicted of a burglary upon the evidence of an accomplice, who received no confirmation concerning any of the facts which proved the criminality of one of the prisoners; but the Judges were unanimously of opinion that the conviction as to all the four was legal, and upon that opinion they all suffered the penalty of the law. Strange notions upon this subject have lately got abroad, and I have thought it necessary to say so much for the purpose of correcting them;" see *The King v. Durham*.<sup>2</sup> At the Old Baily Sessions, 1784, Smith and Davies were tried for robbing Hunter. During the night the prosecutor was attacked by four ruffians, whose persons he was unable to identify; but during the scuffle he had torn a piece of the coat which one of them had on, who, on being discovered by these means, turned King's evidence, and implicated the two prisoners. But the Court, although it was admitted as an established rule of law that the uncorroborated testimony of an accomplice is legal evidence, thought it too dangerous to suffer a conviction to take place under such unsupported testimony; and the prisoners were acquitted. The law, as above laid down, that a conviction is legal, though supported by the uncorroborated evidence of an accomplice, has been admitted by Lord Denman in *Rex v. Hastings*,<sup>3</sup> by Alderson, B., in *Rex v. Wilkes*,<sup>4</sup> and by many other learned and eminent Judges; and it was so ruled by the Court of Criminal Appeal in *Rex v. Stubbs*.<sup>5</sup> The law of England, therefore, upon this subject is beyond doubt.

The law of America is the same, and in that country, where in most of the States new trials are granted in criminal cases, new trials have been refused even when the verdicts were obtained upon the uncorroborated evidence of an accomplice. The cases upon the subject are collected in Wharton's Criminal Law of the United States of America, p. 366. It does not appear that, in the cases in which new trials were refused, the Judge who tried the case had omitted to make such observations to the jury with reference to the evidence of the accomplices as the circumstances required. But in civil cases it is clear that, both in that country and in England, a new trial will be granted where, from the absence of proper instructions from the Judge, the jury fall into an error. Formerly, the rule was that the mere commission of a crime did not

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<sup>1</sup> 2 Camp. 131.<sup>2</sup> 2 Lea. 538.<sup>3</sup> 7 C. & P. 152.<sup>4</sup> 7 C. & P. 272.<sup>5</sup> Dears. C. C., 555; S. C., 25 L. J., Mag. Ca. 16.

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render a witness incompetent, but persons convicted of treason, felony, or certain other crimes, were rendered incompetent by conviction. The incompetency created by conviction was removed in England by Act of Parliament, and was subsequently removed here by Act XIX., 1837, by which it was enacted that no person shall, by reason of a conviction for any offence whatever, be incompetent to be a witness in any stage of a cause, civil or criminal, or before any Court in the territories of the East India Company.

It was contended, in the course of argument in the present case, that, in India, the rule of evidence in the mofussil is different from the law of England with respect to the legality of convicting upon the uncorroborated evidence of an accomplice. If there had been a long uniform course of decisions in the late Sudder Court, that the uncorroborated evidence of an accomplice was insufficient in law for the conviction of a prisoner, we should have been disposed to bow to those decisions, and to act upon the rule, "*stare decisis*." One case only was cited from 7 Nizamut Reports, p. 57,<sup>1</sup> in which a Judge of the Sudder Court stated that he did not think it legal to convict upon such evidence. There may be other cases to the same effect, but there is no uniform current of decisions which would justify us in holding that the law in this respect in the mofussil was different from the established law of England and from that which was administered in the late Supreme Court, and is now administered by this Court, in the exercise of Original Criminal Jurisdiction. It would require a uniform train of decisions to justify us in holding that the law of evidence to be administered by the Court upon such a point as this is different in the exercise of the Appellate Criminal Jurisdiction from that which is acted upon in the exercise of Original Jurisdiction. When called upon to give effect to particular expressions which have been made use of by the Judges of the late Sudder Court with regard to the rules of evidence, we must bear in mind that, up to a very recent period, when trial by jury was established in certain districts, it was the province of the Sessions Judges, and of the Judges of the late Sudder Court, to determine questions of fact as well as questions of law in criminal cases; and that, in dealing with such cases, it was not very frequently necessary to determine whether the evidence of a particular witness was insufficient in law to justify a conviction, or merely insufficient to induce them, as Judges of fact, to declare that a prisoner was guilty. There is a wide distinction, however, between disbelieving evidence and determining that it is not legally sufficient if believed; but this distinction is not always sufficiently adverted to by Courts, which are Judges of fact as well as of law. Act II. of 1855, s. 28,<sup>2</sup> was referred to by the appellant's pleader, by whom the case was very well argued, and it was contended that that act rendered corroboration necessary. Upon that point it is sufficient to say that it was not the intention of the Act to render inadmissible any evidence, which, but for the Act, would have been admissible—see s. 58; nor was it intended to lessen the legal effect of any such evidence.

We have, therefore, no hesitation in answering the first question in the affirmative, and declaring that a conviction may be legally had on the uncorroborated evidence of one or more accomplices.

<sup>1</sup> There is no such case in 7 Nizamut Rep. 57; but see Radhacant Doss v. Mohadeby 1 N. A. R. 304.

<sup>2</sup> Act II. of 1855, s. 28.—"Except in cases of treason, the direct evidence of one witness, who is entitled to full credit, shall be sufficient for proof of any fact in any such Court or before any such person. But this provision shall not affect any rule or practice of any Court that requires corroborative evidence in support of the testimony of an accomplice or of a single witness in the case of perjury."

It is unnecessary, as regards this part of the case, to answer the second question.

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Holding that the Judge was not bound to direct the jury that the evidence was not legally sufficient for a conviction, we shall probably mislead if we do not go on to consider whether there was any error or defect in the summing up which constitutes a valid ground of appeal. The question of misdirection is raised by the Judges who referred the case, and is, I think, substantially before us, and ought to be considered, although there is no specific question as to whether there was a misdirection or not. I proceed, therefore, to consider whether there is any ground for setting aside the conviction upon the ground of error in the summing up.

In the case of *Regina v. Farler*<sup>1</sup> a very learned and eminent Judge, than whom no one was better able to deal with evidence, and to determine the degree of credibility to which particular witnesses were entitled—I mean the late Lord Abinger—in summing up the case to the jury, made the following remarks: “I am strongly inclined to think that you will not consider the corroboration in this case sufficient. No one can hear the case without entertaining a suspicion of the prisoner’s guilt, but the rules of law must be applied to all men alike. It is a practice, which deserves all the reverence of law, that Judges have uniformly told juries that they ought not to pay any respect to the testimony of an accomplice, unless he is corroborated in some material circumstance. Now, in my opinion, that corroboration ought to consist of some circumstance that affects the identity of the party accused. A man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only on the truth of that history, without identifying the persons, that is really no corroboration at all. If a man were to break open a house, and put a knife to your throat, and steal your property, it would be no corroboration that he had stated all the facts correctly, that he had described how the person did put a knife to the throat, and did steal the property. It would not at all tend to show that the party accused participated in it. Here you find that the prisoner and the accomplice are seen together at the house of the landlord—now look at his evidence. If they were seen together under circumstances that were extraordinary, and where the prisoner was not likely to be unless there were concert, it might be something. But he lives within one hundred and fifty yards, and there is nothing extraordinary in his being there; and he left when they were shutting up the house. Therefore it is perfectly natural that he should have been there, and left when he did. The single circumstance is, that the prisoner was seen in a house which he frequents, where he may be seen once or twice a week, and there the case ends against him. All the rest depends upon the evidence of the accomplice. The danger is, that when a man is fixed, and knows that his own guilt is detected, he may purchase impunity by falsely accusing others. I would suggest to you that the circumstances are too slight to justify you in acting on this evidence.” The prisoner was accordingly acquitted. In *Rex v. Wilkes and Edwards*,<sup>2</sup> a similar rule was laid down by Alderson, B., in a case of sheep stealing. He said: “There is a great difference between confirmations as to the circumstances of the felony, and those which apply to the individuals charged; the former only prove that the accomplice was present at the commission of the offence; the latter show that the prisoner was connected with it. This distinction ought al-

<sup>1</sup> 8 C. & P. 106.

<sup>2</sup> 7 C. & P. 272.

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ways to be attended to. In summing up, the learned Judge said: "The confirmation of the accomplice as to the commission of the felony is really no confirmation at all; because it would be a confirmation as much if the accusation were against you and me, as it would be as to those prisoners who are now upon their trial. The confirmation which I always advise juries to require is a confirmation of the accomplice in some fact which goes to fix the guilt on the particular person charged. You may legally convict on the evidence of an accomplice only, if you can safely rely on his testimony; but I advise juries never to act on the evidence of an accomplice, unless he is confirmed as to the particular person who is charged with the offence. With respect to the prisoner Edwards, it is proved that meat of a similar kind was found in his house. The meat cannot be identified, but it is similar; that is, therefore, some confirmation of the accomplice as to Edwards more than any one else. It is also proved that the skin was found in a whirley hole; that is no confirmation, because it does not affect the prisoners more than it affects any other persons. With respect to the prisoner Wilkes, it is proved by the witness Meek that the prisoner Wilkes told him nearly the same story as the accomplice has told you to-day. If you believe that witness, there is confirmation of the accomplice as to the prisoner Wilkes; you will say whether, with these confirmations, you believe the accomplice or not. If you think that his evidence is not sufficiently confirmed as to one of the prisoners, you will acquit that one; if you think he is confirmed as to neither, you will acquit both; if you think he is confirmed as to both, you will find both guilty." The jury found both prisoners guilty. In the case of *Rex v. Stubbs*,<sup>1</sup> in the Court of Criminal Appeal above referred to, Parke, B., said: "My practice has always been to tell the jury not to convict the prisoner unless the evidence of the accomplice be confirmed, not only as to the circumstances of the crime, but also as to the person of the prisoner." And Creswell, J., added: "You may take it for granted that the accomplice was at the committal of the offence, and may be corroborated as to the facts; but that has no tendency to show that the parties accused were there." Jervis, C.J., in the same case remarked: "There is another point to be noticed. When an accomplice speaks as to the guilt of three prisoners, and his testimony is confirmed as to two of them only, it is proper, I think, for the Judge to advise the jury that it is not safe to act on his testimony as to the third person, in respect of whom he is not confirmed, for the accomplice may speak truly as to all the facts of the case, and at the same time, in his evidence, substitute the third person for himself in his narrative of the case." In *Rex v. Moores*,<sup>2</sup> indictment against A as principal, and B as receiver, where the evidence of an accomplice was corroborated as to A, but not as to B, Baron Alderson thought it was not sufficient as to B.

Conflicting opinions have been expressed as to whether, in a case in which an accomplice accuses two persons, and is corroborated as to one, but not as to the other, a jury ought to be advised to acquit the one as to whom there is no corroboration. The opinion expressed by Jervis, C.J., in *Rex v. Stubbs*,<sup>1</sup> as above-mentioned, appears to be the correct one; for nothing is more

<sup>1</sup> Dears. C. C., 555; S. C., 25 L. J., Mag. Ca. 16.

<sup>2</sup> 7 C. & P. 270—These words do not appear in the Law Journal Report, and in Dearsley the words are: "You may take it for granted that the accomplice was present when the offence was committed, and there may, therefore, be no difficulty in corroborating him as to the facts; but that has no tendency to show that any particular person who may be accused was there."

The remarks of Jervis, C.J., and of Parke, B., are quoted from the Law Journal.

easy than for an accomplice to accuse an innocent person, in order to get off his real companion in guilt, and to attribute to the person falsely accused acts which were really committed by the guilty companion.

In the present case, two accomplices gave evidence against Elahi Bax ; but that does not seem to carry the case much further. In *Rex v. Noakes*,<sup>1</sup> in which two accomplices spoke distinctly as to the prisoner, Littledale, J., told the jury that, if their statements were the only evidence, he could not advise them to convict the prisoner ; that it was not usual to convict on the evidence of one accomplice, without confirmation ; and that, in his opinion, it made no difference whether the evidence was that of one accomplice only, or of more than one. This, as a general rule, is correct, for otherwise two companions in guilt might get off by confessing and falsely accusing two innocent persons. But if two or three persons should be apprehended at different places, at long distances from each other, and should each confess and give a similar account as to the persons associated with them in a particular dacoity, the statement of each, if made under such circumstances as not to raise a presumption of collusion, might be proved in corroboration of his evidence ; such statement being admissible as corroborative evidence, under Act II. of 1855, s. 31. The evidence of several accomplices, so corroborated, might be sufficient to satisfy a jury, although the evidence of one of them alone could not have been safely acted upon. These are matters to which the attention of a jury ought, under all circumstances, to be specially directed, with proper remarks from the presiding Judge, according to the rule laid down by Buller, J., in the case already cited.

The danger of acting upon the evidence of an accomplice, who is admitted to give evidence for the Crown, arises not merely from the fact of his having committed a crime, for that would go to the credit of every witness who had recently committed or been convicted of a crime, but from the fact of his giving his evidence under the hope or expectation of pardon, and of his obtaining immunity from punishment if his evidence be believed. Suppose, two gentlemen of previously undoubted honour and good character should, in a moment of irritation, not amounting in law to provocation, get out of a dāk-carriage, and thrash the coachman or syce for not giving them a good horse ; suppose the man should die, and that both should be convicted of culpable homicide, would any one say that either of them would be so wholly unworthy of credit as witnesses in any other case, that a jury ought to be advised not to act upon his testimony, except so far as it was corroborated ? If he would not, after conviction, be unworthy of credit, if called upon to give evidence against a stranger for another offence, why should he be unworthy of credit, before conviction, against his own companion and friend, if compelled to give evidence against his will ? Suppose that, immediately after the commission of the offence, one should be apprehended, and the other should escape without being identified with sufficient certainty for conviction ; suppose that the one who escaped should be apprehended and brought to trial, and that the one who had been apprehended in the first instance should be called as a witness against his will, and being compelled to give evidence (as he might be, under Act II. of 1855, s. 32), should identify his companion, would any Judge, in the exercise of a sound judicial discretion, feel himself bound to tell a jury that, because the witness was an accomplice, it would be dangerous to act upon his evidence alone uncorroborated ?

When the Judges speak of the danger of acting upon the uncorroborated evidence of accomplices, they refer to the evidence of accomplices who are ad-

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mitted as evidence for the Crown, in the hope or expectation of a pardon. If, in such a case, the accomplices admitted to give evidence act fairly and openly, and discover the whole truth, though, according to the law of England, they are not, except in certain cases, for which special provision is made by statute, entitled as of right to pardon, yet the usage, the lenity, and the practice of the Court is to stop the prosecution against them, and they have an equitable title to a recommendation to the mercy of the Crown (Cowper's Reports, 334). The origin of the practice of admitting accomplices to give evidence for the Crown without approvement is explained by Lord Mansfield in *Rex v. Rudd*.<sup>1</sup> He there says : A person desiring to be an approver must be one indicted for the offence, and in custody on that indictment. He must confess himself guilty of the offence, and desire to accuse his accomplices. He must likewise upon oath discover, not only the particular offence for which he is indicted, but all treasons and felonies which he knows of ; and, after all this, it is in the discretion of the Court, whether they will assign him a Coroner, and admit him to be an approver or not ; for if, on his confession, it appears that he is a principal, and tempted the others, the Court may refuse and reject him as an approver. When he is admitted as such, it must appear that what he has discovered is true ; and that he has discovered the whole truth. For this purpose, the Coroner puts his appeal into form ; and when the prisoner returns into Court, he must repeat his appeal, without any help from the Court, or from any bystander. And the law is so nice that, if he vary in a single circumstance, the whole falls to the ground, and he is condemned to be hanged. If he fail in the colour of a horse, or in the circumstances of time, so rigorous is the law, that he is condemned to be hanged ; much more if he fail in essentials. The same consequences follow if he does not discover the whole truth ; and in all these cases the approver is convicted on his own confession. See this doctrine more at large in Hale's Pleas of the Crown, Vol. II., pp. 226 to 236 ; Stan: Pleas of the Crown, Lib. 2 C, 52 to C, 58 ; 3 Inst. 129. A further rigorous circumstance is, that it is necessary to the approver's own safety that the jury should believe him ; for if the partners in his crime are not convicted, the approver himself is executed. " Great inconvenience arose out of this practice of approvement. No doubt, if it was not absolutely necessary for the execution of the law against notorious offenders that accomplices would be received as witnesses, the practice is liable to many objections. And though, under this practice, they are clearly competent witnesses, their single testimony alone is seldom of sufficient weight with a jury to convict the offenders ; it being so strong a temptation to a man to commit perjury, if by accusing another he can escape himself. Let us see what has come in the room of this practice of approvement. A kind of hope that accomplices who behave fairly, and disclose the whole truth, and bring others to justice, should themselves escape punishment, and be pardoned. This is in the nature of a recommendation to mercy. But no authority is given to a Justice of the Peace to pardon an offender, and to tell him he shall be a witness against others. The accomplice is not assured of his pardon, but gives his evidence *in vinculis* in custody ; and it depends on the title he has from his behaviour whether he shall be pardoned or executed." Sir Mathew Hale, speaking of approvement, says : " This course of admitting approvers has long been disused, and the truth is, that more mischief hath come to good men by this kind of approvements, by false accusations of desperate villains, than benefit to the public by the discovery and convicting of real offenders ; jailors for their own profits often constraining prisoners to appeal honest men, and, therefore, provision made against it by I. E. 3, C. 7." (See 2 Hale's Pleas of the Crown, 226.) The

<sup>1</sup> Cowp. 331 at p. 335.

modern practice of admitting accomplices to give evidence under a hope of pardon, though not so dangerous as the old practice of approvement, would still be attended with the greatest danger, but for the safeguard which has to some extent been provided by the practice of the Judges in recommending juries not to act upon such evidence without requiring corroboration as to the identity of the person accused.

The danger of acting upon the uncorroborated evidence of accomplices is at least as great here as it would be in England, for here, as in England, the accomplices are not actually pardoned before they give evidence. In England, by confessing and giving evidence, they acquire an equitable right to a recommendation for the mercy of the Crown. Here the Magistrate is merely authorized to tender a pardon;<sup>1</sup> and if it appear to the Court of Session at the time of trial, or to the High Court as a Court of Reference, that the person who has accepted the offer of pardon has not conformed to the conditions under which the pardon was tendered, either by concealing anything essential or by giving false evidence or information, it is competent to the Court to direct the commitment of such person for trial for the offence in respect of which the pardon was tendered.<sup>2</sup> The witness, therefore, does not give his evidence under an absolute certainty of immunity. In Scotland the law is different. There, as remarked by Mr. Alison,<sup>3</sup> "it has been long an established principle of our law that by the very act of calling a *socius* and putting him in the box, the prosecutor debars himself from all title to molest him for the future with relation to the matter libelled." This is always explained by the presiding Judge to the witness as soon as he appears, and consequently he gives his testimony under a feeling of absolute security, as to the effect which it may have upon himself. This privilege is absolutely and altogether independent of the prevarication or unwillingness with which the witness may give his testimony. Justice may, indeed, be often defeated by a witness retracting his previous disclosures, or refusing to make any confession after he is put into the witness-box; but it would be much more put in hazard, if the witness were sensible that his future safety depended on the extent to which he spoke against his associate at the bar. It is quite as necessary here as it is in England, if not more so, that the evidence of accomplices should not be left to a jury without such directions and observations from the Judge as the circumstances of the case may require. The question is, whether the omission of the presiding Judge, on a trial in the *mofussil*, to make such observations, is not such an error in his summing up as to justify the Court, on appeal or revision, in setting aside a verdict of guilty.

It has been said by the learned author, Mr. Starkie,<sup>4</sup> speaking of the administration of civil justice in England, that "it is the practice for the Judge at *Nisi Prius* not only to state to the jury all the evidence that has been given, but to comment on its bearing and weight, and to state the legal rules upon the subject and their application to the particular case, and even to advise them as to the verdict they should give, so that it may accord with his view of the law and with justice." He proceeds: "Indeed, without this assistance from the Judge, few juries would, in a contested case, be able to come to an unanimous opinion, being frequently left in a state of great perplexity by the influence of the speeches of the contending pleaders. The accuracy of the summing up by the Judge is,

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<sup>1</sup> Crim. Pro. Code, s. 209.

<sup>2</sup> Crim. Pro. Code, s. 211.

<sup>3</sup> Alison's Practice of the Criminal Law of Scotland, 453, cited by Mr. Roscoe; Digest of Evidence in Criminal Cases, 6th Edition, p. 126.

<sup>4</sup> Starkie on Evidence, p. 472.

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therefore, of the very utmost importance, because if the jury, after hearing the evidence and the powerful arguments which probably have been urged in favour of quite opposite views of the question, were entirely left to decide for themselves, without an impartial direction as to what just and legal weight ought to be attached to this or to that view of the case, it would be difficult, if not impracticable, for them to come to a just conclusion; and hence, in the administration of civil justice, it is incumbent on the Judge correctly to state the law upon the case, as well as the evidence and the bearings of the latter." If the above remarks as to the impracticability of juries coming to a just conclusion are correct as regards the administration of civil justice in England, they are still more so as regards the administration of criminal justice in the mofussil, where trial by jury is in its infancy, and where the persons of whom juries are generally composed are necessarily more dependent upon the Judge than they are in England for sound and proper advice and assistance as regards the degree of weight which may be fairly and safely attached to the testimony of particular witnesses. The jury, it is true, are not legally bound to act upon the advice or recommendation of the Judge, as there is no appeal from a verdict of acquittal or from a verdict of guilty upon a mere matter of fact. By s. 379 of the Code of Criminal Procedure it is enacted that, in a trial by jury, the Judge will sum up the evidence on both sides, and the jury shall then deliver their finding upon the charge, and "a statement of the Judge's direction to the jury shall form part of the record." There can be no doubt that that section requires the Judge to sum up properly, and there would be very great danger in holding that there is no remedy by appeal against a verdict of guilty, if it appears clearly to the High Court that failure of justice has been caused by improper advice upon a question of fact, or by an omission to give that advice which a Judge, in the exercise of a sound judicial discretion, ought to give upon questions of fact, or as to the degree of credit to be given to particular witnesses. It appears to me that it amounts to an error in law in the summing up, which on appeal is a ground for setting aside the verdict, subject, however, to the limitation provided by the Code of Criminal Procedure in ss. 439 and 426, *vis.*, that the Appellate Court is satisfied that the accused person has been prejudiced by the error or defect, and that a failure of justice has been occasioned thereby. It was said by Tindal, C.J., in *Davidson v. Stanley*,<sup>1</sup> that "it is no objection that a Judge lets the jury know the impression which the evidence has made upon his own mind," and that "at all events the party objecting to such a course should show that the impression entertained by the Judge was not justified by the evidence." And it has been already shown that it is the practice of Judges in England to advise juries not to convict merely upon the uncorroborated evidence of an accomplice. If a Judge, in a criminal trial in the mofussil, were to tell the jury that, in his opinion, the evidence was sufficient to justify them in finding the prisoner guilty in a case in which, if the Judge had been trying the case with the aid of assessors, the High Court would, on appeal, have reversed his judgment if upon the same evidence he had convicted the prisoner, I have no doubt that the Court ought, on appeal, to set aside a verdict of guilty found by the jury, notwithstanding the advice was merely as to the weight of evidence. So, if a Judge, instead of advising a jury not to convict upon the mere uncorroborated evidence of an accomplice, were to advise them to convict upon such evidence, or were to tell them that the uncorroborated evidence of an accomplice, given under a tender of pardon, was admissible, and that it was for them alone to form their opinion upon it, that a conviction

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<sup>1</sup> 2 M. & Gr. 721, 728.

founded upon such evidence would be legal, and that such evidence, without corroboration, might be acted upon with as much safety as that of any other witness. I think the error in the direction would form a good ground of appeal.

Now, there are errors of omission as well as errors of commission, and I have no doubt that it would form a good ground of appeal against a verdict of guilty if a Judge were to call the attention of a jury to all the evidence against the prisoner, and to omit altogether to allude or call attention to the evidence in his favour. By such a summing up the Judge would not comply with the requirement of the Code of Procedure, and a verdict found upon such a summing up ought, I think, to be set aside, if the Court should be of opinion that the evidence was not sufficient to justify a conviction. I put the case merely to try the principle. It appears to me that such an omission, or an omission to follow a practice which is universally adopted by the Judges in England, and is described by Lord Abinger to be "a practice which deserves all the reverence of law,"<sup>1</sup> would be a ground of appeal against a conviction upon a verdict of guilty based upon such evidence alone, and found by a jury upon such a summing up. So also, I think, it would be error in a summing up, if a Judge, after pointing out the danger of acting upon the uncorroborated evidence of an accomplice, were to tell the jury that the evidence of the accomplice was corroborated by evidence of a fact which did not amount to any corroboration at all. When Lord Ellenborough said, "Judges in their discretion will advise a jury not to believe an accomplice unless he is confirmed, or only in as far as he is confirmed,"<sup>2</sup> he must have intended that it was their duty to do so. "Discretion," says Lord Mansfield, "when applied to a Court of Justice, means sound discretion guided by law. It must be governed by rule, not by humour. It must not be arbitrary, vague, and fanciful, but legal and regular."

But although I am of opinion that the Legislature intended that the Sudder Court should have the power of setting aside a verdict of guilty, pronounced by jury upon an erroneous or defective summing up of the evidence by the presiding Judge, yet I think that it was not their intention that a verdict of guilty should be set aside in every case in which there is a defective or erroneous summing up. It was their intention to provide protection for the innocent, but not chances of escape for the guilty. The power, therefore, of reversing a finding or of setting aside a trial was carefully guarded by ss. 426 and 439 of the Code of Criminal Procedure, by which it was enacted that "no finding or sentence passed by a Court of competent jurisdiction shall be reversed or altered, on appeal or revision, on account of any error or defect either in the charge or in the proceedings on the trial, \* \* \* unless in the judgment of the Appellate Court the accused person shall have been prejudiced by such error or defect," and that "no trial, held in any Criminal Court, shall be set aside, and no judgment, passed by any Criminal Court, shall be reversed, either on appeal or otherwise, for any irregularity in the proceedings of the trial, unless such irregularity have occasioned a failure of justice."

The Code of Criminal Procedure provides that, if a person be convicted on a trial by jury, the appeal shall be admissible only upon a matter of law. But it certainly is not against the principle, or even the letter of the Code, that the Court should have power to set aside a verdict of guilty, for an insufficient or defective summing up of the evidence in a case in which, in their judgment, the verdict is not warranted by the evidence. If a verdict and conviction could

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not, under such circumstances, be set aside, trial by a jury in the Courts of Session in this country would be fraught with the most dangerous consequences. On the other hand, if every convict, against whom a verdict of guilty is pronounced by a jury, has a right to have that verdict set aside upon appeal, and to obtain his discharge, whenever it can be shown that the presiding Judge has not properly directed the jury as to the degree of weight which ought to be given to particular evidence, a wide door would be thrown open for the escape of guilty men, and the due administration of the criminal law of this country would be placed in the greatest jeopardy in those districts to which trial by jury has been extended. A verdict of acquittal by a jury cannot be reversed, and ample protection is afforded to prisoners by allowing the High Court to reverse a verdict of guilty for any error or defect in the summing up, whenever the Court is of opinion that a failure of justice has been thereby occasioned. It has been suggested that the word "reverse" means to change to the contrary, and that to reverse a verdict of guilty is to change it into a verdict of not guilty, and that, although the Court, as a Court of Revision, may grant a new trial, as a Court of Appeal it has not power to do so. But I am of opinion that the word "reverse" is not used in so restricted a sense. The word "reverse," in ss. 419 and 426, is applicable not merely to findings or verdicts, but also to sentences; and in s. 439 the same word is used with reference to judgments only. But if the word "reverse," when applied to a verdict, means, "to change or turn into the contrary," it must also mean the same when applied to judgments or sentences. Thus, a judgment of conviction must be turned into a judgment of acquittal. S. 420 shows that such was not the meaning of the word when applied to sentences, even if without that section it would have been possible to put such a construction upon it. The Court, upon revision, may grant a new trial.<sup>1</sup> But the person convicted cannot obtain a revision as a matter of right. I think that the Court has as great a power in this respect on appeal as it has on revision, and that it may set aside a verdict of guilty, and a conviction founded upon it, for any error in law, such as a misdirection of the Judge in point of law, or an error or defect in the summing up of the evidence, or the improper rejection or admission of evidence: provided the Court is of opinion that the person convicted has been prejudiced by the error or defect, and that a failure of justice has been occasioned thereby. I am of opinion that the word "reverse" is used in its legal sense, and means "to make void," "to set aside," or "annul." The Legislature, when giving a power to a Court of Revision to order a new trial, may have thought it necessary to do so by express words, as a Court of Revision may act of its own motion and without any application or consent of the person convicted, but an appeal must be preferred by the person convicted; and it seems to follow that, if he asks to have a finding and conviction set aside for error in law, he cannot set up that conviction in bar of a second trial. That was the principle acted upon by the Judges in America, who held that a new trial might be granted in cases of felony notwithstanding the words in the Constitution, "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb," which words were interpreted by Mr. Justice Story to mean that "no person shall be tried a second time for the same offence, where a verdict has been given by jury." "I am aware," said Mr. Justice Kane, "that one of the most eminent of our jurists—Mr. Justice Story—has found an inhibition in the Constitution against the grant of new trials in cases involving jeopardy of life. But I cannot realize the correctness of the interpretation which, anxious to secure a citizen against the injustice of a second conviction, requires him to

<sup>1</sup> Crim. Pro. Code, s. 405.

suffer under the injustice of the first. Certainly, I would not subject the prisoner to a second trial without his consent. If, being capitally convicted, he elects to undergo the sentence, it may be his right. When, however, he asks a second trial, it is to release himself from the jeopardy in which he is already, and it is no new jeopardy that he encounters when his prayer is granted, but the same divested of the imminent certainty of its fatal issue." The same distinction was noticed by other Judges between jeopardy incurred with the consent of a prisoner, and jeopardy incurred without that consent. If a new trial may be granted for error in law by a Court of Revision, even without the prisoner's consent, can it be doubted that the same Court, as a Court of Appeal, may grant a new trial when an appeal is preferred by a prisoner against a verdict and conviction? It appears to me that, in all cases in which finding of guilty is set aside upon appeal, the Court, if it considers it necessary, may order a new trial. In some cases it may be necessary, for example, where evidence is improperly rejected, or where, for other reasons, the Appellate Court is unable to form a correct opinion as to the guilt or innocence of the appellants. But when the finding and conviction are objected to upon the ground that the Judge did not properly direct the jury as to the degree of weight which ought to be given to the evidence, it appears to me that this Court, sitting as an Appellate Court, is not necessarily bound to send the case back for a new trial. If the Court are of opinion that the evidence could not, in any proper view of the case, support a conviction, it would be worse than useless to send the case back for a new trial, in order that a jury might have the opportunity of convicting upon such evidence under a proper summing up. S. 419 of the Code of Criminal Procedure allows the Appellate Court to alter or reverse the finding. It does not compel them to send the case back for a new trial, in cases in which they see that it is useless, and may be injurious to do so. Regard for the prosecutor and witnesses forbids it; the prisoner is amply protected by the section which prohibits an appeal from a judgment of acquittal, and a failure of justice is sufficiently guarded against by allowing the Court to order a new trial whenever, upon appeal, they are satisfied that there has been a failure of justice. It would tend to defeat, and not to promote, justice, if a verdict of guilty were set aside, and a new trial granted, for a defective summing up with reference to the weight of evidence in a case in which the High Court would, upon the evidence given on the trial, have affirmed a conviction if, instead of a trial by jury, the trial had been before a Judge and assessors. In determining whether the verdict ought to be set aside, and a new trial granted, for a defective summing up of the evidence, it appears to me that the question to be considered is not whether, upon a proper summing up of the whole evidence, a jury might possibly give a different verdict, but whether the legitimate effect of the evidence would require a different verdict. If the evidence is such that the High Court would have affirmed the conviction if the trial had been before a Judge and assessors, I think that they ought not to set aside a verdict of guilty found by a jury, merely because the Judge has not, in summing up, given proper caution or advice to the jury as to the weight which they might properly give to the evidence. If a verdict is set aside for such a cause, upon the ground that the error of the Judge has caused a failure of justice, and that the prisoner has been prejudiced thereby, it may be necessary in some cases to grant a new trial. But if the Court is satisfied that a failure of justice has been caused, and that the evidence is wholly insufficient to support any conviction against the prisoner, and would, upon the same evidence, have reversed a conviction if the case had been tried without the intervention of a jury, there is no necessity, and I think it would be improper, to grant a new trial. In such a case, the Court, having set aside the verdict, may order the prisoner to be discharged.

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(His Lordship commented on the evidence in the case, and proceeded):—

The case should be returned to the Divisional Bench with an expression of the opinion of the Full Bench :—

1st.—That a conviction found upon the uncorroborated evidence of one or more accomplice or accomplices alone is valid in law.

2nd.—That, for the reasons above stated, there was error in law in the summing up of the evidence, which would warrant the Court in setting aside the verdict of guilty, if the Court is satisfied that the prisoner was prejudiced by the error, and that there has been a failure of justice.

3rd.—That the verdict and conviction ought not to be set aside if the Court be of opinion that the verdict was warranted by the evidence, and that, upon that evidence, they would have upheld the conviction on appeal, if the trial had been by the Judge with the aid of assessors, instead of by jury.

KEMP and PHEAR, J.J., concurred.

SETON-KARR, J.—I have previously read the exposition of the law by the learned Chief Justice with that attention which its full and exhaustive nature merits.

There appears from this and from other cases to have existed some slight doubts amongst us as to how the evidence of an accomplice or of two accomplices should be treated, and as to whether a conviction is legal, and ought to be affirmed, if founded on such evidence alone and uncorroborated. I have now, after full consideration, arrived, substantially, at most of the same conclusions as the Chief Justice. I may observe, however, that on such questions we do quite right to search for information, guidance, and aid in the decisions of the highest judicial authorities in English as well as in American law-books. But, as was remarked by Campbell, J., in a late case, I may take the liberty of doubting whether *dicta* of English law, or even the most elaborate English decisions, are imperatively to rule us on all points in the discharge of the Appellate Criminal Jurisdiction of this High Court. It is almost superfluous to observe that we deal here with a state of society very different from any European society, and we must apply the law either of particular statutes, or that which is best suited to the people. We are not necessarily to be guided by English law on all points. The substantive criminal law of the Penal Code is unquestionably different from English criminal law. On the other hand, I would observe that the utmost that the old Sudder decisions established is, to my thinking, that it was a rule of practice, rather than an established rule of law with Sudder Judges, not to convict on the uncorroborated testimony of accomplices. In this country such a rule may practically, in many cases, be a sound rule, though it is easy to conceive some cases in which there could be no reason why a conviction should not ensue on the uncorroborated evidence of an accomplice.

I think it unnecessary, after a citation of so many high authorities by the Chief Justice, after his full statement of the particular case before us, and after his general remarks, with many of which I entirely agree, to do more than state my own conclusions. I trust that the law on this important subject may henceforth be, in a great measure, settled. Some of the cases quoted, especially that in which Lord Abinger delivered judgment, were referred to by me on a very recent occasion. The consideration, then, which I have given to this subject, has enabled me to arrive at the following conclusions :—

1st.—A conviction upon the uncorroborated evidence of an accomplice is legal, and failure in corroboration of the same is not a ground for refusing to convict, or for reversal of conviction.

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2nd.—Judges, for all that, ought to be most careful in this country to direct juries that the evidence of accomplices should be received with caution, and that, if possible, corroboration should be required. The extent of such corroboration should be matter for the jury. In cases tried by assessors, and open to appeal on the facts, the Judge should himself, I think, act on the same principle.

3rd.—A new trial can be granted, if necessary, by a Bench of the High Court, sitting as well in appeal as on revision. In a late case *Kemp, J.*, and myself, in this view, ordered a new trial on an appeal from a conviction by a jury.

4th.—In the case now referred to us, the failure of the Judge to direct the particular attention of the jury to the nature of the evidence of the accomplices did amount to an error in law; and the Divisional Bench may deal with the case accordingly.

5th.—Convictions ought not to be reversed, nor should new trials be granted, unless the accused has been really prejudiced within the meaning and scope of s. 426 of the Code of Criminal Procedure.

JACKSON, J.—Upon the pure legal point before us, I agree in the conclusions at which the Chief Justice has arrived, and generally in the reasons which he has stated.

I think it must be admitted that a conviction by a jury upon the uncorroborated testimony of an accomplice is good in law.

1st.—Because the accomplice is a competent witness, even though he may have been previously convicted of an offence,<sup>1</sup> and because a single witness, if entitled to full credit, is sufficient, except in cases of treason, to prove any fact, unless there be a rule or practice in our Courts that requires corroborative evidence in support of his testimony.

2nd.—Because cases are conceivable in which the accomplice would be thoroughly credible.

3rd.—Because there is no such established rule or practice as is referred to in the latter part of the section just cited.

There can be no doubt that the Chief Justice has indicated how it is that we have no such rule. This came about, *first*, because for many years exclusively, and until quite recent times, in a large proportion of cases, the procedure in criminal trials was governed by Mahomedan law, and the rules taken from that law and applied to particular cases were never accurately defined and laid down for general adoption; *second*, because the finality of the verdict of a jury has only arisen under the Code of Criminal Procedure, and the Judges of the late Sudder Court, or Nizamut Adawlut, being supreme judges of fact as well as of law in criminal trials, were not under the necessity of discriminating between what was legally insufficient and what their judgment refused to accept. This being so, in the vacancy, as it were, of any rule upon the subject, we ought probably to adopt on the Appellate Side of this Court the same principles of evidence which are recognized in the exercise of Original Jurisdiction. At any rate, we are not at liberty to adopt any principle of exclusion which is not admitted there, and has not the sanction of ancient practice in the late Nizamut Adawlut. And although I should fully adhere, as a judge of fact, to the principle which I stated in the case of *Dwarka*,<sup>2</sup> who was tried by a Judge with assessors, and which in that case had the concurrence of Kemp and Seton-Karr,

<sup>1</sup> Act XIX. of 1837; Act II. of 1855, s. 28.

<sup>2</sup> 5 W. R. Cr. 18.



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JJ., yet, as matter of law, I am bound to say that a conviction by a jury founded upon the evidence of an accomplice without corroboration is not invalid. But before the jury can deliver any finding upon a charge, they must have the evidence on both sides summed up to them by the Judge, and this function, also called his "direction to the jury" (s. 379, Code of Criminal Procedure), must be fully, discreetly, and conscientiously performed. A statement of the direction is to form part of the record, and a report of it forms part of the matter for this Court's consideration when it acts as a Court of Revision. There can be no doubt but that an erroneous direction to the jury, where such direction has caused a failure of justice, is a ground for setting aside the verdict, and for either discharging the prisoner or ordering a new trial, as the circumstances of the case may require. And I am not acquainted with any kind of error which is more important in criminal trials than a direction which misleads or omits to guide the jury as to the nature or the weight of evidence.

I think it immaterial, for the purposes of the present decision, whether the word "reverse," in the 419th and 420th sections of the Criminal Procedure Code, means simply to "turn to the contrary," as in the natural sense, or "to make void," which is, no doubt, a legal interpretation, as convictions before a jury can only come up in appeal to this Court, as this Court, under its powers of revision, can order a new trial, and can exert those powers upon hearing an appeal as well as on other occasions.

Upon the duty of a Judge in summing up I need not add anything to what has been said by the Chief Justice. But upon the necessity for that duty being carefully performed, and upon the special danger of relying on approvers' testimony in this country, I think it right to say that which my official experience has suggested. It is not too much to say that native juries in the mofussil are generally quite incapable of appreciating evidence unaided, when the question before them is at all critical. On the one hand, they readily, and even greedily, listen to positive assertions regarding the guilt or innocence of the prisoner, frequently without discriminating between that which the witness declares of his own knowledge, and that which is pure hearsay. On the other hand, they commonly disregard circumstantial evidence, though it be of the strongest and most trustworthy character. And though it may come out in cross-examination that the statement is hearsay, though it may even be apparent at once, and the words might not be taken down, yet they have been heard by the jury, and the impression is made, and though the facts which constitute circumstantial evidence be well put together, and their effect be obvious to the trained judicial mind, they will seem of little importance to the ignorant juror. With these proclivities the native juror plainly stands in need of intelligent guidance, and, without that guidance, will, in difficult cases, often go entirely wrong. It is remarkable, too, as it is notorious, that the jurors are, as a rule, decidedly less intelligent, as well as less instructed, than the persons employed as assessors in criminal trials, and yet, by a strange anomaly of modern law, the verdict of the ignorant, inexperienced, unsworn jury, is final upon facts; while upon facts not only are the assessors overruled by the Judge, but the opinions of Judge and assessors together may be set aside by the Appellate Court.

And then as to testimony: I feel bound to say, after many years of converse with Courts of Justice of India, that veracity is not regarded in this country as it is in the countries of Western Europe. Whether this be due to wilful falsehood, to imperfect memory, to inexact conditions of mind, to fear, or to all these causes combined, I am not called upon at present to enquire. I need only say that the care with which witnesses must be watched, and the de-

ductions which have to be made from their credit, are much greater than in England. It must in fairness be remembered that, as witnesses, we have to do almost universally with the meaner classes; that the respectable native avoids being made a witness, as we should shun the small-pox, and that witnesses, therefore, are scarcely a fair sample of the population. But the fact remains: and when the witness is, moreover, a person stained, by his own confession, with the commission of atrocious crimes, most of all, where to the desperate ruffianism of the dacoit he adds the depravity of the retained approver, can the unsupported word of such a person be a safe ground on which to convict any prisoner? I need not say that this (and not the unlucky gentleman who, in a moment of irritation, has committed an act of violence) is the kind of approver, or accomplice, whom we have in view when we speak of approvers' testimony. The other case is of extremely rare occurrence—this of every day.

Now, when in the course of a long trial, in which many persons are on their defence, there is against particular prisoners only the kind of evidence we are speaking of, and the Judge in his direction, instead of pointing out the defect, and warning the jury against the danger, actually throws a veil over that nakedness, and disguises the danger by the use of general words to the effect that "the tendency of the evidence is to establish the prisoner's guilt," in such a case can it be doubted that the Judge has greatly miscarried, that the jury have been wrongly directed, and that the prisoner has been seriously prejudiced? I think not, and I am sure that the nature of both witness and juror, the finality of, and absence of sanction to, the verdict, make it even more incumbent on the Judge in this country, than it is in England, to perform with care and fidelity the office of direction.

I have heard it said that, if the jury go wrong, it does not very greatly matter; the prisoner can be pardoned. No doubt, he can, and there may be persons so constituted as to find this a satisfactory assurance. It is not so to me. No doubt, after an improper conviction has taken place, when the matter can be properly represented through the proper channel, when the head of the Government can be communicated with at Darjeeling or at Simla, the convict may, after weeks or months of unmerited suffering, receive a free pardon for an offence of which he ought never to have been found guilty. For my part, I should prefer to be tried by a careful and regular administration of justice.

The Chief Justice has pointed out that the prisoner is not in every case of misdirection entitled to a new trial, and there has been some apprehension expressed that the admission of the principle we are laying down may open a door to the escape of criminals, merely by reason of some short-coming of the Judge in point of form. But it seems to me that the simple test, "Has there been a failure of justice?" may be applied in most cases with perfect ease and perfect safety.

In regard to the proposed rule that we should not interfere in case of misdirection where the facts are such that, if the trial had been held before a Judge and assessors, we should have affirmed the sentence, I have only one misgiving. It is not always safe, I might say it is rarely safe, for an Appellate Court, with papers before it, to put itself in the place of the Court below which has heard the witnesses; and it might be that, in affirming the conviction on the faith of some unnoticed circumstance of corroboration, found in the evidence, we might be using that which the Judge and jury would not have relied upon. But this, perhaps, only suggests caution in the application of the rule rather than an objection to the rule itself.

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With these observations, therefore, I concur both in the judgment on the general point, and in the course which it is proposed to take with the particular case before us.

*Before Sir Barnes Peacock, Kt., Chief Justice, Mr. Justice Kemp, Mr. Justice Seton-Karr, Mr. Justice Campbell, and Mr. Justice Macpherson.*

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IN THE MATTER OF THE PETITION OF BISSUMBHUR SHAHA.<sup>1</sup>

June 20.

*Sentence—Mitigation of sentence—Criminal Procedure Code (Act XXV. of 1861), ss. 405, 428.*

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[6 W. R. 7.]

The High Court can, under ss. 405 and 428 of the Criminal Procedure Code, mitigate a sentence passed by a Magistrate, and confirmed or altered on appeal by the Sessions Judge, on the ground that the sentence was excessive.<sup>2</sup>

THE petitioner in this case, a landowner, was convicted of riot and house-trespass for entering the premises of his tenant with his retainers and dragging him out by force, and was sentenced by the Joint-Magistrate to two years' rigorous imprisonment and a fine of five hundred rupees, and, in default of payment, to six months' rigorous imprisonment in addition. The sentence was upheld by the Sessions Judge on appeal.

Mr. Doyne (with him Baboo Otool Chunder Mookerjee) for the petitioner.

The Junior Government Pleader (Baboo Jogodanund Mookerjee) *contra*.

Mr. Doyne applied to the High Court (MACPHERSON and SETON-KARR, JJ.) to reduce the sentence on the ground that it was excessive. It was not alleged that there was any defect in law in the conviction. Mr. Doyne contended that the High Court had the power to reduce the sentence. The Judges were of the same opinion, but, as it had been ruled otherwise in *The Queen v. Ramdhone Mundul*,<sup>3</sup> they referred the following question to a Full Bench:—

"Has this Court power to mitigate, on the ground of its being excessive, a sentence passed by a Magistrate and confirmed on appeal by the Sessions Judge, or a sentence passed on appeal by the Sessions Judge altering a sentence passed by a Magistrate?"

The following judgments were delivered:—

PEACOCK, C.J. (KEMP, J., concurring).—I do not think that there is any doubt in this case, when we read ss. 405 and 428 of the Code of Criminal Procedure together.

There might have been some doubt if s. 405 stood alone. It says: "It shall be lawful for the Sudder Court to call for and examine the record of any case tried by any Court of Session." The words "any case tried by any Court of Session" might mean only a case tried by a Court of Session in the exercise of original jurisdiction. But when we read s. 428, all doubt is removed. It says: "Except as provided in s. 405 of this Act, sentences and orders passed by an Appellate Court upon appeal shall be final." When the Legislature refers to s. 405, we must construe the Act as meaning s. 405 and not s. 404.

If "s. 404" is in the original record of the Act, and "s. 405" is merely an error of the printer, the case would be different, but we do not think it likely that the words "s. 405" are a misprint.

<sup>1</sup> Criminal Miscellaneous Case from an order of the Sessions Judge of Backergunge.

<sup>2</sup> See Act X. of 1872, s. 297.

<sup>3</sup> 4 W. R. Cr. R. 15.

We have not the original record here to compare it with the print.

Then, if we read "405" as the section referred to in s. 428, s. 428 shows that the Court, under s. 405, may be an Appellate Court. If so, then the words "tried by any Court of Session" must mean a Court of Session sitting either as a Court of original, or as a Court of appellate jurisdiction, and the case becomes perfectly clear.

If we look to the reason of the thing, I think it quite right and just that s. 405 should be read with the interpretation which I have put upon it. Suppose a man should be indicted before the Sessions Court for house-trespass in order to commit theft under s. 451 of the Penal Code, and that it should be proved that he was a starving man in Cuttack or Pooree who was passing by a godown where there was rice, and that he went in and stole a handful. He would be guilty of house-trespass for the purpose of committing theft, and would be liable to imprisonment for seven years and also to fine. Suppose the Sessions Judge should try him and sentence him for such an offence as that to three years' rigorous imprisonment, this Court could call for the record and set the matter right by mitigating the sentence. But suppose another man were tried for a similar offence committed under similar circumstances, not by the Court of Session, but by a Subordinate Magistrate of the first class (as he might be), and should be sentenced to seven years' rigorous imprisonment and to fine, and the Sessions Judge, on appeal, should mitigate the sentence by omitting the fine, and leaving the seven years' rigorous imprisonment. If this Court could not interfere in the latter case, this consequence would follow, that the Court could mitigate a similar three years' rigorous imprisonment passed by a Court of Session as a Court of original jurisdiction, but that it could not mitigate a sentence of seven years' rigorous imprisonment allowed by a Court of Session on appeal to stand for a similar offence. I think it very reasonable that whenever this Court is satisfied that a sentence is wrong in point of law, or is too severe for the offence proved, it should have the power of setting that sentence right. It could not do so upon appeal in a case tried originally by a lower Court, and appealed to the Sessions Court. But I think that the Legislature intended that the highest Court should have the power to grant relief in a case in which a sentence affirmed by a Court of Session sitting as an Appellate Court, or altered by that Court on appeal, and therefore substantially passed by them, is either contrary to law, or improper as being too severe.

In a case heard by a Sessions Court in appeal, the relief cannot be obtained as a matter of course, but the High Court must have such a case made out as to induce it to call for and examine the record.

SETON-KARR, J.—I wish to add nothing to what has fallen from the learned Chief Justice, with whom I entirely concur, except that I always entertained doubt which I expressed in the case of *Ramdhone Mundul*<sup>1</sup> adversely to the opinion of my colleagues, that I still entertained those doubts when I referred the case to a Full Bench with Macpherson, J., and that I am confirmed in the opinion I entertained on both occasions after hearing the arguments on both sides to-day, which have converted those doubts into certainties.

CAMPBELL, J.—I also concur. I had a good deal of doubt in the case. It did not appear to me altogether so clear as it has been now put by the learned Chief Justice; still, on the whole, I agree in the opinion expressed by my learned colleagues.

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<sup>1</sup> 4 W. R. Cr. R. 15.

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TION OF  
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Taking s. 405 alone, I should have been inclined to consider that the words "tried by any Court of Session" refer to the Court sitting as a Court of original jurisdiction, because, looking at chapter 25, there throughout the word "trial" is used as referring to the proceedings in the Court of original jurisdiction, and to that kind of trial only. But as I think that the section admits of doubt, it may be construed by a reference to other sections.

S. 428 is clearly inconsistent with the construction that s. 405 is restricted to trials by Courts of Session in original jurisdiction. At the same time I should like to point out that, in any construction, there is some inconsistency in this part of the Code, because where a Subordinate Magistrate has passed a sentence which has been appealed to the Magistrate of the district, and the Magistrate of the district, in deciding that appeal, has committed, it may be, a gross illegality in that case, under s. 404 this Court has the power to set the matter right as respects the point of law, whereas s. 428 would seem to provide that sentences or orders of an Appellate Court shall be final, except as provided in s. 405, making no reference to s. 404. There, it seems to me, must necessarily be some contradiction. But because there is one inconsistency, that is no reason why we must also make another, and as I am not satisfied that in s. 428 the figure "405" is a misprint or mistake for "404," I think we must consider that "s. 405" refers to the proceedings of an Appellate Court, *vis.*, Court of Session, and that this Court has the power to interfere, as regards the decisions of a Court of Session sitting as an Appellate Court for the trial of criminal cases, to the full extent provided by s. 405.

MACPHERSON, J.—I remain of the same opinion as that which I have already expressed. Whatever inconsistencies there may be in the provisions of the Criminal Procedure Code, I think that, reading ss. 405 and 428 together, it is impossible to come to any other conclusion than that which has been arrived at to-day.

*Before Sir Barnes Peacock, Kt., Chief Justice, Mr. Justice Norman, Mr. Justice Kemp, Mr. Justice Seton-Karr, and Mr. Justice Campbell.*

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July 9.

Sup. Vol. 488.  
[6 W. R. 39.]

THE QUEEN *v.* RAMCHARAN KAIRI AND ANOTHER (APPELLANTS).<sup>1</sup>

*Penal Code (Act XLV. of 1860), ss. 380, 456, 457—Lurking House-Trespass—Theft.*

The prisoner was convicted by the Magistrate of two separate offences under ss. 456 and 380 of the Penal Code, and sentenced for both. On appeal the Sessions Judge, holding that the offence proved was under s. 457, ordered a new trial for offences under ss. 457 and 380. *Held*, that there ought not to be a new trial, but that the conviction and sentence under s. 380 should be set aside.

In this case the prisoner was convicted by the Magistrate of lurking house-trespass by night and also of theft as two separate offences, and sentenced for both.

On appeal the Sessions Judge found that the prisoner was not guilty of two offences, but of the offence of lurking house-trespass by night with intent to commit theft. The Sessions Judge set aside the conviction, and returned the case to the Magistrate to frame charges under ss. 457 and 380 of the Penal Code, with a direction that the prisoner should be retried. The Sessions Judge, having afterwards found that his order was opposed to the ruling in *The Queen v. Ichabur*

<sup>1</sup> Reference from the Sessions Judge of Gya, dated the 7th February 1866.

*Dobey*,<sup>1</sup> sent it up to the High Court, in order that it might be quashed by the Court as a Court of Revision.

The case was heard by NORMAN and CAMPBELL, JJ.

CAMPBELL, J., passed the following order :—This Court having several times ruled that it is illegal to convict and punish a house-breaker who also commits theft, for the separate offences of house-breaking and theft, the Judge's view of the law is correct. But his order questioning the proceedings of the Deputy Magistrate, and ordering a new trial, whereby the appellants are subjected to the peril of a still more severe sentence, seems to be beyond his power. The sentences both of the Deputy Magistrate and of the Judge are set aside as illegal. The Deputy Magistrate will again proceed to deal with the case upon the evidence recorded by him, and if he considers that the offence, when properly charged under s. 457, requires a punishment more severe than he can inflict, he should commit the prisoners to the Sessions.

NORMAN, J., ordered that the case be sent before a Full Bench.

The following judgments were delivered :—

PEACOCK, C.J. (after stating the facts).—We think that the Sessions Judge was wrong in sending the case back to be retried on the two charges mentioned in his order. The prisoner clearly could not be retried under s. 380, as he had already been tried, convicted, and sentenced under that section, as the Sessions Judge says, and properly says, under the facts found by him erroneously. We think that the Sessions Judge was wrong in ordering the prisoner to be retried under s. 457, the prisoner having been already convicted and sentenced under s. 456. We think that the Sessions Judge ought to have set aside the conviction and sentence under s. 380; the conviction and sentence under s. 456 would then have remained.

The prisoner appealed upon the ground that he was not guilty of an offence under s. 456. Upon that appeal the Sessions Judge could not set aside the conviction under s. 456, upon the ground that he was guilty under s. 457. If he was guilty of lurking house-trespass by night with intent to commit theft under s. 457, he was guilty of lurking house-trespass by night. Having been tried and convicted of the minor offence, the Sessions Judge could not, upon the appeal of the prisoner, set aside the conviction in order that he might be tried and punished for the aggravated offence under s. 457. The Judge's order should be altered accordingly, the effect of which will be that the sentence under s. 456 will stand, and the conviction and sentence under s. 380 will be reversed.

The Magistrate should be cautioned to be more careful in future, and not to split up one single aggravated offence into separate minor offences.

As regards the prisoner who has not appealed, he may have the benefit of a similar order by this Court as a Court of Revision.

The case will go back to the Division Bench.

KEMP, SETON-KARR, and CAMPBELL, JJ., concurred.

NORMAN, J.—I concur, though not without some doubts whether the Sessions Judge's order directing that the prisoner should be tried under s. 457 is not correct, whether we might have treated the splitting of the charge as an error in law justifying the Judge in reversing the whole sentence of the Magistrate.

<sup>1</sup> 4 W. R. Cr. Rul. 11.

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*Before Sir Barnes Peacock, Kt., Chief Justice, Mr. Justice Norman, Mr. Justice Kemp, Mr. Justice Seton-Karr, and Mr. Justice Campbell.*

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THE QUEEN *v.* MUSSAMAT ZAMIRAN.<sup>1</sup>

Aug. 31.

Sup. Vol. 521.  
[6 W. R. 65.]

*Alternative Charge and Conviction—False Evidence—Penal Code (Act XLV. of 1860), s. 122—Criminal Procedure Code (Act XXV. of 1861), ss. 242, 381, 382, cl. 5—Evidence—Act II. of 1855, s. 32.*

The prisoner, who as a witness in a former case had made one statement before the Magistrate and a contrary one before the Sessions Judge, was tried and convicted of having either given false evidence before the Judge or given false evidence before the Magistrate. *Held* (Norman and Campbell, JJ., *doubting*) the conviction was right. *Held* also (Campbell, J., *differing*) the evidence taken before the Judge was admissible on the charge of having given false evidence before the Magistrate.<sup>2</sup>

A CASE of culpable homicide occurred in the district of Sarun. Chandi Sukul was charged with the offence, and was sent by the police to the Magistrate upon a charge of culpable homicide not amounting to murder. In that case, the present appellant, Mussamat Zamiran, was sent up by the police to the Magistrate as a witness. Before the Magistrate she deposed that she had seen the prisoner Chandi beating the deceased Biban with his fiddle-bow, and also that she had seen the marks of beating on the corpse.

After making the usual preliminary enquiry, the Magistrate committed the prisoner, Chandi Sukul, for trial before the Sessions Judge. At the Sessions trial, the appellant, Mussamat Zamiran, was again produced as a witness for the prosecution. On that occasion she deposed that she never saw the prisoner Chandi strike the deceased Biban during the above time, namely, six months, or on any occasion, and that she did not see any marks of beating on the corpse. After the trial of Chandi Sukul, the present appellant, Mussamat Zamiran, was committed to the Sessions on two charges, 1st, intentionally giving false evidence in the judicial proceeding before the Sessions Judge of Sarun on the 18th December 1865; and, 2ndly, intentionally giving false evidence in a judicial proceeding before the Officiating Joint-Magistrate of Sarun on the 14th October 1865. The perjuries assigned on these two charges were the statements already noticed, made before the Sessions Judge and the Magistrate respectively. The only evidence which was submitted to the Sessions Court by the prosecution in support of these two charges consisted of the evidence of Doma chaprassi, who proved the correctness of the record of the deposition of Mussamat Zamiran before the Magistrate, and the evidence of Lodaput Hossein, mohurrir of the Sessions Court, who proved the correctness of the record of the deposition of Mussamat Zamiran before the Sessions Judge. The evidence of these two witnesses constituted the whole proof for the prosecution. But for the defence one Bikair Kahar deposed, "I know the prisoner; she gave false evidence in the Magistrate's cutcherry;" so Sheosahai Malli, "I know the prisoner; she gave false evidence before the Magistrate."

On this evidence, the Judge convicted the prisoner, not of one charge or of the other, but alternatively, namely, that she either intentionally gave false evidence in a judicial proceeding before the Judge, or that she intentionally gave false evidence in a judicial proceeding before the Magistrate.

The prisoner appealed, and the case came on before Norman and Campbell, JJ., who considered that this conviction on alternative charges was illegal.

<sup>1</sup> Committed by the Joint-Magistrate, and tried by the Sessions Judge of Sarun, on a charge of giving false evidence.

<sup>2</sup> See Act X. of 1872, s. 461.

Campbell, J., also considered that the Judge was wrong in using the prisoner's deposition before the Magistrate as evidence to prove that the evidence before the Judge was false. The case was referred to a Full Bench, with the following remarks by

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NORMAN, J.—We are disposed to think that, under s. 381 of the Code of Criminal Procedure, the Court, in passing judgment, must distinctly specify the offence of which the accused person is convicted, and that it is only when the same facts constitute or form a part of an offence under one or other of two sections or under one section, and that the Court, from imperfect information, is unable to say under which head the offence falls, that it can pass judgment in the alternative. We doubt whether a finding that A B, on two different days, made inconsistent statements on oath, is a sufficient specification of the offence. It may be that a charge may be so framed under s. 242, in order to guard against the contingency of the Magistrate committing in one charge, and the Judge thinking the other proved, but that the Sessions Judge is bound to state which of the two he believes to be proved.

There is another point in the case on which Campbell, J., entertains a strong opinion.

As the point is of importance, and as there is a Circular Order<sup>1</sup> which, we understand, is in conflict with some decisions of the Court, we would suggest the case should be heard before a Full Bench of five Judges.

The following judgments were delivered :—

PEACOCK, C.J.—I have no doubt that there may be an alternative finding as well in a case in which the evidence proves the commission of one of two offences falling within the same sections of the Penal Code, and it is doubtful which of such offences has been proved, as in one in which the evidence proves the commission of an offence falling within one of two sections of the Penal Code, and it is doubtful which of such sections is applicable. This appears to me to be quite clear when s. 381 of the Code of Criminal Procedure is read together with s. 242 and cl. 5, s. 382 of that Code. A swears before a Magistrate that he saw the prisoner kill B. The prisoner is committed to the Sessions for trial for murder. A, on the trial, swears that he did not see the prisoner kill B, and the prisoner is acquitted. A, in consequence, is committed for trial for giving false evidence, and two charges are framed against him under s. 242, Code of Criminal Procedure : *First*,—That he intentionally gave false evidence before the Magistrate, by swearing that he saw the prisoner kill B. *Second*,—That he intentionally gave false evidence before the Sessions Judge by swearing that he did not see the prisoner kill B. The Sessions Judge finds that the prisoner intentionally gave false evidence, but that it is doubtful whether the statement made before the Magistrate, or that made before the Sessions Judge, was the false one. If the prisoner was innocent, and the statement before the Magistrate was false, the prisoner has in consequence been improperly committed for trial on a charge of murder, and has suffered all the degradation, annoyance, and anxiety of being committed on a false charge. If the prisoner was guilty, and the witness, in consequence of bribery or other cause, has sworn falsely before the Sessions Judge, the administration of justice has been defeated, and a murderer has been acquitted. It is clear that, unless the law is very defective, or we are to trifle with the administration of justice, A ought to be punished. It appears to me that the law is not deficient, and that the case is provided for

<sup>1</sup> Circular No. 10A, dated Calcutta, 18th April 1863. Field's General Rules and Circular Orders, pp. 22 & 23.



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by the Code of Criminal Procedure, whether it be read according to the strict letter or according to its spirit. In such a case it would seem clear that the Magistrate was right in framing a charge containing two heads under s. 242. The Sessions Judge would also be strictly within the letter as well as the spirit of ss. 381 and 382, cl. 5, in finding that A is guilty of the offence of intentionally giving false evidence, and that he is guilty either of the offence specified in the first head, or of the offence specified in the second head of the charge, and is convicted of an offence punishable under s. 193 of the Penal Code. The words in cl. 5, s. 382, which follow the word "namely," are clearly given only as an example, and it is clear that without an example of a case falling within the latter branch of s. 242, such a case falls within the strict letter of cl. 5, s. 382.

The other point upon which Campbell, J., is stated in the reference to entertain a strong opinion is, as I understand him, that the statement made by the prisoner before the Sessions Judge was, in consequence of s. 32, Act II. of 1855,<sup>1</sup> inadmissible against the prisoner in a criminal proceeding, except for the purpose of punishing her for wilfully giving false evidence upon such examination, *i.e.*, examination before the Judge.

Witness was not compelled to give evidence before the Judge, and, therefore, the question does not arise whether she would be protected from a charge of giving false evidence in her examination before the Judge had she been compelled to give evidence. Whatever opinion may be entertained upon that point, there can be no doubt that the evidence given before the Magistrate was admissible to prove that the evidence given before the Judge was false. The prisoner could not have been excused from giving evidence before the Magistrate upon the ground that her answer might criminate her, in respect of the evidence which she might afterwards give before the Judge. The prisoner is charged with giving false evidence upon her examination before the Judge, and, upon that head of the charge, the statement made before the Sessions Judge, as well as that made before the Magistrate, is evidence, the former to prove that the prisoner made the statement, the latter to prove that the statement was false, within the knowledge of the prisoner. But the statement of the prisoner made before the Judge, when used as evidence against her, is also admissible in her favour if the Judge believes it. The Judge, taking the two statements together, and the prisoner's plea of not guilty, which in substance denies that she intentionally gave false evidence before the Judge, says: "I cannot determine which of the statements is false. I cannot, upon the strength of the first statement alone, finding that it is contradicted by the second, say that the second is false. But, giving the prisoner the benefit of the doubt which has been created in my mind by the fact of the contradiction of the first statement by the second, I cannot say that the second is false; I can say that one or the other of the two statements was false, within the prisoner's knowledge. Looking, therefore, at the evidence which has been given in support of the charge, that the second statement was false, I am doubtful under which of the two heads of the charge the offence falls. I can only say that the prisoner has been guilty of intentionally giving false evidence; I cannot say that she is not guilty of intentionally giving false evidence before the Judge, or that she is guilty of it; and therefore I can only find that she is guilty either of the offence charged in the first head of the charge, or of the offence specified in the second head of the charge, namely, that she intentionally gave false evidence before the Judge, or that she intentionally gave false evidence before the Magistrate." The effect of that finding is that the prisoner is liable to be punished for the offence for which the lowest punishment is pro-

<sup>1</sup> See Act I. of 1872, s. 132.

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vided, if the same punishment is not provided for both; see Penal Code, s. 72. In the particular case referred to us, giving false evidence, intending to cause a person to be convicted of culpable homicide not amounting to murder, such as the evidence given before the Magistrate, would be punishable more severely than giving false evidence to procure his acquittal. The former would fall under s. 194 of the Penal Code, and the latter under s. 193; the maximum punishment being for the former offence transportation for life, or imprisonment for ten years, with fine, and for the latter offence imprisonment for seven years, with fine. The argument of Campbell, J., would lead to the conclusion that no indictment ought to lie for giving false evidence before a Judge, if it contradicts evidence previously given in the case before a Magistrate, inasmuch as the liability to be indicted, if the evidence given before the Judge differs from that given before the Magistrate, would be an inducement to the witness to stick to the first statement.

NORMAN, J.—I do not think that the first point in this reference is by any means clear. For myself, I still feel the doubts which are expressed in the order referring the case. S. 381 says that the Court “shall distinctly specify the offence of which, and the section of the Indian Penal Code under which, the prisoner is convicted, or, if it be doubtful under which of two sections the offence falls, shall distinctly express the same, and pass judgment in the alternative, according to s. 72 of the said Code.” I should still doubt whether a finding “that a prisoner either gave false evidence before the Magistrate on the 1st February, or else, if that evidence be true, gave false evidence before the Judge on the 1st of May,” can be properly said to specify the offence of which the prisoner is guilty. It is very important that there should be a definite and well-understood rule on the subject, and I am quite satisfied to abide by the judgment of the majority of the Court.

On the other point raised by Campbell, J., it appears to me perfectly obvious that one who makes a criminal charge against another cannot protect himself from a cross-examination on the direct question whether the charge was true or false, on any pretext whatever. Even assuming for the purpose of argument that such a person could protect himself, still, if he answered voluntarily and without claiming protection, his answer would be admissible against him, and would not be excluded by the 32nd section of Act II. of 1855, because it would not be “an answer which the witness had been compelled to give,” within the meaning of that section. Indeed, if the witness claimed protection in such a case, and said, in substance, “I refuse to answer because the answer, if I speak the truth, will convict me of perjury before the Magistrate,” the objection would be almost as strong evidence against him as if the witness had admitted by a direct answer that his former statement was false. If the evidence given in a subsequent case in answer to cross-examination, and under pressure, would be receivable as against the witness to show that his former statement was false, much more must it be admissible when the subsequent deposition of the witness is given voluntarily, and without pressure of any sort, as in the present case. A subsequent deposition has always been received, both in England and in this country, as evidence, upon a charge of perjury, to show the falsehood of the former contrary deposition by the same witness. There are numerous cases on the point; and the propriety of admitting such evidence has never, as far as I am aware, been questioned by any one except Campbell, J., in this case.

KEMP, J.—I entirely concur in the judgment of the learned Chief Justice.

SETON-KARR, J.—I entirely concur with the learned Chief Justice. Indeed, I had always understood that our Court and the subordinate Courts acted

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on the principle laid down in the judgment with which I concur ; and, until this reference was made, I was not aware that there existed any very serious doubts on the points. Indeed, unless Courts did and could return an alternative finding in such cases of false evidence, the most disastrous consequences to the administration of justice would ensue. Violent crime and crimes of all kinds would go unpunished, and the witnesses who had been bought off to deny their statements implicating the perpetrators of such violent or other crimes would go unpunished also. I can conceive nothing more detrimental to society.

On the second point referred to us, I regret that I cannot concur with Campbell, J. If I understand him aright, I think that the examination of the prisoner before the Judge, and the statements of the prisoner before the Magistrate, are admissible for the reason given by the Chief Justice, and are admissible to test the prisoner's guilt or innocence.

CAMPBELL, J. (after stating the facts)—In the view of the Judge, the deposition before the Magistrate was evidence to show that the deposition before the Judge was false, and the deposition before the Judge was evidence to show that the deposition before the Magistrate was false. On this Mussamat Zamiran appeals to this Court.

The case came before a Division Bench consisting of Norman, J., and myself ; and, having doubts regarding the case, we referred it to a Full Bench.

We had, in the first place, some doubts whether, under s. 381 of the Code of Criminal Procedure, it was not necessary for the Judge, in passing judgment, to specify the offence of which the accused person is convicted, and whether it is not only when the same facts constitute or form a part of an offence under one or other of two sections, or under one section, and the Court, from imperfect information, is unable to say under which head the offence falls, that it can pass judgment in the alternative. We doubted whether the law enables a Judge in such a case as the present to convict of either of two charges of false evidence in the alternative, when the facts constituting one of the alternative offences are wholly different from, and opposed to, those constituting the other alternative offence.

Another doubt was whether, with reference to the provisions of s. 32, Act II. of 1855, the evidence given by Mussamat Zamiran before the Magistrate and before the Judge respectively could be used as evidence against her in support of a criminal charge of false evidence given upon another occasion than that on which the evidence so used was given, Mussamat Zamiran not having put herself forward as a witness of her own accord, but having been summoned, and in a manner compelled, to give evidence, first, before the Magistrate, and then before the Judge.

With reference to the first point of doubt noticed by the Division Bench, I in some degree concur in the doubts which were suggested by Norman, J. I am not by any means clear upon the point. I will only express some doubts.

But with regard to the second point—the construction of s. 32, Act II. of 1855—I have a strong opinion, which I will now proceed to express. S. 32 is as follows : “ A witness shall not be excused from answering any question relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend, directly or indirectly, to criminate such witness ; or that it will expose, or tend, directly or indirectly, to expose such witness to a penalty or forfeiture of any kind, provided that no such answer, which a witness shall be compelled to give, shall, except for the purpose of punishing such person for wilfully giving false

evidence upon such examination, subject him to any arrest or prosecution, or be used as evidence against such witness in any criminal proceeding." In cases of false evidence formerly tried by me, I have expressed the opinion, with reference to the above provision, that, although the evidence of a witness taken before a Magistrate may be used to prove his subsequent perjury before the Judge, the evidence taken before the Judge cannot be used to prove a prior perjury before the Magistrate; that, consequently, when there is no other evidence on the record, a charge of false evidence before the Magistrate, only supported by the subsequent evidence of the same witness before the Judge, must fall to the ground. If so, an alternative conviction that the accused has committed one of two offences, of which the not-to-be-supported charge of false evidence before the Magistrate is one, cannot be sustained. Whether the conviction be on a single charge, or a double charge, no charge can be supported without evidence of some sort. As respects the charge of giving false evidence before the Judge, although the wording of s. 32 of the Act might leave some room for doubt, I do not think it could have been intended to protect a witness against subsequent perjury; and, understanding that the other Judges of this Bench fully agree with me on the point, I may now hold with confidence that the evidence of a witness taken before the Magistrate may be used as *pro tanto* evidence on a charge of subsequent false evidence before the Judge. As respects the other charge of false evidence before the Magistrate, and the question of the admissibility as evidence against the prisoner of his subsequent evidence before the Judge, it seems to me that the policy of the law on this latter point is clear. The old English rule was that no one was compelled to criminate himself, and no man was obliged to answer a question if his answer would expose him to the risk of criminal proceedings. This system was attended with many inconveniences, and the Indian Legislature, by Act II. of 1855, adopted another rule. S. 32 enacts that no witness shall be excused from answering any relevant question, on the ground that the answer will, directly or indirectly, criminate such witness, or expose him to a penalty of any kind; but then it goes on to provide that "no such answer which a witness shall be compelled to give shall, except for the purpose of punishing such person for wilfully giving false evidence upon such examination, subject him to any arrest or prosecution, or be used as evidence against such witness in any criminal proceeding." Witnesses are bound over and compelled to give evidence at a Court of Sessions; and, as I understand the present law, if a witness were to object, "I cannot state the truth, for that would disclose that I committed a murder, or that would disclose that I gave false evidence on a former occasion," the Judge would explain, "You need be under no apprehension; you must answer; but nothing that you say can be used against you in order to convict you of the murder, or the false evidence on the prior occasion: you may therefore speak out without fear." If that be not the meaning of the law, I am quite unable to understand what is the meaning. It seems to me that a witness compelled to appear in a Session case is protected from any use against him of the evidence which he gives; and that such evidence cannot be used against him in a criminal prosecution to prove that he committed perjury on a former occasion. If it were otherwise, witnesses, who had committed themselves to certain statements when first carried by the police before the Magistrate, would be no longer free agents; they would go into the witness-box with halters round their necks. If they venture to speak freely, they may immediately be committed on an alternative charge of this kind without further evidence. The absence of any other evidence implies that if they stick to their original story they are safe, but if they say that which may be the truth, they are forthwith liable to be indicted for perjury. If they give false evidence

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at the Sessions, by all means prove the charge and punish them. But to punish them on an alternative finding, which necessarily implies that the evidence before the Sessions Court may be true, without any other evidence to the prior perjury than the privileged evidence which they are compelled to give, seems to me contrary to the letter and the policy of the law. If that be lawful, Sessions trials must become a farce. Witnesses have no option but to repeat the story once told to the police and the Magistrate. I do not think that it makes any difference that the witness did not go through the form of refusing to answer, and being told by the Judge that she must answer. She was, I think, in every sense compelled to give evidence. She was compelled to appear before the Sessions Court, and being there, the law by penal enactments compelled her to give evidence. Therefore, in my opinion, in this case the evidence taken before the Judge was improperly and wrongfully used in support of the charge of false evidence given before the Magistrate, and a conviction founded upon that evidence only cannot be sustained.

The present case is somewhat complicated by this, that the prisoner has, in some sort, supplied what may possibly be considered evidence upon this head of the charge; that is to say, the charge of false evidence before the Magistrate, inasmuch as two of her witnesses have stated before the Court, "I know that Mussamat Zamiran gave false evidence before the Magistrate." But it seems to me that a statement of this kind, without any particulars as to which the witness pledges himself to his means of knowledge, is no evidence, and certainly is totally insufficient evidence on which to convict a prisoner of giving false evidence.

In my opinion, the conviction ought to be quashed, and a new trial ordered.

*Before Sir Barnes Peacock, Kt., Chief Justice, Mr. Justice Loch, Mr. Justice Kemp, Mr. Justice Seton-Karr, Mr. Justice Phear, and Mr. Justice Macpherson.*

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 July 27.  
 Sup. Vol. 750.  
 [8 W. R. 47.]

QUEEN v. SHEIKH BAZU AND OTHERS.<sup>1</sup>

*Power of High Court—Alteration of Verdict and Sentence—Criminal Procedure Code (Act XXV. of 1861), ss. 402 to 407—Joint Charges.*

The High Court has no power, either as a Court of Appeal or as a Court of Revision, to reverse, alter, or set aside a verdict of acquittal, even if it be contrary to the evidence.<sup>2</sup>

A Magistrate should not send up joint charges to the Sessions Court against persons who take part in a riot on opposite sides, as they have not a common object. But where a person had been so jointly charged, and rightly convicted by the Sessions Court, *Held* (MACPHERSON, J., *dissenting*) that, as the prisoner had not been prejudiced by the mistake of the Magistrate, there was no sufficient ground for setting aside his conviction or ordering a new trial.<sup>3</sup>

THE question whether, when a prisoner has been convicted and sentenced by a lower Court, the High Court, acting as a Court of Revision under s. 104 of the Criminal Procedure Code, or as a Court of Appeal, has power to set aside the conviction and sentence, and to declare the prisoner guilty of a different offence and pass a different sentence upon him, or to send the case back for a

<sup>1</sup> Committed by the Magistrate, and tried by the Sessions Judge of Mymensingh.

<sup>2</sup> See *Queen v. Chandrakant Chuckerbutty*, 1 B. L. R. A. Cr. 8 (or p. 5 of this book); and *Queen v. Gorachand Ghose*, 3 B. L. R. F. B. 1 (or p. 79 of this book); see also Act X. of 1872, ss. 280, 297.

<sup>3</sup> See Act X. of 1872, ss. 283, 297.

new trial, was referred for the opinion of a Full Bench by Loch and Macpherson, JJ., under the following circumstances :—

Moti Mondul, Seeboo, and Megha, were charged (among other charges) with the murder of Solim. There was on the evidence no doubt whatever that Solim died from the effects of a blow on the head which he received in the course of a riot in which the prisoners took part; but it was not proved who struck the fatal blow. There was little evidence as to what occurred upon the occasion of the riot, beyond the fact that when the police, on information received from the prisoner Bazu (who had himself been wounded), repaired to the spot, they found Solim lying senseless on the ground, with Moti Mondul lying not far off with several very severe sword-cuts, Seeboo and Megha being also there, and wounded, though less severely. From the statements made by the prisoners themselves, as well as from other evidence, it appeared that quarrels, accompanied by litigation, had for some weeks been going on between Moti Mondul and the deceased. They lived in the same village, and all the villagers appeared to have taken the side of either the one or the other.

Of the particular riot in the course of which Solim received the blow of which he died, the Judge said: "It would appear that the common object on Moti Mondul's side was to put an end to the case Solim had brought, and to punish him and his witnesses. Murder probably was never intended, but Solim met his death in the riot."

The Judge's finding as to the prisoners Moti Mondul, Seeboo, and Megha, was as follows: "I find that they were members of the same riotous party which, in prosecution of a common object, caused the death of Solim. I find no intention to cause death proved. I am unable to state with what weapon Solim was killed. I consider the crime does not come under any of the clauses in s. 300, but think that there must have been a knowledge that death was likely to result from the proceedings in this riot, and I consider the prisoners all equally guilty under the latter part of s. 304, and sentence each of them to five years' rigorous imprisonment." The conviction was for culpable homicide not amounting to murder, the Court holding that the prisoners caused the death of Solim by acts done "with the knowledge that their acts were likely to cause death, but without any intention to cause death, or to cause such bodily injury as was likely to cause death."

A fourth prisoner, Bazu, who had been one of Solim's party in the riot in which the latter met his death, was tried together with Moti Mondul, Seeboo, and Megha, on a charge of causing grievous hurt to Moti Mondul, and, being convicted, was sentenced by the Judge.

All four prisoners appealed to the High Court. The appeal came on for hearing before Loch and Macpherson, JJ., who were of opinion that, on the facts, as found by the Judge, the conviction of the first three prisoners ought to have been for murder. Loch, J., observed that he saw no objection to the sentence passed on Bazu, and would confirm it. Macpherson, J., took a different view. In consequence of this difference of opinion and a doubt as to their power to alter the sentence passed on the first three prisoners, the learned Judges referred the case to a Full Bench. In referring it the following remarks were made by Macpherson, J. :—

"I am inclined to think that we ought to follow the rule laid down in *Gorachand Gope's case*,<sup>1</sup> inasmuch as the Judge has not found an absence of

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the intention mentioned in cl. 3 of s. 300, and inasmuch as the facts found by him clearly bring the case within the terms of this clause, and show that the conviction for culpable homicide not amounting to murder is, on the facts found by the Judge, wrong in law. It seems to me that we should, in reversing this conviction, be acting in accordance with the decision of the Court in the case which I have just mentioned. But I entertain doubts on the subject which arise chiefly from the decision in the case of *Toyab Sheikh*,<sup>1</sup> which in some respects conflicts with the decision in *Gorachand Gope's* case.<sup>2</sup> I think that the question ought to be referred to a Full Bench.

"As regards the prisoner Bazu, I think he ought not to have been tried along with the other prisoners. Bazu belonged to Solim's party, the common object of which party was the very opposite of the common object of Moti Mondul's party. Moti Mondul, Seeboo, and Megha, are tried and punished for the murder of Solim: Bazu is tried and punished for a wholly different offence, the causing grievous hurt to Moti Mondul. These two charges cannot be properly lumped up together and tried as one offence in which all the prisoners are jointly concerned: and prisoners never can be rightly tried together unless for an offence in the commission of which they are all charged with being jointly implicated. In the riot Moti Mondul received several very bad sword-cuts, which might have caused his death. He has recovered; and surely if Bazu is to be tried for the grievous hurt done to Moti Mondul, it is only reasonable, if not absolutely essential to the ends of justice, that the injured man should be examined as a witness, and that the Court should hear from the witness-box what he has to say on the subject.

"It seems to me that, when there is a regular fight, as in this case, between two distinct parties, the object of the one being directly the opposite to the object of the other, the two parties never can be properly put on their trial together when charged with culpable homicide of whatever kind.

"I think that the conviction and sentence and all the proceedings as against Bazu ought to be set aside, and that a new trial should be had as regards him.

"As Mr. Justice Loch does not concur with me in the view I take as to the conviction of the prisoner Bazu, and as the question seems to me to be one of very great importance, I think that it is desirable that this question also should be referred to a Full Bench."

The following judgments were delivered by the Full Bench:—

PEACOCK, C.J. (BAYLEY, KEMP, and SETON-KARR, JJ., concurring).—I cannot concur in thinking that the conviction of the prisoners of culpable homicide not amounting to murder can be set aside, and the conviction of murder substituted by this Court either as a Court of Appeal or as a Court of Revision, and I am of opinion that the case cannot be sent back for a new trial.

One of the leading principles of the Code of Criminal Procedure is, that there can be no appeal from a judgment of acquittal, and that this Court cannot, as a Court of Revision, alter the finding of a Court of Session upon any question of fact.

An appeal lies upon law or fact: revision is only in respect of matters of law, or too great severity of sentence. On appeal, a judgment of acquittal cannot be reversed; on revision it cannot be reversed upon the ground that the evidence would have warranted the Judge in finding the prisoner guilty of a more aggravated offence than that of which he was convicted.

<sup>1</sup> 5 W. R. Cr. 2.

<sup>2</sup> *Ante*, p. 443 (or p. 700 of this book).

If a prisoner is charged with murder, and also with culpable homicide not amounting to murder, with reference to one and the same act of killing, if he is convicted of culpable homicide not amounting to murder, he is substantially acquitted of murder, and the Court cannot, upon appeal, hold that the evidence was sufficient to warrant a conviction of murder, and alter the conviction accordingly, or reverse the finding, and send the case back for a new trial.

In the case of *Gorachand Gope*,<sup>1</sup> it was held that this Court, as a Court of Revision, might set aside a judgment of acquittal for error in law, and either pass a proper sentence, or order a new trial, according to the circumstances of the case. The case supposed was one in which the facts found would show that the acquittal was wrong in law, not that the evidence would have warranted a different finding on the facts.

In that case the Court said: "Suppose the decision of a Judge should be monstrously absurd. Suppose, upon an indictment for murdering a child, the Judge and the assessors should find that the prisoner caused the death of the child by doing an act with the intention of causing its death, and that the case did not fall within any of the exceptions mentioned in s. 300 of the Penal Code. But suppose they should also find that the child was under the age of six months, and the Judge should hold that it was not murder to kill a child under that age, and should therefore acquit the prisoner, and order him to be discharged,—could it be contended that the judgment of acquittal could not be set aside, and that the prisoner should go free for ever? I apprehend that the Court, as a Court of Revision, would clearly have the power to set aside the judgment of acquittal, and declare that, upon the facts found, the prisoner was guilty of murder, and send the case back to the Judge, ordering him to apprehend the prisoner (if he had been discharged), and to pass the proper sentence upon him. If, in the case above supposed, the Judge were to say, it is not necessary to try whether death was caused by an act done with the intention of causing death, because, if it was so caused, the prisoner was not guilty of murder. I find that the child was under the age of six months, and therefore acquit the prisoner. In such a case there would be no finding on the facts, and the Court, as a Court of Revision, would merely set aside the acquittal, and order a new trial. I have supposed an error in law which is not likely to occur. I put it merely as an illustration; there are many constructions of law equally erroneous, though not so clearly so."

In the case of *The Queen v. Toyab Sheikh*,<sup>2</sup> this Court held that, by finding the prisoner guilty of culpable homicide not amounting to murder, the Sessions Judge and assessors had, in substance and effect, acquitted him of culpable homicide amounting to murder, and consequently acquitted him as well of any intention to cause death, as of the knowledge that the act done was so imminently dangerous as to bring the case within the provisions of cl. 4, s. 300 of the Penal Code.

They say: "It appears to us that, by finding the prisoner guilty of culpable homicide not amounting to murder, the Sessions Judge and assessors in substance and effect acquitted him of culpable homicide amounting to murder, and consequently acquitted him as well of any intention to cause death, as of the knowledge that the act done was so imminently dangerous as to bring the offence within cl. 4, s. 300, in the same way as they would have acquitted him, if they had expressly found that he caused the death with the knowledge that the act was likely to cause death, but without the intention mentioned

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<sup>2</sup> 5 W. R. Cr. 2.



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in cl. 1, 2, or 3 of s. 300, and without the knowledge mentioned in cl. 4 of that section. If they had expressly acquitted him of murder in that way, it would not have been competent to this Court, either as a Court of Appeal or as a Court of Revision, to find that, according to the evidence, the prisoner caused the death with the knowledge mentioned in cl. 4, for whether the death was caused with that knowledge or not, was entirely a question of fact. As a Court of Appeal they could not have done so, in consequence of s. 407. As a Court of Revision they could not have done so, as the error was not one of law, nor was the sentence illegal (see ss. 403, 404, 405 of the Code of Criminal Procedure). However wrong the Court may think that the Sessions Judge and assessors were in acquitting of murder, they have no power, in our opinion, to correct the error. However inadequate they may consider the sentence, they have not, in our opinion, any power to enhance it, as the sentence is one which is authorized by law, for the offence of which the prisoner was found guilty."

In that case the question had reference to cl. 4, s. 300. In this, to cl. 3 of the same section. If that decision is correct—and I cannot doubt that it is so—the principle laid down applies equally to cl. 3 as to cl. 4.

The present case falls within s. 299; it does not fall within any of the exceptions to s. 300. Still it is not necessarily a case of murder. It does not follow that a case of culpable homicide is murder, because it does not fall within any of the exceptions in s. 300. To render culpable homicide murder, the case must come within the provisions of cl. 1, 2, 3, or 4 of s. 300. In the present case it has been found that there was no intention to cause death. The case, therefore, does not fall within cl. 1. It is not contended that it falls within cl. 2 or cl. 4; consequently it is not murder unless it falls within cl. 3 of s. 300.

Was, then, the act done with the intention of causing bodily injury, and if so, was the bodily injury intended to be inflicted sufficient, in the ordinary course of nature, to cause death? The Judge has not found that the bodily injury intended to be inflicted was sufficient, in the ordinary course of nature, to cause death. He finds expressly that the case does not fall under any of the clauses of s. 300; and the facts found do not show that he was wrong, in point of law, in holding that the case did not fall within any of those clauses. If he had found that the act was done with the intention of causing bodily injury to the deceased, and that the bodily injury intended to be inflicted was sufficient, in the ordinary course of nature, to cause death, the facts so found would have shown that he was wrong in law in holding that the case did not fall within any of the clauses of s. 300; for the facts so found would have shown that it fell within cl. 3 of s. 300. If he had found that fact, the case would have come within the principle of *Gorachand Gope's* case;<sup>1</sup> not having found the fact, the case comes under the rule laid down in the case of *The Queen v. Toyab Sheikh*<sup>2</sup> above cited. The evidence might have justified the Judge in finding the fact; but that merely shows that his finding did not come up to the point which the evidence would have justified; it cannot authorize this Court to look at the evidence for the purpose of reversing the acquittal of murder, and of convicting the prisoner of that offence.

The finding of the Judge that there was no such knowledge as would bring the case within cl. 2 or cl. 4, coupled with his omission to find that the bodily injury intended to be inflicted was not sufficient, in the ordinary course of nature, to cause death, is not tantamount to a finding that the injury intend-

<sup>1</sup> *Ante*, p. 443 (or p. 700 of this book).

<sup>2</sup> 5 W. R. Cr. 2.

ed was sufficient, in the ordinary course of nature, to cause death; nor can it authorize this Court to find that it was so, and to reverse the Judge's finding that the case did not fall within cl. 3 of s. 300, which was included in his general finding that the case did not fall within any of the clauses of that section.

If the Court was right in *Toyab Sheikh's* case<sup>1</sup> in holding that the Judge and assessors, by finding the prisoner guilty of culpable homicide not amounting to murder, not only acquitted him of an intention to cause death, but also of the knowledge that the act done was so imminently dangerous as to bring the offence within cl. 4, it is clear that a similar finding in the present case must amount to an acquittal of an intention to inflict such bodily injury as would be sufficient, in the ordinary course of nature, to cause death.

It is said that the Judge has not found that the injury intended to be inflicted was not sufficient, in the ordinary course of nature, to cause death. Suppose that he had expressly found that it was not sufficient, it is clear that this Court could not have altered his finding, in that respect, for the purpose of altering his conclusion, that the prisoner was guilty of culpable homicide not amounting to murder, or, in other words, of reversing his acquittal of murder, and of convicting the prisoners of that offence.

Suppose a jury in a special verdict had found the facts as the Judge has done. It is clear that such a verdict would not have amounted to a verdict of guilty of murder, and that the Court could not have supplied the necessary fact by finding that the injury intended to be inflicted was sufficient, in the ordinary course of nature, to cause death. Nor could the Court have presumed that the jury intended to find that fact in the affirmative, merely from their omission to negative it. It would be much more reasonable to infer (if the law allowed inferences at all in such a case) that the jury considered that their omission to find in the negative would never be considered to amount to a finding in the affirmative.

I am clearly of opinion that this Court cannot add a fact to the finding of a Judge or jury in the case of acquittal, even if the omission was contrary to the weight of evidence, any more than it can reverse or set aside a judgment of acquittal, if it is clearly contrary to the evidence. The appeal will therefore be dismissed as regards the three prisoners named above.

The Magistrate was wrong in sending up joint charges against persons who took part in the riot on opposite sides, for the two parties had not a common object. The Judge, however, took a right view of the case as regards the prisoner Bazu in deciding whether he was innocent or guilty. This prisoner has had a fair trial; he has not been prejudiced by the error of the Magistrate; and in my opinion there is no ground for setting aside the verdict, or reversing the conviction or sentence. The appeal must be dismissed as regards this prisoner.

PHEAR, J.—I agree generally in the judgment of the Chief Justice.

We cannot interfere under the circumstances of the case of Motee Mondul, Seeboo, and Megha, unless we see, on the facts found by the Judge, that he has committed an error of law. It is said that he has committed such error by finding facts which amount to the crime of murder on the part of the prisoners, and yet acquitting them of that crime. I do not think that he has found facts sufficient to support a charge of murder. On the contrary, he finds expressly that this case does not fall under any of the clauses of s. 300. If

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this finding stood alone, it seems to me that it would, without doubt, be taken to amount to a negating of the facts mentioned in those clauses as material to the crime of murder. Then is there any thing in the rest of the judgment to modify it? I think not. The Judge, no doubt, goes on to expressly negative the facts of two of those clauses, and omits at the same time to say anything with regard to those of the third, although he finds that death was caused by the bodily injury intended to be inflicted; and, no doubt, if that injury was in itself such as would, in the ordinary course of nature, be sufficient to cause death, the requisites of that third clause would be complied with; still he stops short of here saying in words that it was so sufficient.

I cannot from his silence in this place, coupled though it be with his express denial of the facts in the other clauses, infer that he meant to affirm the sufficiency of the injury, in the ordinary course of nature, to cause death. This being so, it seems to me that his previous general finding is untouched, and therefore it is impossible for me to say that he has made the error in law which has been alleged.

As to Bazu's case, I think it was extremely improper that this prisoner should have been tried jointly with the other prisoners.

The offence with which he was charged was entirely distinct from those charged against them. So far was he from having any common purpose with them in regard to the conduct which formed the basis of the charges, that he and they were clearly members of bitterly hostile parties respectively. However, I do not see from the materials before me, that any injustice has been done to the prisoner by reason of the irregularity of the trial; and, indeed, I am disposed to believe that he has, under the peculiar circumstances of the case, been rather advantaged thereby than otherwise. I therefore do not think that there is here any sufficient reason for ordering a new trial.

MACPHERSON, J.—On further consideration I think (as regards the first three prisoners) that, as the Sessions Judge has expressly said that the case does not fall within any of the clauses of s. 300, he must be held to have found (however erroneously) such a state of facts as does not amount to murder, and to have acquitted the prisoners of that offence, notwithstanding the apparent modification of his first finding by his subsequent more detailed finding as to the knowledge and intention with which the act which caused the death was done. I, therefore, concur in the opinion that we cannot, as a Court of Appeal or Revision, alter the finding or acquittal, and convict the prisoners of murder.

As regards the prisoner Bazu, I remain of the opinion which I expressed in referring his case to a Full Bench for decision.

LOCH, J.—I concur with Mr. Justice Macpherson regarding the three prisoners convicted of culpable homicide not amounting to murder. With regard to the prisoner Bazu, I think the preferable course would have been to have committed him separately; but I see no sufficient grounds under the circumstances to order a new trial.

*Before Sir Barnes Peacock, Kt., Chief Justice, Mr. Justice Selon-Karr, Mr. Justice L. S. Jackson, Mr. Justice Macpherson, and Mr. Justice Hobhouse.*

THE QUEEN v. BOODHOOA.<sup>1</sup>

*Act XV. of 1862, s. 1—Powers under—Commutation of Sentence—Penal Code (Act XLV. of 1860), s. 59.*

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[9 W. R. 6.]

An officer, who in the exercise of the powers described in s. 1, Act XV. of 1862,<sup>2</sup> has passed a sentence of imprisonment for seven years, has power, under s. 59 of the Penal Code, to commute that sentence into one of transportation for the like period.

JACKSON, J., *dissented.*

THE Deputy Commissioner of Lohardugga being invested, under s. 1, Act XV. of 1862, with power to try all offences not punishable with death, and, under the provisions of the Criminal Procedure Code, to pass sentence of imprisonment of either description for a term not exceeding seven years, tried the prisoner under the provisions of s. 459 of the Penal Code, and, having sentenced him to seven years' imprisonment, commuted that sentence, under s. 59 of the Penal Code, to transportation for a like term. The Judicial Commissioner was of opinion that the Deputy Commissioner had the power to commute the sentence, and acted rightly in so doing. The legality of the proceeding, however, appearing somewhat doubtful, the record was called for by the High Court under s. 405 of the Criminal Procedure Code, and the question whether the Deputy Commissioner had power so to commute the sentence was referred for the opinion of a Full Bench by L. S. Jackson and Mitter, JJ., with the following remarks by

JACKSON, J.—The Judicial Commissioner appears to have advised his subordinate that he was competent to pass the sentence of transportation.

It seems to me that an officer exercising the power described in s. 1, Act XV. of 1862, is not competent to pass such sentence, not having been expressly authorized by the Act to do so.

It is said that s. 59 gives the power. I should understand that section to be subject to the terms of s. 22 of the Code of Criminal Procedure, which defines and limits the power of the Courts, and with which the enactment first quoted must be read. If the power is given by the words "competent to the Court which sentences such offender," then it must be given to Magistrates when sentencing offenders under ss. 451, 457, 404, 393, 380, 325, and others, which all relate to offences punishable with seven years' imprisonment, and over which the Magistrates have concurrent jurisdiction with the Courts of Sessions; for there are no words in s. 59 which limit the power to Courts which are competent to pass sentence of seven years' imprisonment or more.

Act XV. is to be read with the Code of Criminal Procedure, and I think it must be read in this way—first, that the officers referred to are inserted in s. 22 between the Court of Session and the Assistant Sessions Judges in Bombay with the powers stated; second, that the 7th column of the Schedule is modified by inserting those officers against all cases, not capital, triable by the Court of Session, the result of which would be that the offender would be liable to a sentence of transportation, but that he would not be so sentenced by reason of want of power in the particular Court which tried him to pass such sentence.

<sup>1</sup> Criminal Reference from the Deputy Commissioner of Lohardugga.

<sup>2</sup> Act XV. of 1862 was repealed by Act VIII. of 1869, which, in turn, has been repealed by Act X. of 1872. See now s. 36 of the latter Act.

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[4 W. R. 6.]

The following opinions were delivered by the Full Bench :—

HOBHOUSE, J. (after stating the facts).—The question is whether the Deputy Commissioner having, under the words of Act XV. of 1862, only power to pass a sentence of imprisonment, was competent, under s. 59 of the Penal Code, to commute that sentence of imprisonment into one of transportation. It seems to me that he was competent. It is very true that the Deputy Commissioner, being a person who is the chief officer charged with the executive administration of the district in criminal matters, is not a person whose jurisdiction is specially provided for under s. 22 of the Code of Criminal Procedure. But Act XV. of 1862, s. 3, must be taken and read as part of the Code of Criminal Procedure. Then, under the Code of Criminal Procedure and that Act read together, the Deputy Commissioner was competent to punish the offender in question under the provisions of the Penal Code. S. 59 of that Code runs in this way: "In every case in which an offender is punishable with imprisonment for a term of seven years or upwards, it shall be competent to the Court which sentences such offender, instead of awarding sentence of imprisonment, to sentence the offender to transportation for a term not less than seven years, and not exceeding the term for which by this Code such offender is liable to imprisonment." If, therefore, the Code of Criminal Procedure and the other Act read together do not expressly give jurisdiction to the Deputy Collector, I am still of opinion that s. 59 does, in so many words, give that jurisdiction, because it says that the Court which sentences, that is, which under any law is competent to sentence, such offender, shall be competent to award a sentence of transportation instead of a sentence of imprisonment.

I would, therefore, send the proceedings back to the Judicial Commissioner, with instructions that the Deputy Commissioner had power to pass the sentence.

MACPHERSON, J.—I am of the same opinion. S. 1 of Act XV. of 1862 vests the officer who tried this case "with power to try all offences not punishable with death, and under the provisions of the Code of Criminal Procedure to pass sentence of imprisonment for a term not exceeding seven years." S. 59 of the Penal Code says (*reads*). It appears to me, reading these two sections together, that the officer who has tried this case, having power to pass a sentence of seven years, had equally power to pass a sentence of transportation for seven years. The words of s. 59 are distinct, and in my opinion say clearly that in every case in which a Court has jurisdiction to try the case and to sentence to seven years' imprisonment, the Court may, in its discretion, give seven years' transportation instead of imprisonment.

It is said in the order referring the case to this Bench, that "if the power is given by the words "competent to the Court which sentences such offender," then it must be given to Magistrates when sentencing offenders under ss. 451, 457, 404, 393, 380, 325, and others, which all relate to offences punishable with seven years' imprisonment, and over which the Magistrates have concurrent jurisdiction with the Courts of Session; for there are no words in s. 59 which limit the power to Courts which are competent to pass sentence of seven years' imprisonment or more." But it appears to me that there is no substantial foundation for this argument, if the natural and reasonable interpretation is put upon the words of s. 59. Magistrates trying offences under the powers given to them by the Code of Criminal Procedure (apart from the special provisions of Act XV. of 1862) have undoubtedly jurisdiction to sentence offenders to imprisonment for no longer period than two years. In the case of a Magistrate exercising only such powers, there is nothing in s. 59 which would warrant an offender

being sentenced to transportation. S. 59 applies exclusively to cases in which the offender may legally be sentenced by the Court trying him to imprisonment for seven years; therefore, a Magistrate, who can imprison for only two years, has certainly no power to transport at all.

A further argument in favour of the contention that a sentence of transportation cannot be given in this case has been drawn from the fact that, in s. 22 of the Criminal Procedure Code, a distinction is made between the powers of "the Court of Session" and of the "Assistant Sessions Judges" in Bombay,—the Court of Session being declared competent to pass sentence of "death, transportation, imprisonment of either description for a period not exceeding fourteen years," &c., while the Assistant Sessions Judges in Bombay are limited in their powers to "imprisonment of either description for a term not exceeding seven years," &c. It is argued that, because in the case of a Court of Session the word "transportation" heads the list of punishments which may be inflicted by the Court, and as the word "transportation" is omitted in the case of Assistant Sessions Judges, therefore sentences of transportation cannot be substituted by the latter class of Judges for sentences of imprisonment. But, in my opinion, the deduction thus made from the omission, in the second instance, of the word "transportation," is not correct: for a very sufficient reason for its omission is to be found in the fact that there are certain offences under the Penal Code for which transportation is either the only punishment which can be inflicted short of death, or for which transportation is a substantive punishment in itself, and not merely one convertible with, or to be awarded in lieu of, imprisonment. When the offence committed is murder, for instance, the sentence must be either death or transportation for life. There are many sections of the Penal Code in which transportation for life is mentioned, either as the only punishment, or as one of the punishments which may be awarded. Ss. 450, 459, and 468, are instances of sections which give the power of imprisoning only for ten years, but at the same time authorize a substantive sentence of transportation for life. Therefore, it seems to me that there is a very sufficient reason (quite independently of any intention to prevent the Assistant Sessions Judges from sentencing to transportation (in lieu of imprisonment) why s. 22 of the Code of Criminal Procedure should specifically name transportation as one of the sentences which Courts of Session are competent to pass. I see no reason to suppose it was intended that the power of sentencing to transportation in lieu of imprisonment for a term not exceeding seven years should not, under the provisions of s. 59 of the Penal Code, be exercised by Assistant Judges in Bombay.

In my opinion, in every case in which the Court passing sentence has jurisdiction to sentence to imprisonment for seven years, the Court has also jurisdiction, under s. 59, in its discretion, to pass a sentence of transportation for seven years.

JACKSON, J.—I am still of the opinion that I expressed in referring this case for the consideration of a Full Bench, and in which my learned colleague Mitter, J., agreed.

My opinion is based chiefly upon the position that the Indian Penal Code is one that deals with the awards of punishment and the liability of the offenders to such punishment, while the Criminal Procedure Code is the one which indicates the Courts which are to apply these provisions and so award the several degrees of punishment. I am not aware that any section of the Indian Penal Code expressly defines, or in any way declares, what the powers of any

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particular Court shall be. S. 53 details the several punishments to which offenders are liable under the provisions of the Code, and they are specified (1) as death ; (2) transportation ; (3) penal servitude ; (4) imprisonment, which is of two descriptions, rigorous and simple ; (5 and 6) forfeiture and fine. S. 59 declares that " in every case in which an offender is punishable with imprisonment for a term of seven years or upwards, it shall be competent to the Court which sentences such offender, instead of awarding sentence of imprisonment, to sentence the offender to transportation for a term not less than seven years," that is, to transportation for not less than seven years, " and not exceeding the term which by this Code such offender is liable to imprisonment." I do not understand by that section that the transportation to be awarded in lieu of imprisonment was to be given precisely year for year, but there were certain limits fixed, namely, that transportation was to be for a term not less than seven years, and not exceeding the term for which the offender could be imprisoned. It is useful in considering the effect of this section perhaps to refer to the sections of the original Penal Code prepared by the Indian Law Commissioners. By s. 43 of that Code, the Court had not the power to commute or to pass sentence of transportation in lieu of imprisonment, but the power was given to the Government of the Presidency. The words are : " In every case in which sentence of imprisonment for a term of seven years or upwards has been passed on any offender who is not both of Asiatic birth and of Asiatic blood, it shall be lawful for the Government of the Presidency within which the offender has been sentenced, at any time within two years after the passing of such sentence, to commute the remaining imprisonment, without the consent of the offender, for transportation for a term not exceeding the unexpired term of imprisonment, to which may be added banishment for life, or for any term, from the territories of the East India Company." Apparently, in the long consideration which the Indian Penal Code underwent before it passed into law, it was considered that it would be more convenient to vest the power of passing sentence of transportation in the Court which tried the prisoner, instead of in the Local Government : still I do not understand that change in the provision of the law as in any respect importing any power as granted to the several Courts, or to any of the Courts, which they did not possess under the law which expressly regulated those powers. I am willing to construe s. 59, either strictly according to its words, or by what appears to me to be a reasonable construction. It seems to me that, if that section is to be construed strictly by its own words, as I have stated in my minute referring this case to the Full Bench, there is nothing whatever to prevent a Magistrate in those cases where he has concurrent jurisdiction over an offence with the Court of Session, and where an offender might be punished with imprisonment to the extent of seven years, from passing, under this section, a sentence of transportation. Nor, of course, is there anything to prevent an Assistant Sessions Judge in Bombay from passing a like sentence. This consequence is avoided in the opinion of my learned colleagues by stating that the Magistrate has no authority to pass sentence of imprisonment to the extent of seven years, but then, as I have already stated, it appears to me that transportation is not to be given in lieu of imprisonment year for year ; but the law distinctly says that, whenever an offender is punished with imprisonment of seven years or upwards, it shall be competent to the Court which sentences such offender, whether that be a Court capable of awarding seven years' imprisonment or not, to sentence that offender to transportation for a term of not less than seven years.

S. 59 is a portion of the Indian Penal Code, which is otherwise called Act XLV. of 1860. The Criminal Procedure Code was passed in the year 1861 :

it may therefore be looked upon as an expression of the later opinion of the Legislature, and, if the provisions of these two laws in any respect conflict, I presume that the provisions of the later law must prevail. Now, Act XV. of 1862, by s. 3, is to be taken and read as part of the Code of Criminal Procedure. I understand the meaning of that to be that the several parts of the Act XV. of 1862 are to be taken and inserted in their appropriate place in the Code of Criminal Procedure, that is to say, that the definition of the status and powers of the officer described in s. 1 of that Act is to be put in its appropriate place in the 22nd section of the Procedure Code. He would then probably take place after the Court of Assistant Sessions Judge in Bombay. Reading, then, the Courts referred to in that section in the order in which they come, we find, first, the Court of Session; next, the Assistant Sessions Judges of the Presidency of Bombay; thirdly, the Chief Officer charged with the executive administration of a district in criminal matters in what may be called extra-regulation provinces. S. 22 says: "The offences mentioned in the schedule annexed to this Act shall, subject to the provision contained in the third explanatory note prefixed to the said schedule, be triable by the Courts specified in column 7 of the said schedule, and such Courts shall be competent to pass sentence in respect of such offences within the following limits;" that I understand to be a declaration of the powers of the several Courts, implying that the Courts specified in that section are to be restricted within the limits therein prescribed.

A difficulty arises in respect of certain cases, which are not offences under the Indian Penal Code, but which are constituted and rendered punishable by later Acts, or by special or local laws. That difficulty does not occur in the present instance, as we are dealing with a case which is comprised in the schedule annexed to the Code of Criminal Procedure, and is therefore governed by that section. And then I understand that in column 7 of the said schedule, the Court of the officer described in Act XV. is to be inserted in every place where a Court of Session is now to be found, except in cases where the offence is punishable with death. The effect of that would be, I think, that in all cases the particular offences would be punishable by that Court, and that the limits of the powers of that Court to pass sentence would be imprisonment of either description for a term not exceeding seven years, including such solitary confinement as is authorized by law, or fine, or both. I find myself unable to understand the argument which proposes to do away with the effect of the word "transportation" as used in the 22nd section in speaking of the powers of the Court of Session. Transportation, it appears to me it cannot be too often stated, is a separate description of punishment within the competency of one Court, and one Court alone, to award, namely, the Court of Session, and that Court is, it seems to me, alone authorized by law to award that particular punishment; and, therefore, although, under s. 59 of the Indian Penal Code, particular offenders are made liable to transportation, that must be governed by the section of the Criminal Procedure Code which limits the power of the Courts. It appears to me, then, that taking the Penal Code together with the Code of Criminal Procedure, it must be pre-supposed that the Court which sentences is one which is by law enabled to pass the sentence of transportation.

I therefore think the Court of the Deputy Commissioner was not competent to sentence the prisoner to transportation, and that the sentence is not legal.

SETON-KARR, J.—I concur with my colleagues Hobhouse and Macpherson, JJ.

The position and duties of officers in non-regulation provinces, vested with powers under Act XV. of 1862, may, no doubt, occasionally appear somewhat

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anomalous, and it may be necessary to look closely, as in this instance, into the extent of the powers with which they are vested by law. But when I see that by Act XV. of 1862 the Deputy Commissioner is empowered to pass a sentence of imprisonment for a term not exceeding seven years, and when I consider that the punishments which he must award must be substantially the punishments of the Penal Code which he administers, I can come to no other conclusion than that, under s. 59 of that same Penal Code, he is empowered to pass sentences of transportation where he is empowered, as he undoubtedly is, to pass a sentence of imprisonment.

In this view I have only to say that I think the sentence of transportation passed by the Deputy Commissioner of Lohardugga is legal.

PEACOCK, C.J.—I concur with the majority of my colleagues in thinking that the Deputy Commissioner in this case had power to pass sentence of seven years' transportation. His powers were derived, not under the provisions of s. 22 of the Code of Criminal Procedure, but under s. 1 of Act XV. of 1862. The substance of that section is that, whenever, under the provisions of s. 445 of the Code of Criminal Procedure, the Code has been, or shall be, extended to any part of the territories not subject to the general Regulations, it shall be lawful for the Governor-General in Council, or for the Local Government of such territory, to vest the Chief Officer charged with the executive administration of a district in criminal matters, by whatever designation such officer is called, with power to try all offences not punishable with death, and under the provisions of the said Code to pass sentence of imprisonment of either description for a term not exceeding seven years, including such solitary confinement as is authorized by law, or fine, or both; and by s. 3, "this Act shall be taken and read as part of the Code of Criminal Procedure." I assume that, under the provisions of this Act, the Deputy Commissioner of Lohardugga was vested with the power to pass sentence of imprisonment of either description for a term not exceeding seven years. Having that power, it appears to me that s. 59 of the Penal Code gave him the power, instead of passing sentence of imprisonment for seven years, to pass sentence of transportation for a term not less than seven years, and not exceeding the term for which the prisoner was liable to imprisonment. The Penal Code in that section not only enacted what was the amount of punishment for particular offences, but it vested the Court, which should sentence the offender, with power to award transportation of not less than seven years, instead of awarding sentence of imprisonment. It went out of the ordinary course adopted in other parts of the Code, and, instead of merely defining the punishment, gave a certain power to the Court which should pass the sentence to award a different kind of punishment from that specified in the Code. My colleague, Louis Jackson, J., has referred to the Penal Code as it was originally prepared by the Law Commissioners for the purpose of showing that, under that Code as it was prepared, the Court had not the power to commute or to pass sentence of transportation in lieu of imprisonment, but that the power was given only to the Government of the Presidency. He points that out to show that, under the Penal Code as originally prepared, the power of passing sentence of transportation instead of imprisonment was vested in the Government, and not in the Courts. There was a very good reason for that, and for the alteration which took place in the Penal Code when it was finally settled. At the time when the Penal Code was prepared by the Indian Law Commissioners, it was a rule of the Court of Directors of the East India Company that no native should be sentenced to transportation for a period less than for life; it being the opinion of that time that a native of India, if once transported, should never be allowed to

return to this country. The Indian Penal Code, as prepared by the Law Commissioners, did not provide transportation as punishment for any period short of life, and it did not give power to the Government to commute a sentence of imprisonment for seven years for transportation, except in cases where the prisoner was not of Asiatic blood and of Asiatic birth. But when the Penal Code came to be altered, a different rule was thought necessary. It was thought reasonable that natives of India, as well as Europeans and others, should be sentenced to transportation for periods less than for life, and that the reason for not allowing a native who had once been transported to return to India no longer held good; and therefore, as the Penal Code, as prepared by the Indian Law Commissioners, did not provide transportation as a punishment for any less period than for life, it was thought advisable, when the Code was altered, to enact by a general clause that, in all cases in which an offender should be punishable with imprisonment for seven years or upwards, the Court should have power to sentence him to transportation instead of imprisonment, provided the term should not be less than seven years, and should not exceed the term for which the offender should be liable to imprisonment. That is the reason why s. 59 was introduced. It necessarily gave power to a Court which could sentence a prisoner to seven years' imprisonment to sentence him to seven years' transportation in lieu of it; but it never intended to give power to a Court which could not sentence to imprisonment for more than two years to transport for seven. It appears to me to follow that, as the Deputy Commissioner is a Court which has the power of sentencing to imprisonment for seven years, he has power to sentence to transportation for a period not less than seven years.

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It is said that, if this construction be put upon s. 59, then in very case in which a Magistrate tries an offence punishable with seven years' imprisonment, although that Magistrate could not sentence to the full extent of imprisonment, he would have the power, instead of sentencing him to two years' imprisonment, to sentence him to transportation for not less than seven years. It appears to me that that would be a most unreasonable and forced construction of s. 59, and that such a construction ought not to be put upon it. If a man is convicted before a Magistrate of an offence which is made punishable by the Code with seven years' imprisonment, the offender is not punishable with imprisonment for seven years; because, upon that conviction, there is no one competent to punish him with seven years' imprisonment, a Magistrate not having power to imprison for more than two years. The words of s. 59 are "every case in which an offender is punishable," &c., not every person convicted of an offence which by this Code is punishable, &c. The meaning of the section clearly is that, where the prisoner is punishable with an imprisonment for a term of seven years, it shall be competent to the Court, which has power to sentence him to that punishment, to sentence him to transportation instead of imprisonment. In this view of the case, a Magistrate would not have power to transport. It never could have been intended to give power to a Court which has not power to sentence to imprisonment for more than two years to transport for seven years. It would not lie within either the words or the spirit of the section.

Under these circumstances, it appears to me that the Deputy Commissioner had the power to pass sentence of transportation for seven years; that the Judicial Commissioner came to a right conclusion in telling him that he had that power; and that he was right in passing that sentence. Consequently the sentence must be affirmed.

*Before Sir Barnes Peacock, Kt., Chief Justice, Mr. Justice Selon-Karr, Mr. Justice L. S. Jackson, Mr. Justice Phear, and Mr. Justice Macpherson.*

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*Cumulative Sentence—Whipping—Criminal Procedure Code (Act XXV. of 1861), s. 46<sup>2</sup>—Act VI. of 1864.<sup>3</sup>*

When a Magistrate, in exercise of the powers conferred by s. 46 of the Criminal Procedure Code, passes a cumulative sentence against a person convicted at one and the same time of two or more offences punishable under the Indian Penal Code, *Held per* PEACOCK, C.J., and PHEAR and SETON-KARR, JJ., that he cannot, in addition to the penalties prescribed by the Penal Code, sentence the prisoner to whipping under Act VI. of 1864, nor can he exceed twice the extent of his ordinary jurisdiction as defined by s. 22 of the Criminal Procedure Code.<sup>4</sup>

*Held further, per* SETON-KARR, J., that in the case of hardened offenders a Magistrate can award whipping in addition to the maximum of imprisonment which he is competent to award.<sup>5</sup>

*Held per* MACPHERSON and JACKSON, JJ., that the Magistrate may in such case, in addition to awarding double the punishment which may be awarded for a single offence, award the punishment of whipping; but only one whipping can be awarded.

THE following judgments were delivered in this case by the Full Bench :<sup>6</sup>

MACPHERSON, J.—This case has been sent to a Full Bench by a Division Court, before whom it came when sitting as a Court of Revision. As we, unfortunately, do not agree in the view we take of the point referred, it becomes necessary for me to express my opinion first.

The question is what is the maximum of punishment to which a Magistrate of a district can legally sentence a person convicted at one time of two or more offences punishable under the same or different sections of the Indian Penal Code?

S. 46 of the Criminal Procedure Code enacts that it shall be lawful for the Court to sentence such person for the offences of which he shall have been convicted to the several penalties prescribed by the Indian Penal Code, which such Court is competent to inflict; "such penalties, when consisting of imprisonment, to commence the one after the expiration of the other. . . . Provided that, if the case be tried by a Magistrate, the punishment shall not, in the aggregate, exceed twice the extent of punishment which such Magistrate is, by his ordinary jurisdiction, competent to inflict." S. 22 prescribes the extent of punishment which a Magistrate was, at the time of the passing of Act XXV. of 1861, by his ordinary jurisdiction, competent to inflict,—"imprisonment of either description not exceeding the term of two years, including such solitary confinement as is authorized by law, or fine to the extent of Rs. 1,000, or both imprisonment and fine in all cases in which both punishments are authorized by the Indian Penal Code."

<sup>1</sup> Reference to the High Court by the Sessions Judge of Mymensingh, under Circular Order No. 17, dated the 17th June 1863.

<sup>2</sup> See Act X. of 1872, s. 314.

<sup>3</sup> Ss. 8, 11, and 12 of Act VI. of 1864, are repealed by s. 2, Act X. of 1872. Ss. 11 and 12 being re-enacted with some modifications by ss. 312 and 313 of the latter Act.

<sup>4</sup> But see *Manuruddin v. Gour Chandra Shamadar*, 7 B. L. R. 165 (p. 374 of this book).

<sup>5</sup> See *The Queen v. Udai Patnaik*, 4 B. L. R. A. Cr. 5 (p. 156 of this book) and *The Queen v. Banda Ali*, 6 B. L. R. App. 95 (p. 343 of this book).

<sup>6</sup> The referring order in this case not having been found, the judgments of the Full Bench are alone printed.

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When the Code of Criminal Procedure became law, whipping was not a punishment which could be awarded under the Penal Code. Subsequently, however, Act VI. of 1864 was passed, and the punishment of whipping was thereby authorized in certain cases. The question arises whether, in cases in which whipping may be awarded under Act VI. of 1864, whipping can be said to be one of the penalties prescribed by the Indian Penal Code, which the Magistrate is competent to inflict within the meaning of s. 46 of the Criminal Procedure Code?

I think it is one of these penalties. The preamble of Act VI. of 1864 declares that "it is expedient that in certain cases offenders should be liable, under the provisions of the Indian Penal Code, to the punishment of whipping; and s. 1 declares that, "in addition to the punishments described in s. 53 of the Indian Penal Code, offenders are also liable to whipping under the provisions of the said Code." Reading the preamble and this 1st section together, it appears to me that their effect is this—that s. 53 of the Indian Penal Code must be read as if whipping were mentioned in it as one of the punishments to which offenders are liable under the provisions of the Code, and that all whipping under Act VI. of 1864 is to be deemed to be whipping under the provisions of the Indian Penal Code. The Whipping Act is not very clearly expressed. But this appears to me the only meaning that can be attached to the words "under the provisions of the Indian Penal Code," which occur in the preamble and the 1st section.

The 2nd section specifies the offences for which whipping may be awarded in lieu of any other punishment. It is as follows: "Whoever commits any of the following offences may be punished with whipping in lieu of any punishment to which he may, for such offence, be liable under the Indian Penal Code, that is to say," &c. The effect of these words I understand to be that the sections mentioned in this 2nd section are to be read respectively as if words to this effect had been added to each, "or in lieu of such punishment (or punishments), the offender may be punished with whipping." It is argued that as this 2nd section says that whipping is to be in lieu of any punishment to which the convict may be liable under the Indian Penal Code, it is clear that the whipping itself cannot be under the Indian Penal Code. But it appears to me that "any punishment" must be read as "any other punishment;" and that this was the intention of the framers of the Act is shown by s. 3, in which, under precisely similar circumstances, the word "other" occurs. Moreover, I have said that I consider that, by reason of the preamble and the 1st section, all whipping under Act VI. of 1864 is to be deemed to be whipping under the Penal Code; and, if I am right in that opinion, then the whipping under s. 2, as well as under the other sections of the Act, must be deemed to be under the provisions of the Penal Code. On the whole, I think that whipping is one of the penalties prescribed by the Penal Code within the meaning of s. 46 of the Criminal Procedure Code.

Then is it a punishment which a Magistrate is competent to inflict? At first I had doubts on this point, the powers of a Magistrate being defined in s. 22, and whipping not being one of the punishments there mentioned. But it appears from s. 8 of Act VI. of 1864 that a Magistrate of a district has the power to punish with whipping; for, unless the Magistrate was intended to have that power, it would have been quite unnecessary to enact that "no sentence of whipping shall be passed by any officer inferior to a Subordinate Magistrate of the first class, unless he shall have been expressly empowered by the Local

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Government to pass sentences of whipping." The exclusion of inferior Magistrates from the exercise of the power would seem to import the possession of the power by superior Magistrates. As a Magistrate may pass a sentence of whipping, and as a sentence of whipping under Act VI. of 1864 is to be deemed a sentence passed under the provisions of the Penal Code, I think, further, that whipping is a punishment which a Magistrate is (in the words of s. 46), "by his ordinary jurisdiction, competent to inflict;" that is to say, I think that a Magistrate is, by his ordinary jurisdiction, competent to sentence not only to the punishments mentioned in s. 22 of the Criminal Procedure Code, but also to whipping, either as the only punishment, or as an additional punishment, as provided in Act VI. of 1864.

What, then, is the greatest amount of punishment which a Magistrate can award without exceeding "twice the extent of punishment which he is, by his ordinary jurisdiction, competent to inflict?" There is no doubt that in cases of convictions at the same time of two or more offences punishable by imprisonment and fine, the Magistrate has power to sentence, in the whole, to four years' imprisonment and fine, with one year's additional imprisonment if the fines are not paid. But it is more difficult to say what is the limit in cases in which whipping has been awarded.

According to the literal interpretation of s. 46 of the Criminal Procedure Code, a Magistrate (in the view I take of his powers) might sentence, upon several convictions at the same time, to four years' imprisonment with fine, and another year's imprisonment in lieu of payment, and two whippings: for s. 46 says only that "the punishment shall not in the aggregate exceed twice the extent of punishment which such Magistrate is, by his ordinary jurisdiction, competent to inflict." But these words of s. 46 must be read with the provisions of Act VI. of 1864; and under that Act it appears to me that in no case can more than one sentence of whipping be passed. Such a thing as double whipping is not contemplated by Act VI. of 1864. This appears to me from the general tenor of the whole Act, and is shown more especially by the 9th, 10th, and 11th sections, which provide that, when whipping is awarded in addition to imprisonment, the whipping shall be inflicted immediately on the expiry of fifteen days from the date of the sentence, or (in the case of an appeal having been made) immediately on the receipt of the order of the High Court confirming the sentence—that "in no case, if the cat-of-nine-tails be the instrument employed, shall the punishment of whipping exceed one hundred and fifty lashes, or, if the rattan be employed, shall the punishment exceed thirty stripes,"—and that "no sentence shall be executed by instalments." With these provisions in the Act, and in the absence of any indication of an intention that a man should be liable to be sentenced at one time to more than one whipping, I am of opinion that under s. 46 only one whipping can be awarded.

But although I think a Magistrate would be acting within the letter of the law in passing a sentence, amounting in all to four years' imprisonment with whipping, and a fine of Rs. 1,000, or an additional period of imprisonment for one year, in my opinion he would not exercise his discretion wisely in passing such a sentence on any person who had not previously been convicted of the like offence. For it may be very much doubted whether it was the intention of the Legislature to authorize whipping in the case of a second offence, except when the ordinary punishment had been tried and failed; or, in the case of a first offence, if whipping was to be accompanied by imprisonment under a simultaneous sentence. The punishment of whipping for a first offence is one which recommends itself not only from its deterrent qualities, but from this, that it

does not expose the offender to the risk of contamination and demoralization, which he necessarily incurs if sent to prison. The latter object is defeated, if one who has not previously been convicted (using the term in the sense of being convicted before the commission of the offence for which he is about to be punished) is sentenced to imprisonment as well as whipping.

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The Whipping Act is one in the construction and carrying out of which many very difficult questions arise : and it is impossible to warn Magistrates and other officers sufficiently strongly to be cautious and moderate in acting under it. In no case can a Magistrate be justified in passing a sentence of whipping, if he has any doubt as to his legal competency to do so.

The answer which I would give to the question put to us is : A Magistrate is competent to sentence a person convicted at one time of two or more offences punishable under the same or different sections of the Indian Penal Code to imprisonment for four years with whipping, and to fine amounting to Rs. 1,000, or, in default of payment, to a further period of imprisonment not exceeding one year. This would be the maximum aggregate punishment which any Magistrate could pass under s. 46 of the Criminal Procedure Code.

PHEAR, J.—The punishment of whipping is given by Aft VI. of 1864. It seems to me, upon consideration of the preamble and the words of the 1st section, that the Legislature, in passing that Aft, intended to make the punishment of whipping to be read thenceforth as if it had been included among the punishments prescribed by the Indian Penal Code.

The preamble is in these words : “Whereas it is expedient that, in certain cases, offenders should be liable, under the provisions of the Indian Penal Code, to the punishment of whipping ; it is enacted as follows.” S. 1 enacted that, “in addition to the punishments described in s. 53 of the Indian Penal Code, offenders are also liable to whipping under the provisions of the said Code.” S. 8 of the same Aft also seems to me by implication to give power to a Magistrate to pass sentences of whipping. “No sentence of whipping,” it says, “shall be passed by any officer inferior to a Subordinate Magistrate of the first class, unless he shall have been expressly empowered by the Local Government to pass sentences of whipping.” I cannot escape from the conclusion that Aft VI. of 1864 intends to insert in the Penal Code, among the punishments therein prescribed, the punishment of whipping, and also to empower a Magistrate to pass sentences of whipping.

But this Aft does not authorize a Magistrate to pass, simultaneously, several sentences which shall take effect in succession to one another. That provision is given solely by the Code of Criminal Procedure. The 46th section of that Aft says : “When a person shall be convicted at one time of two or more offences punishable under the same or different sections of the Indian Penal Code, it shall be lawful for the Court to sentence such person for the offences of which he shall have been convicted to the several penalties prescribed by the said Code, which such Court is competent to inflict ; such penalties, when consisting of imprisonment, to commence the one after the expiration of the other. It shall not be necessary for the Court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which such Court is competent to inflict on conviction of a single offence, to send the offender for trial before a higher Court. Provided that in no case shall the person be sentenced to imprisonment for a longer period than fourteen years ; and provided also that, if the case be tried by a Magistrate, the punishment shall not, in the aggregate,

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exceed twice the extent of punishment which such Magistrate is, by his ordinary jurisdiction, competent to inflict."

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I think that a Magistrate has no power to inflict a succession of punishments, except under the provisions of this s. 46 of the Code of Criminal Procedure. It is, therefore, necessary to consider what are the sentences which that section authorizes a Magistrate to pass to take effect in succession. It is clear that, unless this Act has been altered by subsequent legislation, the different penalties of the Indian Penal Code to which this section refers are the penalties prescribed by that Code at the time that the Criminal Procedure Act was passed. It is also clear that the proviso at the end of the section, unless similarly altered by subsequent legislation, means now, as it meant when it was passed, in referring to the ordinary jurisdiction of the Magistrate, the ordinary jurisdiction such as it then existed.

I believe there is no contention but that the ordinary jurisdiction of the Magistrate as it then existed is that which is mentioned in s. 22 of the Code of Criminal Procedure, *viz.*, that he may inflict imprisonment up to a term of two years with a fine commutable to imprisonment for six months; so that it appears to me, unless s. 46 of this Act has been altered by subsequent legislation, the Magistrate, while he has power of passing sentences simultaneously to take effect in succession the one to the other, can only, in such accumulated sentences, give the penalties which were prescribed by the Penal Code as it existed at the time of the passing of the Criminal Procedure Act; and that he was then limited in the aggregate to a term of four years' imprisonment, with two fines commutable into six months' imprisonment each, or twelve months in the whole. Now, it is not suggested that the meaning of s. 46 of the Criminal Procedure Code has been changed by the Legislature otherwise than by the passing of the Whipping Act, as it is termed, or Act VI. of 1864. But I am unable to find anything in Act VI. which goes the length of effecting such a change. When the Legislature by that Act inserted the punishment of whipping into the Penal Code for the general purposes of that Code, it did not, as it seems to me, intend to alter the meaning or scope of any other existing Act of the Legislature. No doubt, this Act gave powers which no previous Act gave, but, excepting the Penal Code, it did not make any other Act utter language which it did not utter before. If the Legislature had, when passing it, intended to do this, it could have done so expressly. It clearly to my mind has not expressly done it: and I do not think that there is any such necessity arising out of the provisions of Act VI. of 1864 (remembering that it is a penal Act) as to make us come to the conclusion that such a change was effected by implication.

On the whole, therefore, it seems to me that, if a Magistrate exercises the powers which are given to him by s. 46 of the Criminal Procedure Code, and passes an accumulated sentence, he must confine himself to the penalties prescribed by the Penal Code before it was altered by Act VI. of 1864. He cannot include in that sentence the punishment of whipping, and he cannot exceed in the total twice the extent of his ordinary jurisdiction as defined by s. 22 of the Criminal Procedure Code.

JACKSON, J.—I have arrived at the same conclusion as my colleague Macpherson, J., and generally for the same reasons.

It is remarkable enough that Act VI. of 1864, which legalizes the punishment of whipping, is expressly designed by its terms to become, I may say, a portion of the Indian Penal Code, but contains no reference whatever, from first

to last, to the Code of Criminal Procedure. If the result of that omission were that neither the Criminal Procedure Code, nor any other Act, except the Indian Penal Code, were altered or affected by the provisions of Act VI. of 1864, it seems to me that the result would be that no officer or any Court whatever would be competent to inflict the punishment of whipping: because if s. 22 of the Criminal Procedure Code were unaffected by the terms of Act VI. of 1864, the several Courts and officers therein enumerated would still be bound by the limits of punishment laid down in that section, and would have no authority to go beyond those limits by awarding a sentence of whipping.

But, looking to the terms of s. 8 of Act VI. of 1864, it appears to me that the Legislature intended to invest, and did invest, all officers not inferior to a Subordinate Magistrate of the first class with the power of passing sentences of whipping, and that it reserved to the Local Government the power of authorizing inferior Magistrates also to exercise the like power. The result, therefore, of the amalgamation, so to say, of the Whipping Act with the Indian Penal Code, and of the operation of that Act upon the Code of Criminal Procedure, will be, in my opinion, to insert in s. 53 the punishment of whipping as one of those to which offenders are liable under the provisions of the Code; to insert in the several sections of the Penal Code, enumerated in ss. 2, 3, and 4 of the Whipping Act, the punishment of whipping as a punishment to which a person committing the offences described in the respective sections will be liable, either in lieu of another punishment, or in addition to the other punishment, as the case may be; also to add to s. 22 of the Code of Criminal Procedure the punishment of whipping as included within the ordinary jurisdiction of the Court of Sessions, of the Magistrate of the district, and of Subordinate Magistrates of the first class without condition, and Subordinate Magistrates of the second class when expressly empowered by the Local Government, as punishments each was competent to inflict; and, lastly, to introduce into the schedule annexed to the Code of Criminal Procedure, in the column of punishments, that of whipping, in the several cases and under the respective conditions which are prescribed by the Whipping Act. That being so, and the limit of the ordinary jurisdiction of the Magistrates being enlarged to the extent I have said, it seems to me to follow that in the case of more than two convictions of the offences specified in s. 2 of the Whipping Act, a Magistrate would be within the strict letter of the law, if he passed sentence of punishment not exceeding four years' imprisonment, with fine as permitted by s. 22, and whipping not exceeding thirty stripes, if inflicted with the rattan; for it appears to me that, in that respect also, there is a modification of s. 46 of the Code of Criminal Procedure in respect of this, that it would not be lawful for the Magistrate, or for any Court, to sentence an offender, no matter how many offences he might be convicted of, to more than thirty stripes, if the rattan be the instrument of punishment. This is the conclusion at which I have arrived after careful consideration of the subject; and I only add that I entirely concur in the observations of my colleague Macpherson, J., both as to the very numerous and difficult questions of construction presented by the Whipping Act, and also as to the extreme caution which it behoves Magistrates and Courts of Justice to employ when putting in force the provisions of that Act.

SETON-KARR, J.—There is no doubt, as has been very justly remarked by my learned colleagues who have preceded me, that there are several questions of nicety and difficulty arising in the construction of what is known as the Whipping Act.

On the whole, I am inclined, substantially, to agree with the conclusions arrived at by Campbell, J., to be found in the printed papers furnished to us for

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this reference, which conclusions are dated the 24th of September 1866. The judgment<sup>1</sup> is noted in the foot-note below.

But, of course, it becomes necessary for me to state more particularly what my conclusions are. I deem it unnecessary to set out at length the various sections which have already been quoted by my learned colleagues.

The first conclusion at which I have arrived is, that by s. 1 of Aft VI. of 1864, whipping is added to s. 53 of the Indian Penal Code, and that it thereby becomes a seventh punishment, which officers dealing with that Code are empowered to administer.

Then comes the difficulty which has been already pointed out, *viz.*, that the Whipping Aft contains no reference to, or mention whatever of, the Code of Criminal Procedure, and yet that the Magistrate ought to be held to administer the Code of Criminal Procedure when he administers the Whipping Aft. I cannot myself doubt that, when a Magistrate administers any of the punishments defined in the Penal Code with the Whipping Aft added to it, he does, at the same time, administer, and is bound by the Code of Criminal Procedure. I do not think that he administers whipping under Aft VI. of 1864 alone, and not under the Criminal Procedure Code.

But when we come to look at s. 46 of that Code, which is a very important section, altering, as I believe it does, the old criminal law of the country as formerly administered, and empowering Magistrates, in certain cases and with certain restrictions, to give cumulative punishments, I do not think that we are justified in applying that particular section to the punishment of whipping, which can or may be administered by Aft VI. of 1864. I think that an express mention of this s. 46 would be necessary in Aft VI. of 1864 to enable a Magistrate to make whipping cumulative for first offences; and without such a distinct proviso, I shrink from holding that offenders can be whipped and imprisoned for such first offences.

I do not lose sight of the difficulty which arises if we lay it down that the Magistrate does administer the Criminal Procedure Code in all cases, and yet that he is shut out from one particular section of it in some cases; but I am bound to look at the intention of the Legislature in making whipping a legal punishment at all.

Looking to the objects of the Whipping Aft, it is quite clear to me that that Aft empowered Magistrates to administer the punishment of whipping to two broad and distinct classes of offenders; firstly, offenders whom it was thought necessary to punish with whipping in lieu of other punishments; and, secondly, more hardened offenders who, on conviction of certain specified offences, were

<sup>1</sup> The judgment quoted was appended to a reference to the High Court by the Joint-Magistrate of Mymensing in the case of *The Queen v. Nahmut Ahmed*, and was in the following terms: "I think there is not the least doubt that a Magistrate can sentence for offences so punishable to two years' imprisonment and fine, or six months' in default of payment, total two-and-a-half years; and in case of two or more offences, up to four years and fine, and one year's imprisonment in default, total five years.

Flogging cannot be inflicted in lieu of any part of the punishment or punishments, which can be inflicted for any one offence. When flogging is inflicted in lieu of any other punishment, no other punishment can be inflicted for that offence. And when a Magistrate has punished otherwise for two offences, I think that he cannot flog for a third offence. But in cases in which flogging can be awarded in addition to other punishment, it seems to me that the Magistrate, having jurisdiction to try the case, can inflict it in addition to the full measure of his ordinary powers, *e.g.*, to two years and six months and to stripes in addition, or to five years and stripes in addition; and the maximum number of stripes cannot be doubled."

thought fit subjects for whipping in addition to other punishments. But I am unable to come to the conclusion that Act VI. of 1864 contemplated that whipping should be cumulative, except in the case of hardened offenders.

For instance, a man, not being an old offender, is arraigned, tried, and convicted on three distinct thefts, it appears to me that it would be competent for a Magistrate to inflict on him two years and six months for one theft, and two years and six months for a second, and not more than this for three or four instances of theft tried together. I do not think that it could have been the intention of the Legislature, and it certainly is nowhere so expressly provided by Act VI. of 1864, that a Magistrate, having given the maximum of imprisonment for two offences of theft, could flog for a third offence; or that, having given a sufficient amount of punishment for one offence, he could, in addition to imprisonment, inflict a whipping for a second.

I am quite clear, on the other hand, that in the case of hardened offenders contemplated by s. 4, he might give the maximum of imprisonment which he was competent to award, and might give a whipping of thirty stripes in addition, because I think that the law itself expressly provides for this. Further, I do not think that in any case, looking to the provisions of s. 10 of the Act, he could give cumulative whippings, that is to say, he could not give thirty stripes plus thirty stripes.

These are the conclusions at which I have arrived, after some discussion and a full consideration of this question; and it appears to me that my conclusions do not substantially differ from the practical effect of those arrived at by Phear, J., except in the instances of offenders previously convicted, and I may not take exactly the same view of every portion of the Act, or of all the nice questions which have arisen out of it.

PEACOCK, C.J.—There are two questions which have been submitted for our opinion: first, what is the limit of jurisdiction of a Magistrate with full powers in respect to imprisonment under s. 46 of the Criminal Procedure Code?

There seems to have been no difference of opinion upon this point. A Magistrate with full powers, upon convicting a prisoner at the same time of several offences, may sentence him to twice the amount of punishment which such Magistrate is, by his ordinary jurisdiction, competent to inflict, that is to say, to punishment not exceeding in the aggregate four years' imprisonment, and fines not exceeding Rs. 2,000, the ordinary limit of his jurisdiction being two years' imprisonment, and fine not exceeding Rs. 1,000; see s. 22, Code of Criminal Procedure.

I am speaking merely of the extent of the jurisdiction of the Magistrates: the punishment for any one of the offences cannot exceed that for which the offender is liable under the Penal Code, and the punishments should be awarded severally.

The difficulty which seems to have occurred was whether, if each of two offences were punishable with imprisonment of two years and fine, the Magistrate, if he should fine as well as imprison to the full extent of two years for each offence, could also direct by his sentence that, in default of payment of the fines, the offender should suffer additional imprisonment. I have no doubt that he may do so. I take the case of theft as an illustration. Theft, by the Penal Code, is punishable with imprisonment of either description for a period not exceeding three years, or with fine, or with both. The ordinary jurisdiction of the Magistrate of the district is imprisonment of either description not exceeding the term of two years, or fine to the extent of Rs. 1,000, or both imprison-

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ment and fine. Upon conviction of a prisoner of one offence of theft, the Magistrate could sentence him to two years' imprisonment, and to pay a fine of Rs. 1,000. By the 64th section of the Penal Code, he might also direct by the sentence that, in default of the payment of the fine, the offender should suffer imprisonment for a certain term regulated by the 65th section, in excess of any other imprisonment to which he might have already sentenced the prisoner. By the 65th section of the Penal Code, the term for which the Court directs the offender to be imprisoned in default of payment of fine is not to exceed one-fourth of the term of imprisonment, which is the maximum fixed for the offence, if the offence be punishable with imprisonment as well as fine. Thus, the Magistrate might, for one offence of theft, sentence a prisoner to two years' imprisonment, and a fine of Rs. 1,000, and direct that, in default of the payment of the fine, the prisoner should be imprisoned for a term not exceeding half a year, that being one-fourth part of the imprisonment to which the Magistrate might sentence him for the offence.

S. 46 of the Code of Criminal Procedure directs that, "when a person shall be convicted at one time of two or more offences punishable under the same or different sections of the Indian Penal Code, it shall be lawful for the Court to sentence such person for the offences of which he shall have been convicted to the several penalties prescribed by the said Code, which such Court is competent to inflict; such penalties, when consisting of imprisonment, to commence the one after the expiration of the other. It shall not be necessary for the Court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which such Court is competent to inflict on conviction of a single offence, to send the offender for trial before a higher Court: Provided that in no case shall the person be sentenced to imprisonment for a longer period than fourteen years, and provided also that, if the case be tried by a Magistrate, the punishment shall not in the aggregate exceed twice the extent of punishment which such Magistrate is, by his ordinary jurisdiction, competent to inflict."

If he convicts at the same time of two offences of theft, he may sentence for each offence to imprisonment for two years, and a fine of Rs. 1,000, and he may direct, with regard to the fine in each case, that, in default of payment, the offender shall suffer imprisonment for half a year, which sentences, in effect, will subject the offender to two years and-a-half imprisonment in each case, unless the fines be paid. By payment of both the fines, the prisoner will be free from the imprisonment awarded in default of the non-payment of the fines.

The next question is—whether, if a person is convicted at the same time of two or more offences punishable under the Indian Penal Code, it is lawful for the Court, in addition to the penalties prescribed by the Penal Code, to sentence the prisoner to whipping.

There is no doubt that, if the Magistrate sentences the prisoner for one only of the offences of which he is convicted, he may sentence him to whipping if whipping is warranted by Act VI. of 1864. But I am clearly of opinion that, if the Magistrate sentences the prisoner for both offences, whipping cannot form a portion of the punishment for either.

It is a rule of construction that penal Statutes or Statutes which subject men to punishment are to be construed strictly; and it appears to me that, if there is in the whole Statute Book one Act more than another to which that rule ought to be applied, it is Act VI. of 1864, which subjects adults to the punishment of whipping. The recital in that Act is, that "it is expedient that in certain cases offen-

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ders should be liable under the provisions of the Indian Penal Code to the punishment of whipping." S. 1 enacts that, "in addition to the punishments described in s. 53 of the Penal Code, offenders are also liable to whipping under the provisions of the said Code." The word "are" cannot have been intended to mean that whipping was one of the punishments which the Indian Penal Code authorized, because it was not so; that punishment was purposely and advisedly omitted from the Code. The word is used in a future sense, and means that, after the passing of this Act, whipping shall be one of the punishments to which offenders shall be liable under the Penal Code. The Act speaks from the time it took effect. The meaning is the same as if it had said, "Offenders are now, by virtue of this Act, liable to whipping," &c. S. 53 of the Penal Code, which is the section referred to in s. 1 of Act VI., contains merely a description of the punishments to which offenders are liable under the Code; that is to say, that the punishments therein enumerated are the several classes of punishment to which, by the various sections of the Code, offenders of different kinds are made subject. The effect of s. 1 is to add whipping as one of the several classes of punishments, and instead of there being six, as there were under the Penal Code, there are now seven classes of punishments. Death is one of the punishments, imprisonment is another, fine is another, whipping is another. But it is not because death is one of the punishments enumerated in the Penal Code, that death is a punishment provided by the Code for every offence mentioned in the Code. Such also is the case as regards whipping.

S. 2 of Act VI. of 1864 says that "whoever commits any of the following offences may be punished with whipping in lieu of any punishment to which he may, for such offence, be liable under the Indian Penal Code." It does not say, and it could not say, that by the Penal Code he was liable to be whipped. But it might say that, by the Penal Code, as amended by this Act, he shall be liable to be whipped. Take the case of theft. S. 2 of the Act does not say that, by the Penal Code, a man who commits theft is liable to be whipped, but it says that, in lieu of giving him the punishment inflicted by the Penal Code, *viz.*, three years' imprisonment and fine, he may be punished with whipping. Ss. 3 and 4 render offenders liable to whipping in lieu of, or in addition to, the punishments imposed by the Penal Code.

S. 46 of the Code of Criminal Procedure says that, "when a person shall be convicted at one time of two or more offences punishable under the same or different sections of the Indian Penal Code, it shall be lawful for the Court to sentence such person for the offence of which he shall have been convicted to the several penalties prescribed by the said Code." But it does not say that, when a prisoner shall be convicted of two or more offences, it shall be lawful for the Court to sentence such person for the offences of which he shall have been convicted to the several penalties prescribed by any subsequent Act. The punishment of whipping is not one of the offences prescribed by the Penal Code, but it is a punishment prescribed by a subsequent Act in lieu of the punishment prescribed by the Penal Code, or in addition to it, as the case may be. The proviso in s. 46 of the Code of Criminal Procedure declares that, if the case be tried by a Magistrate, the punishment shall not, in the aggregate, exceed twice the extent of punishment which such Magistrate, by his ordinary jurisdiction, is competent to inflict. The ordinary jurisdiction of a Magistrate with full powers is defined in s. 22, *viz.*, imprisonment not exceeding two years; or fine to the extent of Rs. 1,000, or both. If whipping be awarded in lieu of, or in addition to, any of the punishments prescribed by the Penal Code, the punishments for the several offences will, in the aggregate, exceed the extent of punishment which a Magistrate, by his ordinary jurisdiction, is competent to inflict.

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S. 22 of the Code of Criminal Procedure is not intended to describe the punishment allotted to the several offences of which a man may be guilty, but merely the ordinary jurisdiction of the Magistrate. Take theft as an example. Theft, by the Penal Code, is punishable with three years' imprisonment, or with fine, or with both ; but the Magistrate of the district, or a Magistrate with full powers, cannot sentence the prisoner, if he convicts him of the offence of theft, to three years' imprisonment, and fine without limit, because his jurisdiction is limited to two years' imprisonment, and a fine of Rs. 1,000. The punishment to be awarded for the several offences is limited by the sections of the Penal Code which provide the punishment for them. I agree that, under Act VI. of 1864, a sentence of whipping may be passed by an officer not inferior to a subordinate Magistrate of the first class. The extent of whipping to which a Magistrate may sentence is not limited except by s. 10 of Act VI. of 1864, which limits the amount of the punishment generally. It matters not whether whipping is imposed as a punishment by a Magistrate or by a Sessions Judge : each of them, if he can pass the sentence at all, can impose it to the full extent authorized by this Act.

Take theft as an example. Theft is one of the offences for which an offender may be punished with whipping in lieu of the punishment awarded by the Penal Code. The limit of the punishment is contained in s. 10 of the Act. " In no case, if the cat-of-nine-tails be the instrument employed, shall the punishment of whipping exceed one hundred and fifty lashes ; or, if the rattan be employed, shall the punishment exceed thirty stripes." By the Notification as to the mode in which the punishment of whipping is to be inflicted in Bengal, it is directed that the rattan shall be the instrument used, and that the rattan shall not exceed half an inch in diameter.<sup>1</sup> If a man is whipped with a rattan for one offence of theft, whether under the sentence of a Sessions Judge or under the sentence of a Magistrate with full powers, he may have thirty stripes with a rattan not exceeding half an inch in diameter. If he is flogged for that offence with the cat-of-nine-tails in those parts of the country where that instrument is allowed to be used, he may have as many as one hundred and fifty lashes. It cannot be supposed that it was ever intended that, if a man should be convicted of two offences at the same time, he should be subject to one hundred and fifty lashes with a cat-of-nine-tails for each offence, amounting to three hundred lashes altogether, or to thirty stripes with a rattan half an inch in diameter for each offence, amounting in the aggregate to sixty stripes with such an instrument. If a man is convicted of a theft to-day by a Magistrate of a district, he may be sentenced to thirty stripes with the rattan ; if that same man commits another offence, and is convicted by the Magistrate of that second offence six months hence, he can have thirty stripes with a rattan for that second offence. The jurisdiction of the Magistrate, as regards whipping for those two offences, is limited to thirty stripes for each, or sixty stripes in the whole. If the Magistrate convicts the offender of two thefts at the same time, is he to be allowed to give twice the extent of the punishment which he could give for one of them ? When the Legislature in 1861 enacted by the Code of Criminal Procedure that, if a Magistrate should convict a prisoner of two offences at the same time, he should have power to sentence the offender to the several penalties prescribed by the Penal Code for the said offences, provided that he should not sentence to any punishment exceeding in the aggregate twice the extent of punishment which such Magistrate was, by his ordinary jurisdiction, competent to inflict,

<sup>1</sup> See a Notification by the Lieutenant-Governor, dated 28th March 1864, published in the *Calcutta Gazette* of the 30th March 1864.

they knew what they were about. They knew what the punishments prescribed by the Penal Code were, and they knew that a Magistrate had not, by his ordinary jurisdiction, power to inflict more than two years' imprisonment with a fine not exceeding Rs. 1,000. They would have taken an unjustifiable leap in the dark in dealing with the subject of punishments if they had extended the same power with respect to any new punishment which any succeeding legislative body might think it justifiable to impose.

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S. 46 of the Code of Criminal Procedure must be construed strictly, and limited to the penalties prescribed by the Penal Code and to the ordinary jurisdiction of the Magistrate as defined by s. 22 of the Code of Criminal Procedure. The Legislature, at the time when the Code of Criminal Procedure was passed, never intended by s. 46 to legislate beyond what they could foresee, and to give powers the result of which must have been unknown to them. The Code of Criminal Procedure did not intend to allow two punishments of whipping to be inflicted at the same time for two offences, of which an offender might be convicted at the same time. At the time when the Code of Criminal Procedure was passed, the punishment of whipping did not exist. There is nothing in the Code of Criminal Procedure, or in Act VI. of 1864, from which the Legislature can be presumed to have intended that, if a man should be convicted of two thefts at the same time, he might be sentenced to stripes for the one, and to imprisonment and fine for the other. The limitation in s. 46 could not have that effect; it is limited to twice the amount of punishment prescribed by the Penal Code, which the Magistrate can inflict according to his ordinary jurisdiction. If it be held that he can punish for one offence with stripes when he punishes for both, I see no mode by which we can escape from holding that he may punish for each by whipping. He has not, as it appears to me, the power of sentencing to whipping in lieu of imprisonment for each; and I do not see how he can have the power of sentencing to it in either. I do not believe that it was intended to sanction such a cruelty as to allow a double flogging to be inflicted upon a prisoner convicted of two offences at the same time. The object of s. 2 in giving whipping in lieu of any other punishment appears to have been to avoid the crowding of jails, and the contamination to which offenders might be subjected by being inmates of jails. But this object would be frustrated if in the case of an offender being convicted of three thefts he might have two years' imprisonment, and a fine for one, and stripes to the extent of thirty with a rattan half an inch in diameter for each of the others of which he might be convicted.

Looking to the words of the several Acts, and construing them according to the ordinary rules of interpretation, I am of opinion that, if a Magistrate proceeds under s. 46 of the Code of Criminal Procedure, he must confine his sentences strictly within its provisions. If he proceeds under Act VI. of 1864, in the case of a conviction for two offences at the same time, he must be guided by that Act only, and cannot sentence the offender for more than one of the offences.

## APPENDIX.

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[6 W. R. 21.]

*Before Sir Barnes Peacock, Kt., Chief Justice, Mr. Justice Norman, Mr. Justice Kemp, Mr. Justice Selon-Karr, and Mr. Justice Campbell.*

THE QUEEN v. KHYROOLLA AND OTHERS.<sup>1</sup>

*Evidence—Criminal Proceedings in the Mofussil—Admissibility of Wife's Evidence for or against Husband or Person charged jointly with him.*

Upon a criminal trial in the mofussil, the evidence of a wife is admissible for or against her husband or persons charged jointly with him.<sup>2</sup>

NORMAN, J., dissented.

ON the trial of Khyroolla and others for murder, the wives of four of the prisoners were examined on behalf of the prosecution. All the prisoners were convicted and sentenced to death. Upon the sentence coming before the High Court (Norman and Campbell, JJ.) for confirmation, the learned Judges were doubtful whether in criminal proceedings in the mofussil the evidence of a wife for or against her husband, or persons charged jointly with him, was admissible, and they accordingly referred the following questions for the opinion of a Full Bench:—

"1. Whether upon the trial, in the mofussil, of a person charged with an offence, his wife is competent to give evidence for or against him?

"2. Whether upon the trial, in the mofussil, of several persons charged jointly with an offence, the wife of one of them is competent to give evidence for or against the others?"

The questions were referred with the following observations:—

NORMAN, J.—I am of opinion that there ought to be a new trial as regards the prisoners Khyroolla, Ainooddeen, and Shahabooddeen.

According to the cases of *Govind and Ram Sahoo*<sup>3</sup> and *Reg. v. Noyaudee and Shodee*,<sup>4</sup> decided by Steer and L. S. Jackson, JJ., in this Court, on the 9th of September 1863, and *The Queen v. Gour Chund Polie*,<sup>5</sup> the evidence of a wife is not admissible for or against her husband, or against a prisoner charged jointly with him. No doubt, there are cases in the late Sudder Court in which this rule was not acted upon,<sup>6</sup> and as the question is one of very great importance, I think that the opinion of a Full Bench should be expressed on the subject. . . . Although the wives of the prisoners are not, according to my present impression, admissible witnesses against their husbands, or the supposed accomplices of their husbands standing on their trial at the same time, it would be a most important thing to show how and when the statements were made by them which led to the discovery of the several places in which the body of the deceased had successively been deposited.

<sup>1</sup> Reference by the Sessions Judge of Tipperah, dated the 4th May 1866.

<sup>2</sup> See Act I. of 1872, s. 120.

<sup>3</sup> 1 N. A. Sel. Rep. 182.

<sup>4</sup> Unreported.

<sup>5</sup> 1 W. R. Cr. 17.

<sup>6</sup> See *Hurrah's case*, 1 N. A. Sel. Rep. 7; *Ohareya's case*, *Id.* 144; *Lurrie Chung's case*, 2 N. A. Sel. Rep. 149; *Gunga Chundel's case*, N. A. 1827, 10; *Ram Lochun Kyburt's case*, N. A. 1835, 14; *Ashoory Akhoond's case*, N. A. 1840, 197; *Godye Mullungy's case*, N. A. 1843, 27; *Sheikh Sherajdee's case*, N. A. 1852, Pt. i., 156; *Shibram Chung's case*, N. A. 1857, Pt. i., 472.

CAMPBELL, J.—As it appears that there are some expressions of some Judges which may possibly give rise to doubt respecting the admissibility of the evidence (notwithstanding all the authority on the other side), I have no objection to the reference to a Full Bench.

The following opinions were delivered by the Full Bench :—

PEACOCK, C.J. (after stating the questions referred, continued).—I am of opinion that both of the questions must be answered in the affirmative.

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It is a general rule of English law, subject to certain exceptions, that in criminal cases a husband and wife are not competent to give evidence for or against each other. But the English law is not the law of the mofussil.

At the date of the grant of the Dewany to the East India Company in 1765, when the civil government of the Provinces of Bengal, Behar, and Orissa, was vested in the East India Company, the Mahomedan law was the criminal law of the country. That law was not abrogated on the accession of the British Government, and for some years afterwards the administration of justice in criminal cases was left to the Nazim. Even after the criminal law was administered by the Courts of the East India Company without reference to the Nazim, the Mahomedan law as modified by the Regulations and Acts of Government continued to be the general criminal law of the country. The proceedings of the Criminal Courts were regulated by the futwas or opinions of their Mahomedan law-officers; and it was expressly enacted, by s. 74 of Regulation IX. of 1793, that the sentences of the Nizamut Adawlut should be regulated by the Mahomedan law, excepting in cases in which a deviation from it was expressly directed by any Regulation passed by the Governor-General in Council.

In some cases provision was made with reference to the futwas to be given by the law-officers in cases in which the evidence given on a trial would be deemed incompetent by the Mahomedan law. For example, s. 56, Regulation IX. of 1793, enacted that "the religious persuasions of witnesses shall not be considered as a bar to the conviction or condemnation of a prisoner; but in cases in which the evidence given on a trial would be deemed incompetent by the Mahomedan law, solely on the ground of the persons giving such evidence not professing the Mahomedan religion, the law-officers of the Courts of Circuit are required to declare what would have been their futwa supposing such witnesses had been Mahomedans. The Courts of Circuit are not to pass sentence in such cases, but shall transmit the record of the trial, with the futwa directed to be required from the law-officers, to the Nizamut Adawlut, which Court, provided they approve of the proceedings held on the trial, shall pass such sentence as they would have passed had the witnesses, whose testimony may be so deemed incompetent, been of the Mahomedan persuasion."

Further, by Regulation I. of 1810, which authorized the Government to dispense with the attendance and futwa of the law-officers whenever there might appear to be sufficient cause, it was enacted that, "in the event of any question of Mahomedan law arising upon such trials, the same should be recorded upon the proceedings for the information and decision of the Court of Nizamut Adawlut. But if the question refer to the competency of a witness, such witness shall be examined, leaving the admission or ultimate rejection of the testimony so given to the consideration of the Nizamut Adawlut."<sup>1</sup>

<sup>1</sup> S. 4.



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Other modifications of the Mahomedan criminal law were made, and in some instances particular offences, such as perjury and forgery, &c., were defined, and the punishment for them declared by Regulations of Government; see Regulation II. of 1807, and Regulation XVII. of 1817. In 1832, by Regulation VI., s. 5, it was enacted that any person not professing the Mahomedan faith, when brought to trial on commitment for an offence cognizable under the general Regulations, might claim to be exempted from trial under the provisions of the Mahomedan Criminal Code, and in such cases the prisoner was to be tried with the assistance of a punchait, assessors, or a jury, and the *futwa* of the law-officer was to be dispensed with.

It is clear that the English criminal law was not the criminal law of the *mofussil*, and that the English law of evidence was never extended by any Regulation of Government to criminal trials there.

S. 3, Act XV. of 1852, did not render a husband or wife incompetent for or against the other in criminal cases. It merely declared that nothing in the Act should render them competent.

Act II. of 1855 did not affect the matter now under consideration. It is clear that s. 14 did not render a wife competent to give evidence against her husband in a criminal case. It declared that the persons therein mentioned only should be incompetent to give evidence. It rendered them incompetent in all cases, but it did not render any person competent or incompetent with reference to particular persons or particular cases. S. 20 applied to civil proceedings only, and s. 58 declared that the Act was not to be so construed as to render inadmissible in any Court any evidence which, but for the passing of the Act, would have been admissible in such Court.

It should be observed that at the time when Acts XV. of 1852 and II. of 1855 were passed, the Mahomedan criminal law as modified by the Regulations was the general criminal law of the country.

As a general rule, women were incompetent witnesses under the Mahomedan law in criminal cases; 2 Hedaya, p. 667. Mr. Beaufort, in his Digest, Vol. I., p. 118, para. 629, limits the rule which excludes the evidence of women to cases inducing *hudd* or *kisas*, but he does not cite any authority for that position. Zihra says: "In the time of the prophet and his two immediate successors, it was an invariable rule to exclude the evidence of women in all cases inducing punishment or retaliation; 2 Hedaya, p. 667.

In *Hurrah's* case,<sup>1</sup> it was held that the evidence of a wife or son was insufficient for a sentence of *kisas*, but sufficient for conviction on strong presumption and a sentence by *siasat*. In *Mussamut Mughnee v. Ohariya*,<sup>2</sup> the evidence of the prisoner's wife was admitted in corroboration of other evidence against him to support a sentence of death or other punishment by *siasat*. In *Shaikh Sherajdee's* case<sup>3</sup> Mr. Mills in a case of culpable homicide says: "Though the testimony of a wife against her husband may be received in our Courts, yet the practice of summoning a wife to give evidence against her husband has been always held to be objectionable, and it is one which should on no account be encouraged." In *Lurrie Chung's* case<sup>4</sup> the Court observed: "The wife of the prisoner was called to give evidence against him, though her testimony was wholly unnecessary; that the practice of summoning such a near relation to the prisoner as a witness for the prosecution, excepting in cases of urgent necessity, is con-

<sup>1</sup> 1 N. A. Sel. Rep. 7.

<sup>2</sup> *Id.* 144.

<sup>3</sup> N. A. 1852, Pt. i., 156.

<sup>4</sup> 2 N. A. Sel. Rep. 150.

sidered highly objectionable, and the Court therefore directed that such practice should be discouraged."

In 3 Macnaghten's Reports, it was held, contrary to the futwas of all the law-officers, that the evidence of a son was admissible against his father in a criminal case.<sup>1</sup>

But it is not necessary to allude further to these cases except to show that it was the practice of the Nizamut Adawlut to admit the evidence of a wife against her husband, or a son against his father, in criminal cases, in cases in which the sentence was by *siasat*. I do not, however, place much reliance on those cases, as they were decided under a very different system of law from that which now exists. Still they show that, at that time, the evidence of a wife was legally admissible. The Mahomedan criminal law, including the Mahomedan law of evidence, is no longer the law of the country. It has been superseded by the Penal Code and the Code of Criminal Procedure so far as they go; but they do not touch upon the rules of evidence. After the passing of the Penal Code and the Code of Criminal Procedure, Regulation IX. of 1793, by which the Mahomedan law as modified by the Regulations was established as the general criminal law of the country, and many other Regulations bearing upon the same subject, were repealed by Act XVII. of 1862. A Code of Evidence has not yet been passed, and we have no express rule laid down by the Legislature in any existing laws upon the subject now under consideration.

By the abolition of the Mahomedan law, the law of England was not established in its place.

I know, therefore, of no law which renders a husband or wife incompetent to give evidence against the other, or which excludes the evidence of others who are bound by the closest ties of relationship.

It has, however, been held by a Division Court that the evidence of a wife is not admissible against her husband in a criminal case, even in corroboration of other evidence given—*Queen v. Gour Chund Polie*.<sup>2</sup> In that case the Judges say: "We think that the evidence of the wife against her husband should not have been recorded. It is true that there are cases published in the earlier reports of the Nizamut Adawlut in which the evidence of the wife has been received against the husband in corroboration of other evidence; but this practice has been reprobated by later decisions of the same Court, and is certainly opposed to the general principle of all criminal law. The Judge has quoted s. 20, Act II. of 1855, but this section refers to civil proceedings. The Judge would hardly condemn a wife who committed perjury for her husband, and, on the other hand, he would most likely discredit her if she appeared too willing a witness against her husband."

With reference to that part of the judgment in which it is said that the practice had been reprobated in later decisions, I would remark that it was merely the practice of compelling a wife to give evidence against her husband when her evidence was not necessary that was reprobated, and that it is to be inferred that the evidence is admissible, although the attendance of a wife against her husband ought not to be compelled when not necessary. In this I entirely concur.

It is our duty to declare what the law is, not to make the law,—or, as Lord Bacon expressed it, "*jus dicere*," not "*jus dare*." If Judges were at liberty to

<sup>1</sup> The case referred to is probably *Buldu v. Gunga Singh*, 3 N. A. Sel. Rep. 309, in which, however, the evidence admitted was that of the prosecutor's son.

<sup>2</sup> 4 W. R. Cr. 17.

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decide what the law is according to their notions of public policy, the greatest confusion and uncertainty would necessarily be caused. It is not for us to say whether the rule of English law is founded upon sound principles or not, although there are many eminent jurists who consider that it is not. But I may say that I cannot concur in the proposition enunciated in the case last cited, that it is contrary to the general principle of all criminal law to admit the evidence of a wife in corroboration of other evidence against her husband.

When the Judges of the Nizamut Adawlut spoke of a wife giving evidence in corroboration of other testimony against her husband, they no doubt had reference to the Mahomedan law which did not allow a conviction upon the evidence of only one witness; and, I presume, the Judges of the Division Bench, who in the case last cited rejected the evidence of a wife in corroboration, would also reject it where the wife's evidence is uncorroborated. They do not allude to the exception in the English law by which a wife is competent to give evidence against her husband upon a charge of personal violence committed by him upon her; but I presume that they would admit of that exception.

Bentham, speaking of the rule of English law which excludes the evidence of a wife against her husband, says: "A law which should exclude the evidence of the wife in the case of a prosecution against her husband for ill-usage done to the wife would be tantamount to authorizing the husband to inflict on the wife all imaginable cruelties so long as nobody else was present—a condition which, having by law the command in and over his own house, it would in general be in his power to fulfil. A law which excludes the testimony of the wife in the case of a prosecution against her husband for mischief done to any other individual, or to the State, is, in like manner, in other words, a law authorizing him to do, in the presence and with the assistance of the wife, every kind of mischief, that excepted by which she would be a sufferer. The law which in the former case affords protection to the wife,—with what consistency can it, in the latter case, refuse its protection to every human creature besides?" See Bentham's Works by Bowring, Vol. VII., p. 484. "Two men, both married, are guilty of errors of exactly the same sort, punishable with exactly the same punishment. In one of the two instances (so it happens), evidence sufficient for conviction is obtainable without having recourse to the testimony of the wife. While the one suffers,—capitally, if such be the punishment,—to what use, with what consistency, is the other to be permitted to triumph in impunity?"—*Idem*.

If these arguments are not sufficient to show that the rule of exclusion in England is merely a rule of positive law, and not one depending upon the fundamental principles of natural justice, I would adopt the arguments of that eminent and highly distinguished jurist, Mr. Livingstone. In his Introductory Report to the Code of Evidence, prepared by him for the State of Louisiana, he says: "The exclusion of interested testimony having been examined and found to be injurious to the investigation of truth, and its admission to be attended with no inconvenience which may not be reduced to one of a quantity that has no assignable value, it of course finds no place in the proposed Code; and with it disappears one of the most fruitful sources of uncertainty, expense, delay, and inconvenience in the law. If the search after truth requires that interested witnesses, and even the parties themselves, should be interrogated to discover it, are there any relations in which the offered witness may stand to the parties that exclude his testimony? By the English law—and, of course, in the several cases which have been noticed by ours—there are several: husband and wife, &c.

"1st. The Code now offered does not contain the exclusion of husband or wife, as witnesses, for or against each other; because the reporter does not

find any one sufficient among the reasons by which it is supported in the English decisions or commentaries. The first of these alleged reasons is, that their 'interests are identical'—2 Starkie 706 ; 1 Bl. 443. But in a system which discards interest as an objection to competency, this reason falls of course. The second is said, by the same authority, to be 'on grounds of public policy,' to prevent distrust and dissension between them, and to guard against perjury.

"In the case before us the public evils are designated : First, the danger of domestic dissension ; secondly, the danger of perjury. The first, if the evidence should be against the party connected with the witness ; the second, if it should go to exonerate him. The argument supposes that, if the husband or wife be called as a witness in a suit to which the other is a party, one of two things must happen : either unfavourable truths will be told, which, it is said, will disturb the family peace ; or perjury will be committed to preserve it. Now, these are two opposite and contradictory reasons. If the danger be that family dissensions will grow out of the testimony, then that of perjury is avoided ; if the danger be perjury, then that of family discord need not be apprehended. But legislation must be founded on the general application of its reasons ; not on the tendency of its measures to good or evil in particular instances. If the connexion by marriage be so close as to make the parties incur the danger and disgrace of giving false testimony for the other, then let the case be examined solely with a view to the evil of placing the witness in a situation where strong motives are offered to him to commit a crime. If the predominant risk be that of destroying domestic harmony, let that be assigned as the reason. But to allege both, when they are contradictory, is a strong presumption that neither can safely be relied upon. Both, however, will be examined, and both contrasted with the evils which attended the exclusion.

"First, let us suppose that domestic dissension is the danger,—that is to say, that one spouse will quarrel with the other for telling the truth in a Court of Justice, when it makes against the interest of the other. But in most cases the interest is common between them ; therefore, there is little probability that any ill-will can be created in the mind of the one against the other for not committing perjury in order to protect a common interest. The supposition that a domestic broil may ensue from a cause like this, is to suppose the party raising it corrupt in expecting falsehood from his or her spouse, and malevolent in resenting his disappointment ; and the law cannot reasonably be required to make any great sacrifice for preserving the harmony of so ill-assorted a union as that which such a case supposes. The dissension arises from the performance of a duty—bearing open testimony of the truth, and avoiding a crime—the commission of perjury. And because a brutal, corrupt, or passionate husband may quarrel with his wife for avoiding the crime, shall the law declare that the wife shall not perform the duty ? It will watch over domestic peace by punishing those that disturb it, and, for proper causes, by dissolving the bond of an ill-assorted connexion, but it ought never to say, the one party shall be exempted from the performance of an important public duty, because the other is tyrannical and unjust. The argument supposes, too, that there is greater danger to domestic happiness from this than from any other source ; but is there any foundation for the belief ? Not one case in a thousand, it is believed, will occur in practice where any improper excitement will be created by an adherence to the truth, although it should militate against the wife or the husband of the party who states it. Why should it more in this case than in that of any other witness ? Mutual affection, the knowledge that it was the performance of a duty required by law, and that it could only be avoided by a crime, are so many and

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such cogent reasons to prevent ill-will on the occasion, that it is astonishing how this reason could find favour with the great lawyers who have assigned it as an argument in favour of their rule ; more especially when they themselves most explicitly discard this reason by declaring that the wife shall not be allowed to appear as a witness against the husband, even if he consents, or after a divorce, nor against the interest of his heirs after his death—2 Starkie 706 ; 6 East 192. How connubial happiness can be disturbed by a compliance on the part of the wife with her husband's request while united, or by any act after the connexion has been dissolved by death or divorce, these learned doctors of the law alone can explain.

“ Examine the opposite reason—the danger of perjury. That is to say, the matrimonial union is so strict, that the one party to it will incur all the dangers of punishment and infamy rather than tell the truth when it is injurious to the other ; and the law, it is said, holds out irresistible temptation to the witness when it permits him to be examined. Yet by the preceding argument the temptation is easily resisted. The truth will be told, and this strong connexion is so weak that it is broken merely on that account.

“ But the arguments must be destroyed, not by opposing the one to the other, but both of them to the truth. There is no doubt that in this, as in many other cases, minds may be found that will waver between the declaration of a truth that may hurt their interests or their feelings, and the assertion of a falsehood that, in their opinion, may secure both from injury ; but can the law be said to hold out a temptation to perjury when it orders a party, under those circumstances, to tell the truth ? If there were no temptations to conceal the truth, or assert a falsehood, there would be no need of oaths. Oaths and the penalties for breaking them were made for the purpose of counteracting that disposition. If they were to be dispensed with in cases where that disposition exists, there would be no need for them in any others. In every such case, then, it may, with equal reason, be said that the law holds out a temptation to perjury, because it exacts the oath to tell the truth, when there is an inclination to conceal it ; and the argument would extend with equal reason to the abolition of oaths, and the penalties for the breach of them. This exclusion is at variance, too, with other provisions of the law as they already exist. The party himself may be interrogated in Chancery in England, and in all cases at law here. The wife may be interrogated to support an accusation made by herself against her husband for a personal injury, in some cases affecting his life ; yet she is not permitted to prove a fact that would save him from an ignominious death on a charge brought against him by another. Now, in all these cases, the danger of perjury is equally great, or greater, unless we suppose the attachment of a wife to her husband's interest superior to his own, or her desire to make good her own charge less intense than that which she would feel to support the accusation brought by another. The danger of perjury is no greater in this than in other cases in which it is incurred, without scruple, in the dearest connexions of nature—father and son, mother and child, brother and sister, friendships of the most intimate kind, habits of intimacy during a long life—the parties to all these are every day arrayed for and against each other as witnesses, and the law interposes no other safeguard to their consciences than its penalties and the danger of infamy by detection. No rule of exclusion protects the witness against the influence of his affections or his interest. He is heard, and the degree of connexion is weighed against his character and the probability of his story ; the counsel cross-examine ; the public inspect ; the jury interrogate, and calculate, and determine, and no inconvenience is felt in those cases. Why should there be in this ?

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"Having stated the general principle, that every party to a suit has a right to all the information in relation to his cause, of which he ought not to be deprived, but for reasons of great public or private inconvenience, and examined by discussing the reasons for exclusion in this case, whether it offers any such inconvenience, let us now examine the particular evils attached to the rule as it now stands.

"In criminal cases the evil is most apparent. Suppose the husband, accused by positive but perjured testimony of a crime affecting his life, and the wife the only witness of a fact that would prove his innocence—no matter what circumstances she could adduce to corroborate her testimony; no matter what intrinsic evidence it contained; no matter what perfect conviction it would produce of its truth, it is sternly excluded; and the innocent husband is executed, because 'public policy requires that the peace of families should not be disturbed, and that no temptations should be held out to perjury.' In this case, by no means an improbable one, there is positive evil, cruel injustice, heart-rending distress; in the case which the law attempts to guard against, inconvenience only, if it occurs—but an inconvenience highly improbable to happen, inasmuch as it is supposed to affect domestic union, and, as it is believed, to be a temptation to perjury, not one strong enough to produce the effect, or, should it be yielded to, would be capable of detection by the usual means. But even without supposing the extreme case of life or death, the suppression of testimony is in all cases an evil; and the law deprives a party of a certain right to avoid a problematical inconvenience.

"On the other hand, suppose the testimony of the wife necessary to procure the conviction of the husband; she is the only witness to a murder he has committed. This I consider the strongest ground for the exclusion; it enlists the feelings, and they are most frequently found on the right side. Shall a wife be forced to give testimony that will condemn her husband, the father of her children, to infamy and death, or take refuge in the crime of perjury to avoid it? I confess that, if the alternative could be avoided, a human law-giver would not enjoin it; but if sympathy for individual distress should not be entirely rejected, it ought never to be entertained when its indulgence would lead to more extensive injuries to the community. A wise and provident legislator must have the consequences of every legal provision as present to his mind as its immediate operation is to his senses; and in applying this rule to the subject under consideration, he should not, in tenderness to the feelings of conjugal affection, permit the husband or wife to escape punishment for a crime, or defraud another of his right, by declaring that the only witness of the offence, or the wrong, shall not be heard. Some crimes cannot be perpetrated without the aid of an accomplice. The accomplice may betray the principal. The fear of this treachery, in many instances, may prevent the crime; or a person may not be found willing to engage in the enterprise. But, by the rule of exclusion, the law furnishes an assistant who can never betray, and one who is always at hand; and thus gives a facility to the commission of offences which no other circumstance could possibly offer. Besides, public justice requires, and common sense would seem to point out, that those persons who are the most likely to be acquainted with the fact should be first called on to prove it: but who so probable to know the guilt or innocence of the party accused as the companion of all his hours, the depository of his most secret thoughts; and what better calculated to prevent an intended crime, than the knowledge that those from whom it is so difficult to conceal it may be made the unwilling witnesses of its disclosure? Precisely in the proportion that a man would be encouraged to commit a crime

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by the knowledge that the person to whom he finds it necessary to confide it cannot become a witness against him, will be his fear of committing it when he knows that there is no person in whom he may confide that may not be forced or be willing to betray him.

"So sensible of this have been the judicial law-givers of England that they have imposed no bar to the receiving the testimony of father and son, mother and daughter, brother and sister, and all the other relations of consanguinity or affinity. They have had no regard to the confidences of friendship, and have thought that the affections of nature, as well as those of habit and sympathetic feeling, should afford no obstacle to the attainment of the ends of public justice. They have gone farther, and made an exception to the rule which they laid down, as one inviolable even by consent in the case of husband and wife (Starkie 706; Ca. Temp. Hard. 264); and, as we have seen, have allowed the wife to be produced as a witness against the husband on a prosecution for an injury done to herself. Now mark the reason! It is a convenient and a ready one—'from the necessity of the case'—which must mean, if it mean anything, that there is a necessity that crimes should be punished, and that, unless the testimony of the wife were admitted, they would, in those instances, be unpunished. Now, admit this reasoning, and see whether it does not go to the utter destruction of the rule to which it is offered as an exception. There is no greater necessity for punishing a crime committed by the husband against his wife than there is for punishing the same crime committed by him against another; and if the wife is the only witness that can convict in the last case, her testimony is as necessary as it is in the first; and being necessary in both, it should not be admitted in one, and excluded in the other. But, in truth, the enquiry is never made; and in this and in all the other cases founded on the convenient argument of necessity, although there may have been twenty other witnesses present, the pretended necessary witness is admitted, and although there may be none but him conversant of the fact, he is rejected where it has not yet been deemed convenient to admit the argument of necessity.

"The advantages of receiving testimony from this source so greatly overbalance its evils and the inconveniences, and the injustice of rejecting it are so manifest, that I have not hesitated to give this exclusion no place in the Code;" see p. 271.

In France, according to art. 322 of the Code d' Instruction Criminelle, a husband and wife and other specified relations, if objected to by the accused or by the Procureur-General, cannot be a witness for or against one another; but the President may summon and examine any person, whether such person is comprised in art. 322 or not; see art. 269. The witness in that case is not examined on oath. These are matters of detail to be provided for, if at all, by an express law, and not by rules to be laid down by Judges.

But even if the rule of English law is founded upon sound and just principles with reference to the state of society in England, it appears to me to be wholly inapplicable to the natives of this country and to their social institutions and relations. A law which may be politic and just in a Christian country in which a man is prohibited from having more than one wife, and a woman from having more than one husband, may be wholly inapplicable to a country in which polygamy is allowed. Can the legal fiction that a man and his wife are one person apply to a Kulin Brahmin who has fifty wives, or to a woman in Malabar and her several husbands? Or should the evidence of one of fifty wives against her husband be excluded lest it should cause dissension in the family? A law which should allow a wife to give evidence against her husband

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in a case of personal injury committed upon her, and would not allow her evidence to be either corroborated or contradicted by other wives who were present at the time, would appear to me not to be founded upon the soundest principles either of policy or justice. It would be obligatory upon the Judges to allow a wife to give evidence against her husband upon a charge of an assault committed by him upon her, and to exclude her from testifying upon a charge against him of murdering their infant child when no one was present but themselves. Or would it be just to allow from necessity a wife to give evidence against her husband upon a charge of personal violence committed by him upon her, and to refuse the evidence of another wife on his behalf? If we had to decide this case upon our own notions of policy, I should admit the evidence of the wife, and leave the Court to judge of her credibility as in all other cases; but even if my own opinion were against the policy of admitting such evidence, I should not feel justified in rejecting the evidence of a wife who was the only witness to the murder of her child by her husband, or in rejecting the evidence of a wife as a witness for her husband on a charge of a capital crime preferred against him by one who admits that no one was present when the alleged crime was committed except the accuser, the husband and his wife.

In the case of European British subjects, who are governed by the law of England, we must administer that law. But in the mofussil, where the law of England is not the law of the country, I consider that I should not be justified in excluding any witness who was not clearly incompetent by law. *Prima facie* every one is competent and bound to give evidence; and every one who is charged with a crime is entitled to adduce on his behalf the evidence of any witness who can throw light upon the facts in dispute, and who is not expressly declared by the law to be incompetent. Would any Judge, unless bound by the clearest and most indisputable rule of law, condemn a prisoner to death for murder upon the evidence of the wife of another man, and upon his own notion of public policy reject the testimony of the prisoner's own wife in his favour? Would he do so if it were proved that the three persons in question were the only persons present at the alleged murder, or that the husband of the witness was also present, and that he had fled? We cannot import one portion of the English law and reject the remainder without taking upon ourselves the duty of legislators. I think that the evidence of the wife is admissible in both cases, because I do not find any law of this country which expressly provides against it. The degree of weight to be attached to the evidence in such cases must, as in every other case, be determined by those who have to decide upon it?

It appears from a late edition of Mr. Norton's Book upon Evidence that the Court of Foujdari at Madras sentenced a man to death who was found guilty of murder upon the sole evidence of his own wife; 3rd ed., p. 41.

There is also, I believe, a ruling of the Nizamut Adawlut at Agra to the same effect. The case in Madras appears to have arisen in Malabar where a woman has a plurality of husbands. I have not been able to refer to either of the two cases. The case should go back to the Division Bench by which it was referred with the expression of our opinion.

NORMAN, J.—I regret that I am compelled to differ from the rest of the Court.

In order to explain my views, it is necessary that I should go into the history of this question. Regulation IX. of 1793 made provision for the trial of persons charged with crimes or misdemeanours. S. 47 enacts: "The charge against the prisoner, his confession (which is always to be received with cir-



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cumspedition and tenderness) if he plead guilty, or if he plead not guilty, the evidence on the part of the prosecutor, the prisoner's defence, and any evidence which he may have to adduce, being all heard before him, the Cauzy and Mufty (who are to be present during the whole of the trial) are to write at the end of the record of their proceedings the futwa or law as applicable to the circumstances of the case, and to attest it with their seals and signatures. The Court shall attentively consider such futwa, and if it shall appear to them consonant to natural justice, and also conformable to Mahomedan law, they are to pass sentence in the terms of the futwa," &c. By s. 54 it is enacted: "The Judges of the Court of Circuit are to refer to the Cauzy and Mufty of their respective Courts all questions on points of law that may arise during the course of any trial, and respecting which no specific rules shall have been enacted by the Governor-General in Council, and shall regulate their proceedings by the opinions which may be delivered by those officers. If such opinions shall appear to the Judges contrary to the principles of natural justice or to the Mahomedan law, they are nevertheless to be guided by them; and after completing the trial, and obtaining the futwa of the law-officers upon the case, they shall, without passing sentence upon it, transmit the proceedings and futwa to the Nizamut Adawlut, with a separate letter stating their objections to such opinions or futwas, and wait the sentence of the Court." By s. 56, "in cases in which the evidence given on a trial would be deemed incompetent by the Mahomedan law, solely on the ground of the persons giving such evidence not professing the Mahomedan religion, the law-officers of the Courts of Circuit are to be required to declare what would have been their futwa, supposing such witnesses had been Mahomedans. The Courts of Circuit are not to pass sentence on such cases, but shall transmit the record of the trial, with the futwa directed to be required from the law-officers to the Nizamut Adawlut, which Court, provided they approve of the proceedings held on the trial, shall pass such sentence as they would have passed had the witnesses, whose testimony may be so deemed incompetent, been of the Mahomedan persuasion." By s. 74, "the sentences of the Court (of Nizamut Adawlut) shall be regulated by the Mahomedan law, excepting in cases in which a deviation from it may be expressly directed by any Regulation passed by the Governor-General in Council."

Under this Regulation, the Criminal Courts were bound by the Mahomedan Law of Evidence, except in the cases provided for by s. 56 or other special Regulation of the Governor-General in Council.

The religion of the State in Hindustan was according to the tenets of the Sunnis. Amongst the Sunnis, the testimony of a wife was not admissible concerning her husband, or of a husband concerning his wife; see 2 Hedaya, p. 685. This is a rule of evidence entirely apart and distinct from that by which the testimony of women was excluded in cases including punishment or retaliation; as to which see 2 Hedaya, p. 667.

The rule is clearly and shortly stated in Harington's Sketch of the Mahomedan Criminal Law taken chiefly from the Hedaya and Futwa-i-Alumgiri; see 1 Harington's Analysis, p. 278. "The testimony of near connexions, such as father and son, grandfather and grandson, husband and wife, master and slave, in favour of each other, is not admissible in consideration of their relative interest."

In 1809, in the case of *Buncharam v. Govind Sahoo* and *Ram Sahoo*, charged with the murder of Ramnarain, the wife of the prisoner Ram Sahoo was considered to be not admissible as a witness for the prisoner to prove that Ram-

narain was committing adultery with her.<sup>1</sup> The probability is that in this case the prosecutor objected to the evidence adduced by the prisoner, and that the point was distinctly decided in the presence of Mr. Harington and Mr. Fombelle.

By the English law, as a general rule, husbands and wives cannot be witnesses for or against each other in criminal proceedings. In Staunforde's Pleas of the Crown, first published in 1557, p. 26 b, quoted in Dalton's Justice of the Peace, p. 377, it is said: "The wife is not to be bound to give evidence, nor ought to be examined, against her husband; for by the laws of God and of this land she ought not to discover his counsel or his offence in case of theft or other felony." I may observe that it is well established that, under the English law, a wife is not bound to disclose even her husband's treason. Sir Edward Coke, in Co. Litt., 6 b, says that husband and wife are two souls in one flesh, and it might be the means of implacable discord and dissension between them, and the means of great inconvenience, if such testimony were admitted. Buller, J., says, if a wife were a witness for her husband, it would be a strong temptation to commit perjury; and, if against the husband, it would be contrary to the policy of the marriage, and would create much domestic dissension and unhappiness—Buller's Nisi Prius, 286; see also Blackstone's Commentaries, p. 443; Best on Evidence, 226, 694. Cases of injuries done to the wife by the husband, or the reverse, form an exception to the general rule.

The law prevailing in the United States on this subject is similar to that of England; see 2 Kent's Commentaries, p. 184; Taylor on Evidence, 1062; Greenleaf on Evidence, 254. In America it has been held that the evidence of a wife cannot be given against a husband even by his own consent, on the ground that the public have an interest in the peace of families.

The rule of law which excludes the evidence of a wife in favour of or against her husband is no exceptional or arbitrary rule of Mahomedan and English law. I believe it will be found to exist in the jurisprudence of all the most enlightened and civilized nations of the world. It is to be found in the Roman law—Digest, Lib., xxii., Tit. 5, which treats husband and wife as one person for this purpose. So in the French law—Code d' Instruction Criminelle, arts. 156 and 322. By art. 322 it is provided that such testimony may be received before the Court of Assize, if no objection is taken to its admission by the opposite party. Further, art. 269 of the Code empowers the President to summon any person whose evidence is not admissible, and question them for the purpose of obtaining information. But he cannot administer an oath to them. He does not, and cannot, make them witnesses.

By the law of Scotland, persons are rejected as witnesses in the causes of certain near relatives. Wives and children cannot be compelled to give testimony against their husbands and parents *ob reverentiam personarum et metum perjurii*; see 2 Erskine's Institutes of the Law of Scotland, Bk. iv., Tit. 2, § 24, p. 979 of the edition of 1828. It appears, however, that there are some exceptions from the laws of exclusion "introduced from necessity to the effect of reducing the objection from disqualification to credibility." Such is the case of *penuria testium*. This is confined chiefly to criminal acts whose secrecy is studied. Secondly, to domestic occurrences which necessarily exclude the presence of strangers; or, thirdly, to the case of witnesses necessary to the act in question; see Bell's Principles of the Law of Scotland, s. 2256.

Erskine gives an instance: "Children have been admitted as witnesses in an action brought by the mother against her husband for separation and main-

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tenance on account of his harsh treatment of her, there having been no servants at the time in the family by whom the fact might have been proved." A witness is rejected upon his propinquity of blood to him who produces him, though he stand in as near a relation to the party who makes the objection, inasmuch that his testimony is not received even *cum nolo*.

If the rule of exclusion be established, and partial exceptions either created by express legislation as in this country and in England, or established by careful judicial decision as in England and Scotland, or compensations provided by legislation as in France, the benefits of the rule may be preserved, and all inconveniences arising from any deviations from the rule may be either entirely avoided or incurred only in cases of absolute necessity, or reduced to a minimum.

It has been well said that marriage is an institution of natural law antecedent to all forms of government, and even to the organization of civil society. The rule excluding the testimony of married persons against each other is one which maintains the inviolable sanctity of the confidences of married life. The rule has its foundation in the deepest and purest instincts of human nature. We can trace it in the laws of almost all civilized nations; differently expressed in the laws of different countries—sometimes laid down in distinct and formal propositions with reasons given for them, as in the law of England; sometimes as part of a larger and wider rule of exclusion. It seems no unnatural inference that it has existed from a period prior to all legislation as one of those

"Unwritten laws by all men recognized,

"They are not of to-day or yesterday,

"But live for ever; nor can man declare,

"From whom or whence they sprang."

See Sophocles' *Antigone*, line 450.

Such was the character of the rule which was law in this country in 1809; and it appears to me to be one which could only be abrogated by an Act of the Legislature, and ought not to be lightly set aside by judicial decision.

I proceed to examine the cases which have or are supposed to have infringed on the rule. In *Hurrah's* case in 1805<sup>1</sup> the prisoner was charged with murder, and the question was whether the widow of the deceased was a competent witness to sustain a claim for *kisas* or retaliation in which she as an heir was supposed to be interested. By the Mahomedan law-officer she was declared incompetent for that purpose, and his opinion is confirmed by that of the editor, apparently Mr. T. H. Harington (see Preface), in a note. The case, therefore, does not touch the question, but supports the proposition that, by the Mahomedan Law, an interested witness is inadmissible.

In *Mussamut Mughnee v. Ohariya*,<sup>2</sup> two wives of the prisoner gave evidence against him. It does not appear that the question of the admissibility of the evidence was raised. The case is reported by Mr. Dorin, who in a note appears to have misunderstood *Hurrah's* case, and it is contrary to that reported at p. 182 of the same book.<sup>3</sup>

Regulation I. of 1810 provided for dispensing with the attendance and *futwa* of the law-officers in the Courts of Circuit, and by s. 4 enacted that, "in the event of any question of Mahomedan law arising upon such trials, the same shall be recorded upon the proceedings, for the information and decision of the Court of Nizamut Adawlut. But if the question refer to the competency of a

<sup>1</sup> 1 N. A. Sel. Rep. 7.

<sup>2</sup> 1 N. A. Sel. Rep. 144.

<sup>3</sup> *Govind and Ram Sahoo's case*.

witness, such witness shall be examined, leaving the admission or ultimate rejection of the testimony so given to the consideration of the Nizamut Adawlut. The result of this enactment would naturally be that, in all doubtful cases, the evidence, whether admissible or inadmissible, would be recorded, and would have to be dealt with by the Nizamut Adawlut.

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Regulation XVII. of 1817 recites that "the Mahomedan law of evidence in some cases (especially those of zina, including adultery, rape, and incest) is such as to render a legal conviction almost impossible, . . . and its exceptions to the competency or credit of witnesses are in some instances inconsistent with the ends of public justice" (and enacts, s. 5)—"If the evidence of a witness on a criminal trial before a Court of Circuit be declared by the Mahomedan law-officer inadmissible on the ground of the witness being a police-officer, or an officer of Government of any description, or any other ground of exception in the Mahomedan rules of evidence, which may appear to the Judge unreasonable and insufficient, the Judge shall cause the examination of the witness to be taken, notwithstanding the exception stated by the law-officer, and shall require the latter, on the completion of the trial, to declare in his futwa the sentence to which the prisoner would have been liable, if the evidence of the witness objected to had been admissible under the provisions of the Mahomedan law." If the conviction of the prisoner depended wholly or exclusively on the evidence objected to by the law-officer, the Judge was not to pass any sentence, but to refer the trial to the Nizamut Adawlut. By s. 4, if two or more Judges of that Court, on a deliberate consideration of the evidence and circumstances of the case, concurred in opinion that the proof against the prisoner was sufficient to convict, and that he was, in every respect, a proper object of punishment, the Judges were declared competent to convict and pass sentence upon him as if he had been convicted by the futwa of the law-officer. This Regulation, as long as it remained in force, gave to the Courts a discretionary power to act on the evidence of interested and other witnesses whose testimony was excluded by Mahomedan law, and, amongst others, of the husband or wife of an accused party.

In 1820, in *Lurrie Chung's* case,<sup>1</sup> the Court found that the wife of the prisoner had been called to give evidence against him, though her testimony was wholly unnecessary. The Court say that the practice of summoning such a near relation of the prisoner as a witness for the prosecution, excepting in the case of urgent necessity, was highly objectionable. In *Buldu v. Gunga Singh*,<sup>2</sup> the Court acted on the evidence of the son of the prosecutor against the opinion of the Mahomedan law-officer. In *Sheikh Sherajdee's* case,<sup>3</sup> Mr. Mills says: "Though the testimony of a wife against her husband may be received in our Courts, yet the practice of summoning a wife to give evidence against her husband has always been held to be objectionable, and is one which should on no account be encouraged." In *Shibram Chung's* case,<sup>4</sup> Loch and Bayley, JJ., expressed themselves in similar terms, and on that ground considered it unnecessary to refer to the evidence of the prisoner's wife. In the Nizamut Adawlut Reports, 1855, p. 213, the wife of the prisoner was admitted as evidence against him. The Nizamut Adawlut of the North-West Provinces, acting on the authority of the cases of *Mussamut Mughnee v. Ohariya*<sup>5</sup> and of *Lurrie Chung*,<sup>1</sup> while allowing that the evidence of a wife was admissible, stated that

<sup>1</sup> 2 N. A. Sel. Rep. 149.

<sup>3</sup> N. A. 1852, Pt. i. 156.

<sup>2</sup> 3 N. A. Sel. Rep. 309.

<sup>4</sup> N. A. 1857, Pt. i. 474.

<sup>5</sup> 1 N. A. Sel. Rep. 144.

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I lay wholly out of consideration the authority of Mr. Bentham and Mr. Livingstone, and attribute no special value to their opinions as to what should or should not be enacted as the law on this subject. Their views and opinions have been long and familiarly known to those employed in the business of legislation in this country. With full knowledge of those opinions and of what had been done under Regulation XVII. of 1817, the Government, by Aft XV. of 1852, in legislating for Her Majesty's Courts, declared that nothing in that Aft contained should, in any criminal proceeding, render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband. Again, Aft II. of 1855 (an Aft to improve the law of evidence in all Courts of Justice), by ss. 14, 18, and 19, provided a remedy for the evils alluded to in Regulation XVII. of 1817. By s. 20 it rendered husbands and wives competent to give evidence for or against each other in civil proceedings, subject to a proviso that any communication made by the one to the other during the marriage should be deemed a privileged communication, and should not be disclosed without the consent of the person making the same. It is clear that the Legislature deliberately refused to sanction the admission of wives and husbands as witnesses for or against each other in criminal cases. Regulations I. of 1810 and XVII. of 1817 were repealed by Aft XVII. of 1862, and by that repeal an end was put to any special and exceptional powers of the Zilla Courts to admit at their own discretion evidence whether admissible or not under Mahomedan law. But Regulation IX. of 1793, which made the Mahomedan law the law of the Criminal Courts, was repealed at the same time.

What then remained? If the ancient law as it prevailed in the conquered and ceded territories, except so far as it is altered by the subsequent legislation of the conqueror, is to remain, the evidence is excluded, because it would be excluded by Mahomedan law. If the repeal of Regulation IX. of 1793 is to be taken as a declaration that the Courts are no longer to be guided by Mahomedan law in any respect (and there is, no doubt, much to be said in favour of that view of the case), then, I think, where we have no positive law to guide us, we must act upon those universal principles of right which are recognized by our own laws. If the conditions of the married life of the people of the country had been in all respects similar to those which exist in our own country, there would not, in my opinion, be a doubt on the present question. I cannot accept the loose practice of Zilla Judges under the exceptional powers of Regulation XVII. of 1817, though sanctioned by the Sudder Court, as having established by judicial decision a rule on this subject. There is no instance in which the question has been raised and formally decided by the Court after argument, on a full consideration of all that could be said on either side of the question. It seems to me that the Sudder Court always felt that, in admitting the evidence, it was on dangerous ground, and evidently saw the mischief likely to result from doing so. The Legislature, in passing Aft II. of 1855, distinctly declined to sanction their practice.

I must admit, however, first, that polygamy amongst the Mahomedans and Kulin Brahmins places wives in a relation to their husbands different from that occupied by a European wife towards her husband. Secondly, as I understand it, the ancient criminal law of the Hindus allowed the wife or husband to be called on to testify the one against the other, though such evidence was not admissible in civil cases; see the *Dharmasastra* of *Yajnyawalkya* by Roer and

Montriau, sloke 72, p. 28; Mitakshara translated by Macnaghten; 1 Macnaghten's Hindu Law, p. 246.

From these circumstances it has, no doubt, been the case that in this country the admission of such testimony has not been felt to be, and is not in fact, a violation of the law of the family in the same sense that it would be in a European community. Still the Mahomedans appreciated the wisdom of the rule as applicable to the state of their own society; and for the Hindus they are now living under a rule wiser, milder, and more merciful than that of their own criminal law; and the polygamy of Kulin Brahmins was an exceptional institution.

I believe that in practice the cases where a crime is committed under such circumstances that it cannot be proved except by the testimony of husband or wife are rare indeed. I do not recollect one such in the whole course of my reading. It is easy to suppose exceptional and extraordinary cases, as Mr. Livingstone and Mr. Bentham have done. It was said indeed that Rush would not have been convicted had he been married to the wretched woman who lived with him. The arguments of my learned brothers might have greater weight if the great object of social life was to convict criminals—if we were bound to presume that every husband against whom a wife should be called was guilty. I believe that, if these suggestions were adopted in European communities, the peace and confidence of hundreds of houses would be interfered with for an advantage of most doubtful character. If I were at liberty to speculate on the subject, I might say that some rule for admitting the testimony of a husband or wife in exceptional cases might be enacted by the Legislature.

There is another point on which I have not yet touched, *viz.*, the danger of perjury. Mr. FitzJames Stephen's observations on this subject appear to me full of good sense. He admits, as every one must, that, if considered merely with reference to the discovery of the truth, the exclusion of the testimony of husband and wife cannot be defended. At p. 201,<sup>1</sup> he says: "The proposal to make a prisoner a competent witness in his own behalf has an appearance of system about it which at first sight is extremely plausible. It would, no doubt, harmonize with what I have called the litigious theory of criminal trials, but there are strong objections to it. In the first place, the prisoner could never be a real witness; it is not in human nature to speak the truth under such a pressure as would be brought to bear on the prisoner, and it is not a light thing to institute a system which would almost enforce perjury on every occasion. It is a mockery to swear a man to speak the truth who is certain to disregard it. At p. 286 he says: "The objections already stated to making the accused competent witnesses apply with greater force to the case of their husbands and wives, inasmuch as the conjugal love which would lead a person to lie to screen a wife or husband is a better motive than the self-love which would lead a man to lie in his own case, and one not less powerful. It is so important that perjury should not be committed, and especially that it should not be committed under circumstances which would lead the public to sympathize with the criminal, and it is so much more important that the administration of criminal justice should harmonize with the public feeling than that it should exhaust all possible means of convicting criminals, that I think the utmost modification of the present law which would be advisable would be to permit an accused person to call husband or wife if he thought fit."

I may observe that in the case before us, and in regard to which the reference was made, the wives of four prisoners were called for the prosecution, three of

<sup>1</sup> Stephen's Criminal Law.

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whom gave false evidence to save their husbands. The same result followed from calling the wife in the case from the North-West Provinces and in the case cited from the Nizamut Reports of 1855.

I am of opinion that there is no law in this country which makes the evidence of a wife admissible for or against her husband in criminal cases other than charges of injuries or wrongs done by the husband to the wife, and as a consequence that such evidence is not admissible against the husband, or for or against parties included in the same charge, and standing on their trial at the same time with her husband. As to the latter point, see the *King v. Smith* before the twelve Judges.<sup>1</sup>

There are two decisions of the High Court in accordance with my opinion, viz., that of Steer and L. S. Jackson, JJ., in the *Queen v. Noyaudee* and *Shodee*,<sup>2</sup> decided in 1863, and that of Kemp and Glover, JJ., in the *Queen v. Gour Chund Puli*.<sup>3</sup>

CAMPBELL, J.—I entirely concur in the judgment of the Chief Justice. Any further question on the subject has been to my mind cleared up by the judgment of Norman, J. The question before us is not whether it is under certain circumstances expedient to examine the wife, or what questions she may be properly pressed to answer, but whether she is or is not absolutely inadmissible as a witness for or against her husband, and for or against any person tried jointly with her husband according to the strict rule of English law.

I do not understand my colleague, Norman, J., to found his objection to the admission of the wife on a broad rule which would equally exclude the son, the father, and other near relations, as interested parties. He would not, I believe, exclude these other relations: the daily practice of the Courts and the necessities of justice render that impossible. The rule which he maintains is the English rule.

That rule he looks at from two points of view—first, that of natural justice, and, secondly, with reference to the law and practice of the Indian Courts.

As respects natural justice, he considers the English rule to be one of those “unwritten laws” which prevail, or ought to prevail, all over the world: and although I have no doubt that our function is in fact “*jus dicere*,” not “*jus dare*,” and apprehend that we can hardly at this time deliver unwritten laws of our own concoction, I notice this part of the subject merely to say that the authorities quoted by my learned colleague in regard to the provisions of various laws seem to me to show that the rule maintained by him, or anything like it, has never been adopted in any country whatever except England. By none of the authorities quoted is the evidence of the wife specially and absolutely excluded. They all, without exception, merely refer to certain cautions and restrictions in regard to the evidence of a large class of interested parties, including all near relations; and none of them absolutely exclude such evidence. Some old Mahomedan law-books seem to lay it down as a maxim that the evidence of parties standing in certain positions of relationship “is not to be believed,” because they are interested: for instance, parties related as father and son, grandfather and grandson, husband and wife, master and slave. I doubt whether under this rule these parties were ever absolutely excluded. At any rate, the Mahomedan law of evidence has been relaxed in India. In France, again,

<sup>1</sup> 1 Moody's Crown Ca. 289; Roscoe's Evidence in Cr. Ca. 117.

<sup>2</sup> Unreported.

<sup>3</sup> 1 W. R. Cr. 17.

the rule applies to a similar large class of relations, and seems to amount simply to this: They are all *prima facie* admissible; but if either party objects, then the President is to decide, at his discretion, whether the witness shall or shall not be examined with reference to the circumstances of the particular case. There is no inadmissibility there. So again in Scotland, the practice, as set forth by my learned colleague, is in brief this—that certain near relatives are not to be examined except in case of necessity, when the case cannot be proved or disproved in any other way. That is, in fact, the rule laid down by the Sudder Court in this country. I conclude, then, that no consent of nations imposes on us the English rule absolutely excluding the wife, and the wife only.

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I next look to Indian law and practice. I believe that thousands of cases might be found in which both wives and other near relations have been admitted as witnesses, but in which the point is not reported, because no one thought of objecting. That is the reason why the number of rulings on the point is comparatively small. I doubt whether the evidence of a wife was ever really excluded on the ground of Mahomedan law. There is only one case in the early reports—that of 1809. There the witness was in fact examined, and it seems to me that the Judges afterwards used the term “inadmissible” only in the sense that the evidence could not be admitted to full credit. But, be that as it may, my colleague Norman, J., has pointed out the important fact that, by a subsequent Regulation (XVII. of 1817) the restrictions of the Mahomedan law of evidence were by express enactment swept away. To use the words of my learned colleague, “this Regulation gave to the Courts a discretionary power to act on the evidence of interested and other witnesses, and, amongst others, of the husband or wife of an accused party.” We are therefore, I think, all agreed that, from 1817 onwards, the evidence of the wife was admissible; and a series of cases shows that the Courts acted accordingly. What, then, has occurred to introduce a restriction? Clearly nothing, as it seems to me. I cannot imagine that any argument can be founded on Act II. of 1855 for excluding evidence which up to that time was admissible in the Company’s Courts, since that Act in the most express terms provided that nothing contained in the Act should be construed to render inadmissible in any Court any evidence which but for the Act would have been admissible in such Court. The Act merely provided, as it were, a minimum of admissibility in all Courts, leaving to those Courts having more liberal rules the freedom which they before enjoyed. It was principally designed to relax the stringency of the English law of evidence in consequence of recent reforms in England. It did not exclude the wife in criminal cases, although it did not go beyond the reforms of English law in respect of Courts governed by that law, so as to admit the wife in those particular Courts.

The real question seems, in fact, to be whether the most technical parts of the English law of evidence are to be introduced into our Courts. For that I think that there is not the least warrant of law. As respects the practice, I always feel that in these matters there is this difficulty—that the law of the Mofussil Courts has been so indefinite and uncertain that there is scarcely any doctrine popularly known as English law which, somewhere or other, in the course of a vast number of judgments extending over very many years, may not be found to have been somewhere quoted by one or two Judges for mere purposes of argument, illustration, or decision. But, in my opinion, such rare misquotations do not establish a law. The English law of evidence was notoriously, till within a recent period, one of the most barbarous and artificial in the world; and though a great deal of the worst part of it has now been swept away, a good



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many things still remain which many people think bad in England. At least, they are only supported there, by the peculiar circumstances of English law, habits, and procedure, and are, I think, altogether inappropriate to a widely different country. I should think it a very great misfortune if, just when the English law is, bit by bit, approaching to complete reform, its most barbarous and technical portions could be imported into this country by the mere *dicta* of one or two Judges speaking loosely in the absence of definite law. In the present instance, however, it seems to me that Regulation XVII. of 1817, and Act II. of 1855, have settled the matter by Statute, and that there is really no decision from 1810 to 1862 which lays down the doctrine of the exclusion of the wife. Both the High Court of Madras and the Sudder Court of the North-Western Provinces have recently ruled that her evidence is admissible. The only precautionary direction in which both the consent of nations and the practice of our Court seems to agree, is that the Court should exercise its discretion, and not unnecessarily force a near relation to give evidence or to answer unfair questions. That is, I think, a very proper rule, and it will probably meet the difficulties which seem to have suggested themselves to the minds of some Judges; but it is not exclusion by law. I would admit the evidence of the wife as not contrary to law, because it seems to me that there is no law to exclude it, and that, in the absence of such a law, all witnesses are admissible, subject to objection to their credibility.

SETON-KARR, J.—We have not had the advantage of hearing counsel on the important point submitted to us by the Divisional Bench, as none appeared on either side; but we have discussed the reference together, and I, personally, have had the advantage of perusing the elaborate judgments recorded by my learned colleagues, the Chief Justice, and Norman and Campbell, JJ. I lose no time in recording my own opinion, which is in unison with that of the learned Chief Justice and Campbell, J.

First, it seems to me that the Mahomedan law can be no possible warrant for our sanctioning the exclusion of a wife from giving evidence in criminal cases as a witness for or against her husband, or for or against other persons than her husband charged jointly with him on a criminal trial. The Mahomedan law relative to the admissibility of evidence was eminently fantastic, barbarous, unjust, and capricious. Regulations were made, from our earliest days, in order to remedy or annul its most patent absurdities, and, of late years, it has been, as a Code, entirely swept away.

It next seems to me that we can derive no warrant for the exclusion of the wife's testimony from any of the provisions contained in the well-known laws passed for the improvement of evidence, Act XV. of 1852, and Act II. of 1855.

The first of these laws, s. 3, merely enacts that nothing contained in the law shall render competent, or shall compel the wife to give evidence against the husband, and, *vice versa*, the husband against the wife. As remarked by the learned Chief Justice, this Act does not render either of these parties absolutely incompetent; it merely leaves matters in this respect just as they were.

The same remark applies to the later and the more comprehensive enactment, Act II. of 1855. S. 14 of this law, in declaring what persons are incompetent to testify, expressly mentions children under seven years of age and persons of unsound mind as incompetent, but says nothing about wives. S. 20, indeed, does expressly recognize the competence of husband and wife in all civil proceedings to give evidence for or against each other. But s. 58, the last section of the Act, specifies that nothing in the law shall render inadmissible

evidence now admitted in the Company's Courts, *i. e.*, in the Courts of the mofussil. By this proviso, then, it seems clear to me that the law of evidence in criminal trials was left just where it was.

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The next question then is, whether, interpreting the law, and referring to the decisions of the late Sudder and of our own Court, we can say that there has been such an uniform and consistent course of decisions from the commencement of this century, as to warrant us in ruling that the wife has been held, and ought to be held, incompetent to give evidence against or for her husband. The decisions referred to and analyzed by my learned colleagues sufficiently show that there has not been any such uniformity. It was clearly the practice of the Courts to admit such evidence in cases of necessity, or when other evidence could not be procured. Opinions can, no doubt, be quoted in favour of the exclusion of the wife, but it is on account of this diversity of opinion, and possibly of practice, that we are now called on to say what is the correct rule and practice, or to lay down some rule for the future. The earlier authorities are in favour of the admission of the wife. Mr. Mills, an eminent public servant, expressly recognizes the practice; and certainly, my own experience is that, in practice, the testimony of the wife is constantly admitted.

But, it may be said, if there has been this uncertainty of law and this diversity of opinion, why not take the opportunity of ruling that the English law, the offspring of great intellects, of liberal institutions, and of humanity and civilization, shall be our guide on this subject? We seem all agreed that the English law of evidence is not the law applicable to the Courts of the mofussil; but still it may fairly be contended that, in cases of doubt or difficulty, we may endeavour to arrive at a sound decision by reference to the analogies of a science, based on reason, and ameliorated by the labours of jurists and philanthropists of acute analytical powers, wide sympathies, and liberal views. It may be said, too, in furtherance of this view, that the experience of other countries confirms and strengthens the position of those who feel inclined to resort to, or to rest their decisions on, the English law.

In answer to this, I would observe that, as pointed out by the Chief Justice and Campbell, J., the laws of other countries are not absolute and uniform on this point. The English law itself admits of deviations from the rule of exclusion. At Common Law even, and before certain enactments were passed, the rule did not apply where personal injury had been committed by the husband against the wife, and *vice versa* (Broom's Legal Maxims, p. 477). A difference of opinion clearly exists amongst the highest English authorities as to whether the wife can give evidence against her husband in cases of high treason (Taylor on Evidence, p. 1066); and other "necessary exceptions," says the same authority, have been engrafted on the law of England, so as to admit of the wife's having a remedy against personal injury. In short, it seems quite clear that the law of England, positive as it is in many respects on this important doctrine, does admit of exceptions and qualifications; while the opinion of several eminent jurists tends directly to controvert the soundness of the principles on which the exception is based, and to enforce, as desirable in the interests of justice, the admissibility of the wife's evidence.

The long extract from Mr. Livingstone's writings quoted by the learned Chief Justice sets forth the arguments for the admission of such evidence with a logical force, with a breadth of view, and with a power of language, which I should think it would be difficult to refute or weaken. This is a task which I certainly shall not think of attempting.

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On this particular point, then, I may be warranted in at least concluding that the soundness of the English doctrine is fairly open to some question.

I have always understood that the basis of the English law in this respect is the maxim that husband and wife are "*duæ animæ in carne undæ*," and that the admission of the evidence of either would be against public policy, as leading to interminable discord, and to the disunion of families.

Then admitting, for the sake of argument, that much may be said in support of the exclusion of the wife, from a purely European point of view, we may fairly ask whether the circumstances which distinguish the marriage tie, and which regulate social life in this country, are on a strict parallel with those of civilized Europe. Our learned colleague, Norman, J., has quoted some excellent lines from an ancient poet and moralist relative to those "unwritten laws," which are an emanation from the Deity himself, and to which no human intellect ever gave birth. I admit their force in some instances, and as the foundation of all law; but for the matter before us I would venture to quote the language of another ancient author, the most eminent jurist of his time, who tells us—*Accommodabimus, hoc tempore, leges ad illum quem probamus civitatis statum*—(Cic. de Leg., Lib. iii., Chap. 2). And again—"*Constat profecto ad salutem civium, civitatumque incolumitatem, vitamque hominum, quietam et beatam inventas esse leges.*" (Id., Lib. ii., Chap. 5.) We must interpret laws in conformity to the temper and constitution of the people with whom we are dealing, and we must not lose sight of the great objects of all criminal legislation.

Now polygamy, we all know, is admitted and sanctioned by both the Hindu and the Mahomedan creeds, and is daily practised in India. Let us take a few of the dilemmas which may any day arise, if we give sanction to the prevalence of the English rule on this subject. A Kulin Brahmin may have seventy, eighty, or a hundred wives. Are we prepared to say that not one of these women is, under any circumstances, to give evidence for or against her husband in a criminal trial involving the most serious consequences? It is true that it is not usual for such a husband to live with all the seventy, eighty, or hundred wives at one and the same time and place; and that, therefore, it is not competent for us to base an argument on the supposition that all, or a majority, or half a dozen of the wives may be witnesses of the same crime, or of a series of crimes on the part of the husband, and that all the mouths of all these wives, of necessity, will be shut if the rule of exclusion is to guide the Courts. But it is common for a Hindu husband to live with more than one wife at one and the same time, and in the same household or place. We hear of the wife and of the co-wife, and of the elder rani and the younger ranis, living together with the husband in numerous cases. Suppose a Hindu or Mahomedan, in the secret privacy of his household, actuated by a fit of passion, or jealousy, or pique, to kill one wife, or slay a daughter, after barring the doors and carefully excluding every other competent witness, are the mouths of the remaining wives to be closed, and is justice to be evaded? Or, suppose the converse. In a family, where there are three wives, one is assassinated or poisoned by one of others: suspicion, owing to circumstances which will suggest themselves to any mind, falls on the husband: of the two remaining wives, one knows that the other committed the crime, and her evidence may have the corroboration of the most important circumstantial evidence; but she is not allowed to tender the deposition which would clear her husband, and would convict the murderess, because she is the only witness, and her evidence is not admissible by law. It would be very easy to go on and imagine scores of such probable and possible cases, marked by every variety and shade of difficulty. Again, we have the custom of polyandry in the hills

and in some parts of the plains. Are we prepared to lay down this rule of exception, and to push it to its farthest and remotest conclusion, by saying that when seven husbands commit a crime in succession, or labour unjustly under the suspicion of having committed various sorts of crimes, the ends of justice are to be defeated, or the innocent are to suffer, because the wife of the seven may not be put into the witness-box to inculcate or exculpate any one of those seven, to whom she stands in the position, not of the half which is more than the whole, but of a seventh portion of a domestic partner?

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But, it will be said, we increase the temptation to commit perjury, under which temptation would lie the wife who gave evidence against the husband, whom she either loved or hated, and whom she might wish to save or to ruin. I confess that this is a danger which I am prepared to meet at all times in order to do justice; and I cannot admit that the consideration is paramount to all others, or that the temptation would be of greater force in the case of wife *versus* or for the husband, than it would be, or is daily, in any case where passions are excited or sympathies are strongly enlisted on one side or the other. Is it not fair to conceive that the tie which binds a son to a father, a disciple to a Brahmin, a *shagird* to his *pir* and *murshid*, a retainer to a chief, might, in this country and climate, prove at least as strong against the truth, as the tie which binds a wife to a husband who has one, two, or a dozen other wives, and who, according to his Eastern notions, does not assign to any of them that high place in the affections, or in the social circle, which is conceded to woman in all Western countries?

At any rate, looking to the admitted prevalence of perjury in the Courts of this country, this appears to me a danger which we cannot get rid of, but which we must face boldly, and endeavour to expose by strict judicial enquiry in the case of a wife, just as we do in the case of any other person interested, connected, or influenced by peculiar motives and ties, personal and feudal, secular, social, or religious.

On the whole, then, admitting the seriousness and importance of this subject, as well as the possibility of a fair and reasonable opposition of judicial opinions, I have come to the conclusion that, looking to the law and practice, as well as to the ends of justice and to grounds of public policy, the questions referred to us by the Divisional Bench should be answered by us in the affirmative.

My reasons I would sum up as follows:—

1. The Mahomedan law, besides being barbarous and uncivilized, no longer rules or influences the decisions of our Courts on points of evidence.
2. The evidence of a wife is not rendered inadmissible by any enactment of the Anglo-Indian Legislature.
3. There exists no such consistent and uniform current of decisions of the highest Courts in the country, as would exclude the wife; but, on the contrary, in spite of some diversity of opinion, the practice has been to take such evidence.
4. Granting that we may have recourse to the principles and analogies of English law in cases of difficulty and doubt, there is some reason to think the state of the English law on this head not wholly unassailable, and there is every reason to conclude that it would be highly inapplicable to the peculiar circumstances of this country, as well as that it might tend to defeat the ends of justice, and to encourage secret and violent crime.

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KEMP, J.—These papers have come to me after my learned colleagues have recorded their elaborate judgments. The last word generally is an advantage; but in this instance so much has been said, and so well said, on both sides of the question, that I feel that, whether I agreed or differed with the majority, I could only give my simple concurrence with one view or the other. Whether the evidence of a wife for or against her husband, and, *vice versa*, that of a husband, is properly excluded in Courts which have to administer the law of England, is a question upon which I feel that I am not competent to give any opinion worth having. My own feelings and impressions are that it is properly excluded, and when I find such eminent Judges as Lord Hardwicke, Lord Kenyon, Justice Buller, and others of the like stamp holding the same opinion, I am content to err in such company. But that is not the question before us. Our Courts are not bound to administer the law of England. Is there, then, any Regulation or Act of Government which enacts that such evidence is not admissible in our Courts, and has such evidence been admitted or not in our Courts?

The judgments of the learned Chief Justice, and Seton-Karr and Campbell, JJ., have fully convinced me that such evidence is not excluded by any Regulation or Act, and that the current of decisions in our Courts is on the whole in favour of its admission. It would be presumptuous in me to attempt to add anything to the able and elaborate arguments of those learned Judges, and I content myself with expressing my concurrence in the opinion expressed by them. I have held a different opinion hitherto, but I yield to the new light which has been thrown on the subject, and frankly admit that I have hitherto taken a more impulsive than sound view of this question.

## DIGEST OF CRIMINAL RULINGS, B. L. R.

### Abduction—

See UNLAWFUL ASSEMBLY, 2.

### Abduction per se no offence—

See WARRANT, 3.

### Abetment—

**ABETMENT**—*Penal Code (Act XLV. of 1860), ss. 107, 202, 382*—*Omission to inform police when an offence has been committed.*] An omission to give information that a crime has been committed does not, under s. 107 of the Penal Code, amount to abetment, unless such omission involves a breach of a legal obligation. A private individual is not bound by any law to give information of any offence which he has seen committed.—*Queen v. Khadim Sheikh*, 4 B. L. R. A. Cr. 7 [or p. 157].

See APPEAL, 4.

WAGING WAR.

### Abetment of False Charge—

See FALSE CHARGE, 3.

### Abkari Laws—

See EXCISE.

### Abkari Rules—

See LORD'S DAY ACT.

### Absence of Accused—

Passing sentence in. See EXAMINATION OF WITNESSES.

### Absence of Complainant—

**1. ABSENCE OF COMPLAINANT**—*Dismissal of charge for default*—*Discharge of accused*—*Penal Code (Act XLV. of 1860), ss. 143, 342.*] The complainants preferred a charge against the accused under ss. 143 and 342 of the Penal Code for wrongfully and unlawfully confining them. The complainant and his witnesses did not attend on the day fixed for the trial, and the Deputy Magistrate struck off the case. Subsequently the complainants applied to the District Magistrate that their evidence might be heard, and the case tried. The District Magistrate referred the case to the High Court, recommending that the Deputy Magistrate should rehear the case. The High Court considered the reference unnecessary; there had been no trial; the accused was simply discharged because the complainants and their witnesses were not in attendance; and the Deputy Magistrate's order was not illegal.—*Queen v. Abdul Biswas*, 7 B. L. R. 8 note [or p. 357].

**2. ABSENCE OF COMPLAINANT**—*Discharge of accused*—*Criminal misappropriation*—*Criminal Procedure Code (Act XXV. of 1861), ss. 248 and 259, and chaps. 14 and 15.*] Glover, J.—The mere fact of a summons having been issued for criminal misappropriation, in the first instance, instead of a warrant, under s. 248, did not bring the case within the purview of chap. 15 of the Code of Criminal Procedure, or allowed the Magistrate to dismiss the complaint under s. 259 for the absence of the complainants. This is clearly illegal. The case remained subject to the rules laid down in chap. 14 of the Code, and there is no provision in that chapter for the dismissal of complaints on account of non-attendance of complainants.—*Queen v. Bhagabati Suthran*, 7 B. L. R. 9 note [or p. 358].

### Absence of Complainant (contd.)—

*Wrongful confinement*—*Penal Code (Act XLV. of 1860), s. 347.*] A Deputy Magistrate has no power to dismiss, in default of prosecution, a charge laid under s. 347 of the Penal Code, of wrongful confinement for the purpose of extorting money. Where the evidence of a prosecutor and his witnesses is taken in the presence of the accused, and the case is postponed by the Court for the evidence of witnesses for the defence, the case ought not to be dismissed for default of prosecution, if on the day to which it has been postponed the prosecutor is not present.—*Queen v. Bidur Ghose*, 7 B. L. R. 9 note [or p. 358].

### 3. ABSENCE OF COMPLAINANT—

*Wrongful confinement*—*Penal Code (Act XLV. of 1860), s. 347.*] A Deputy Magistrate has no power to dismiss, in default of prosecution, a charge laid under s. 347 of the Penal Code, of wrongful confinement for the purpose of extorting money. Where the evidence of a prosecutor and his witnesses is taken in the presence of the accused, and the case is postponed by the Court for the evidence of witnesses for the defence, the case ought not to be dismissed for default of prosecution, if on the day to which it has been postponed the prosecutor is not present.—*Queen v. Bidur Ghose*, 7 B. L. R. 9 note [or p. 358].

### Accomplice—

**1. ACCOMPLICE** — *Corroboration* — *Evidence as to prisoner's previous character.*] In a case in which the principal evidence against the accused is the evidence of an approver, the Sessions Judge should carefully warn the jury of the infirmity which attaches that evidence, and he should also tell them (if the Act be so) that the approver is speaking under the influence of any offer of conditional pardon. The corroboration of the evidence of an approver should arise from other evidence relative to facts which implicate the prisoner in the same way as the story of the approver does. Evidence of character and previous conduct of a prisoner, being matters of prejudice, and not direct evidence of facts relevant to the charge against the prisoner, ought not to be

**Accomplice (contd.)—**

allowed to go to the jury.—*Queen v. Baikanthanath Banerjee*, 3 B. L. R. F. B. 3 note [or p. 80].

2. **ACCOMPLICE—Evidence of approver.]** The evidence of an approver is not sufficient to convict a person charged with an offence.—*Queen v. Tulsi Dosad*, 3 B. L. R. A. Cr. 66 [or p. 130].

3. **ACCOMPLICE—Evidence of—Judge's summing-up—Evidence of accused's bad character—Improper admission of evidence—Discharge of prisoner on appeal—Recording deposition.]** Where a Sessions Judge, in his charge to the jury in a case in which an approver-accomplice gave his evidence, drew the attention of the jury to the necessity for requiring corroboration to approver's evidence before they could convict upon it, and the jury, notwithstanding his charge, convicted upon the uncorroborated evidence of the accomplice, it was held, following a Full Bench case cited, that the High Court could not interfere with such conviction. Where a Sessions Judge omitted in his charge to the jury to comment on different parts of the evidence for the defence, to which he simply alluded as being unimportant, and allowed evidence as to character and hearsay evidence to go to the jury, the High Court acquitted the prisoner, the other evidence in the case being insufficient for conviction. Evidence as to character ought not to be laid before a jury, but should only be taken and considered by the Sessions Judge in awarding punishment.—*Queen v. Mahima Chandra Das*, 6 B. L. R. Ap. 108 [or p. 346].

4. **ACCOMPLICE—Testimony of—Corroboration—Criminal Procedure Code (Act XXV. of 1861), ss. 419, 426—Reversal of finding.]** The uncorroborated testimony of one or more accomplice or accomplices is sufficient in law to support a conviction (see Act I. of 1872, s. 133). The evidence of accomplices should not be left to the jury without such directions and observations from the Judge as the circumstances of the case may require, pointing out to them the danger of trusting to such evidence when it is not corroborated by other evidence. The omission to do so is an error in law in the summing-up by the Judge, and is, on appeal, a ground for setting aside the conviction, when the Appellate Court

**Accomplice (contd.)—**

thinks that the prisoner has been prejudiced by such omission, and that there has been a failure of justice. The nature and extent of the corroboration requisite explained and illustrated. The word "reverse" in ss. 419 and 426, Code of Criminal Procedure, means to make void, to set aside or annul, and not merely to change or turn into the contrary.—*Queen v. Elahi Bax*, B. L. R. Sup. Vol. 459 [or p. 710].

See CONFESSION, 4.  
SENTENCE, 3.

**Account—**

See CRIMINAL BREACH OF TRUST, 1.

**Account-Books—**

Dishonest removal of. See PARTNER, 1.

Forcibly taking away. See THEFT.

Taking Possession of. See PARTNER, 2.

**Accused—**

See EXAMINATION OF ACCUSED.

Passing Sentence in Absence of. See EXAMINATION OF WITNESSES.

**Acquittal—**

**ACQUITTAL—Criminal Procedure Code (Act XXV. of 1861), ss. 402-407—Powers of High Court—Appeal—Revision—Alteration of verdict and sentence—Joint charges.]** The High Court has no power, either as a Court of Appeal or as a Court of Revision, to reverse, alter, or set aside a verdict of acquittal, even if it be contrary to the evidence. A Magistrate should not send up joint charges to the Sessions Court against persons who take part in a riot on opposite sides, as they have not a common object. But where a person had been so jointly charged, and rightly convicted by the Sessions Court, held (Macpherson, J., dissenting) that, as the prisoner had not been prejudiced by the mistake of the Magistrate, there was no sufficient ground for setting aside his conviction or ordering a new trial.—*Queen v. Sheikh Bazu*, B. L. R. Sup. Vol. 750 [or p. 738].

See DISCHARGE, 1.

JURY, 5.

REVISION, 4, 5.

**Acquittal by Jury—**

See PRIVILEGED COMMUNICATION.

**Act XXXIV. of 1850 (State Prisoners)—**

See HABEAS CORPUS, 2.

- Act II. of 1855 (Evidence)**—  
S. 24. See PRIVILEGED COMMUNICATION.  
S. 28. See FALSE EVIDENCE, 12.
- Act XXI. of 1856 (Abkari)**—  
See EXCISE.
- Act III. of 1857 (Cattle-tree-pass)**—  
See NUISANCE.
- Act VI. of 1857 (Land Acquisition)**—  
S. 8. See RIGHT OF WAY.
- Act XI. of 1857 (State Of-fences)**—  
See WAGING WAR.
- Act XIII. of 1857 (Opium)**—  
Ss. 20, 30. See OPIUM.
- Act III. of 1858 (State Prisoners)**—  
See HABEAS CORPUS, 2, 3.
- Act X. of 1859 (Rent)**—  
S. 145. See FRAUDULENT REMOVAL OF PROPERTY.
- Act XIII. of 1859 (Artificers)**—  
See ARTIFICERS.
- Act XXVII. of 1860 (Certificate to collect Debts)**—  
See POSSESSION, 1.
- Act XXXI. of 1860 (Arms)**—  
See DISOBEDIENCE TO PUBLIC SERVANT, 3.  
Ss. 25, 26, 32. See ARMS' ACT, 1.  
S. 32. See ARMS' ACT, 2.
- Act V. of 1861 (Police)**—  
See POLICE-OFFICER.  
S. 17. See EXECUTIVE ORDER.
- Act X. of 1862 (Stamp)**—  
S. 50, cl. 2. See STAMP.
- Act XV. of 1862 (Amending Criminal Procedure Code)**—  
S. 1. See SENTENCE, 7.
- Act XVII. of 1862 (Repealing Enactments)**—  
See REVIEW.  
S. 4. See WAGING WAR.
- Act XVIII. of 1862 (Criminal Procedure, Supreme Courts)**—  
S. 41. See STATEMENT OF ACCUSED.
- Act III. of 1864 B.C. (Mofussil Municipality)**—  
S. 66. See DAILY FINE, 2.  
S. 67. See NUISANCE, 10.
- Act V. of 1864 B.C. (Canal-tolls)**—  
S. 16. See OBSTRUCTING NAVIGATION.
- Act VI. of 1864 (Whipping)**—  
See WHIPPING.
- Act VII. of 1864 B.C. (Salt)**—  
S. 16. See SALT.
- Act VI. of 1865 B.C. (Native Labourers)**—  
Ss. 31, 32. See LABOURERS' WAGES.
- Act VII. of 1865 B.C. (Slaughter-houses)**—  
S. 7. See SLAUGHTER-HOUSE, 1.
- Act XI. of 1865 (Mofussil Small Cause Courts)**—  
S. 21. See FALSE EVIDENCE, 2.
- Act XIII. of 1865 (High Court's Criminal Procedure)**—  
See HIGH SEAS.  
S. 8. See DEPOSITION.
- Act XX. of 1865 (Pleaders and Mukhtars)**—  
See MOOKHTEAR, 1 to 4.
- Act IV. of 1866 B.C. (Calcutta Police)**—  
S. 26. See SUMMARY CONVICTION.
- Act VI. of 1866 B.C. (Amending Beng. Act VI. of 1863)**—  
Conviction under. See SENTENCE, 2.
- Act XX. of 1866 (Registration)**—  
Ss. 93, 94. See FALSE PERSONATION.  
REGISTRATION, 2.  
S. 95. See JURISDICTION, 3.  
REGISTRATION, 1.
- Act IX. of 1868 (Taxing Professions and Trades)**—  
S. 17. See CERTIFICATE-TAX.
- Act XIV. of 1868 (Contagious Diseases)**—  
Ss. 11, 21. See COMMON PROSTITUTES.
- Act XXVII. of 1870 (Amending Penal Code)**—  
Ss. 10, 294A. See LOTTERY OFFICE.
- Act VIII. of 1871 (Registration)**—  
S. 82. See JURISDICTION, 7.
- Act X. of 1873 (Oaths)**—  
Ss. 5, 13. See EVIDENCE, 11.  
S. 13. See OATH.
- Act X. of 1875 (High Court's Criminal Procedure)**—  
S. 147. See TRANSFER OF CASE, 4.
- Actual Possession**—  
See POSSESSION.
- Additional Evidence**—  
See APPEAL, 5.



**Additional Inquiry—**

See REMAND, 3.

**Adjournment—**

See REMAND, 2.

**Admissibility of Evidence—**

See EVIDENCE, 4, 5.

**Admission—**See EVIDENCE, 9.  
THREAT.**Affidavit—**

See HABEAS CORPUS, 1.

**Affray—**

See NUISANCE, 6, 7, 12.

**Allegiance—**

See HABEAS CORPUS, 3.

**Alteration of Charge after Accused pleads Guilty—**

See PRIVATE DEFENCE, 3.

**Alteration of Verdict and Sentence—**

See ACQUITTAL.

**Alternative Charge—**

See FALSE EVIDENCE, 10, 13.

**Alternative Finding—**

See FALSE EVIDENCE, 11, 13.

**Alternative Statements—**

See FALSE EVIDENCE, 4.

**Annoyance—**

See NUISANCE, 6, 7.

**Answers to Police or Magistrate—**

See STATEMENTS OF ACCUSED.

**Appeal—**

1. APPEAL—*Criminal Procedure Code (Act XXV. of 1861), s. 411—Separate offences.*] A was convicted of offences, under ss. 143, 447, and 211 of the Penal Code, and sentenced by the Magistrate to one month's imprisonment for each offence. Held that, under s. 411 of Act XXV. of 1861, there was no appeal. The separate sentences could not be taken together, and combined into one sentence, so as to give a right of appeal.—*Queen v. Nagardi Paramanik*, 1 B. L. R. A. Cr. 3 [or p. 2].

2. APPEAL—*Letters Patent, 1865, s. 36—Criminal Procedure Code (Act XXV. of 1861), s. 420.*] When a criminal appeal is heard by two Judges sitting as a Division Court, and they differ in opinion, the opinion of the senior Judge must prevail under s. 36 of the Letters Patent of the High Court, notwithstanding

**Appeal (contd.)—**

ing s. 420 of the Criminal Procedure Code.—*Queen v. Kazim Thakoor*, 2 B. L. R. F. B. 25 [or p. 51].

3. APPEAL—*Criminal Procedure Code (Act VIII. of 1869), ss. 445A, 445C—Deputy Commissioner.*] The right of appeal to the High Court given by s. 445C of the Criminal Procedure Code to persons convicted on a trial held by an officer invested with the power described in s. 445A is confined to cases in which the officer has exercised that power.—*Queen v. Dhona Bhooya*, 5 B. L. R. 658 [or p. 222].

4. APPEAL—*Code of Criminal Procedure (Act XXV. of 1861), ss. 407, 426.*] A was charged with the offence of voluntarily causing hurt to C, and B was charged with the same offence, and also with the offence of abetting A. The Magistrate found A guilty of the offence, and sentenced him to three months' rigorous imprisonment. The Magistrate also found B guilty of abetment of the offence of voluntarily causing hurt to C, and sentenced him to one month's rigorous imprisonment and a fine. On appeal, the Sessions Judge held that there was no evidence to convict A, and he accordingly released the prisoner. The appeal of B, however, was rejected, on the ground that the evidence, though it did not prove him guilty of abetment, proved him guilty of voluntarily causing hurt, and, therefore, under s. 426 of the Code of Criminal Procedure, the sentence could not be reversed. No "error or defect either in the charge or in the proceedings on trial" was alleged. Held (by Mitter, J.) that s. 426 of the Code of Criminal Procedure did not apply.—*Queen v. Mahendranath Chatterjee*, 5 B. L. R. Ap. 39 [or p. 226].

5. APPEAL—*Criminal Procedure Code (Act VIII. of 1869), s. 422.*] Upon an appeal from a sentence passed by a Magistrate, the Sessions Judge remanded the case for the purpose of additional evidence being taken by the lower Court. Such evidence having been taken by the Magistrate, the case was returned to the Appellate Court. The Sessions Judge then disposed of the case in the manner prescribed by s. 419 of the Criminal Procedure Code. On an application by the prisoner to the High Court to be allowed to appeal on the merits of the case under s. 408, Act XXV. of 1861, held no appeal

**Appeal (contd.)—**

lay to the High Court on the merits.—In the Matter of the Petition of Dhanobar Ghose, 6 B. L. R. 483 [or p. 306].

6. APPEAL—*Power of a single Judge of the High Court.*] A Judge of the High Court, sitting alone on the Appellate Side, has the power to hear and dispose of appeals in criminal cases.—*Queen v. Chandra Jugi*, 9 B. L. R. 6 [or p. 485].

See ACCOMPLICE, 3.

ACQUITTAL.

REVIEW.

REVISION, 1.

SUMMARY TRIAL.

**Application for Copies—**

See COPIES OF RECORDS.

**Approver—**

See ACCOMPLICE.

**Arms' Act—**

1. ARMS' ACT (XXXI. of 1860), ss. 25, 25, 26, 32—*Carrying or possessing arms without a license—Issue of summons or warrant without specifying the charge.*] In districts where s. 32 of Act XXXI. of 1860 is not in force, it is not an offence to be in possession of arms.—In the Matter of the Petition of Baboo Rameshar Prasad Narayan Singh, 9 B. L. R. Ap. 34 [or p. 545].

2. ARMS' ACT (XXXI. of 1860), s. 32—*Possession of arms without license.*] The mere possession of arms is no offence under Act XXXI. of 1860 in districts where s. 32 of the Act is not in force.—*In re Madnarain Pari*, 9 B. L. R. 34 note [or p. 546].

See DISOBEDIENCE TO PUBLIC SERVANT, 3.

**Arrears of Rent—**

See TOLLS.

**Arrest—**

See TOLLS.

TRANSFER OF CASE, 3.

WAGING WAR.

WARRANT, 2.

**Arrest and Detention of Accused and Witnesses—**

See WARRANT, 1.

**Arrest of Judgment—**

See STATEMENT OF ACCUSED.

**Artificers—**

1. ARTIFICERS—*Act XIII. of 1859—Servants—Artificer, workman, labourer.*] Act XIII. of 1859 does not apply to contracts for a "chakri," domestic or

**Artificers (contd.)—**

personal service, but to contracts to serve as artificer, workman, or labourer.—In the Matter of Domestic Servants, 3 B. L. R. A. Cr. 32 [or p. 109].

2. ARTIFICERS—*Act XI I. of 1859—Breach of contract to supply wood.*] A breach of contract to supply wood does not fall within the purview of Act XIII. of 1859.—In the Case of the Upper Assam Tea Company v. Thopoor, 4 B. L. R. Ap. 1 [or p. 166].

**Assault—**

ASSAULT—*Causing hurt*—"Autre fois acquit"—*Penal Code (Act XLV. of 1860), s. 352—Criminal Procedure Code (Act XXV. of 1861), s. 55.*] A person who is tried and discharged for the offence of assault under s. 352, Penal Code, cannot again, upon the same complaint, be tried for "causing hurt."—*Kaptan v. G. M. Smith*, 7 B. L. R. Ap. 25 [or p. 444].

**Assertion of Proprietary Right—**

See DISMISSAL OF COMPLAINT, 5.

**Assessors—**

1. ASSESSORS—*Summing-up to—Waging war against Queen—Conspiracy to wage war—Treason—Misprison of treason—Limitation of period of prosecution—Documents, Admissibility of, in evidence—Penal Code (Act XLV. of 1860), s. 121—Criminal Procedure Code (Act XXV. of 1861), s. 379—7 Will. III., c. 3, s. 5.*] Although the Code of Criminal Procedure does not expressly provide for summing-up of the evidence in a trial with the aid of assessors, there is nothing in the Code to prevent a Judge from summing-up the evidence to the assessors. Where one of the two assessors says that he thinks it proved that a war was waged against the Queen, that there was a conspiracy to carry on that war, and that the prisoner is guilty of all the acts charged, and the other assessor concurs with him, it cannot be said that the assessors have given no reason of their opinion. The offence of engaging in a conspiracy to wage war, and that of abetting the waging of war against the Queen, under s. 121 of the Penal Code, are offences under the Penal Code only, and are not treason or misprison of treason; and therefore the provisions of the Statute 7 Will. III., c. 3, s. 5, are not applicable. The *Gazette of India, or Calcutta Gazette*, containing official letters on the subject of hostilities between the

**Assessors (contd.)—**

British Crown and Mahomedan fanatics on the frontier, were rightly admitted in evidence, under ss. 6 and 8 of Act II. of 1855, as proof of the commencement, continuation, and determination of hostilities. Similarly, under s. 6, a printed letter from the Secretary to the Government of the Punjab to the Secretary to the Government of India was properly resorted to by the Court for its aid as a document of reference. It was not necessary that these documents should be interpreted to the prisoner. It was sufficient that the purposes for which they were put in were explained.—*Queen v. Amiruddin*, 7 B. L. R. 63 [or p. 367].

2. **ASSESSORS—Summing-up to—Statement before Magistrate.** Where a statement made by an accused before the Magistrate bears the Magistrate's attestation, proof of the statement having been made is not necessary, but the proceedings must be presumed to be regular until the contrary is shown. A summing-up of the evidence is not required in a case tried by assessors.—*Queen v. Joge Poly*, 7 B. L. R. 67 note [or p. 369].

See PLEA OF GUILTY.

**Attached Property—**

**ATTACHED PROPERTY—Review of order in criminal case—Fraud—Forfeited property—Criminal Procedure Code (Act XXV. of 1861), ss. 184, 185—Penal Code (Act XLV. of 1860), s. 174.** Where property of an absconding offender had been attached and declared to be at the disposal of Government under s. 184 of the Criminal Procedure Code, and the offender was subsequently convicted under s. 174 of the Penal Code, and such conviction was upheld on appeal, held that the High Court had no power to make any order with respect to such property. Where an order for the release of the property so attached had been obtained from the High Court on an *ex-parte* application, and on an incorrect statement of facts, the High Court, on the application of the Government, cancelled such order.—In the Matter of the Petition of the Government of Bengal, 9 B. L. R. 342 [or p. 525].

**Attempt at Murder—**

See EVIDENCE, 11.

**Attempt at Rape—**

See SENTENCE, 1.

**Attempt to commit Offence—**

**ATTEMPT TO COMMIT OFFENCE—Acts sufficiently indicative of—Penal Code (Act XLV. of 1860), ss. 511, 436—Possession of a fire-ball.]** Held, by Glover, J., that incendiarism having, on several occasions, occurred in a village, produced by a ball of rag with a piece of burning charcoal within it, and the prisoner one evening being discovered to have a ball of that description concealed in his dhoti, which contained burning charcoal, he is, under s. 511 of the Penal Code, guilty of an attempt to commit mischief by fire. The possession of the instrument to commit mischief by fire, and the going about of the person with it, are sufficient to raise a presumption that he intended to commit the act, and had already begun to move towards the execution. These facts are sufficient to constitute an attempt. Held, by Mitter, J., that the possession of a fire-ball and moving about with it cannot support a conviction under ss. 436 and 511 of the Penal Code. These facts are not sufficiently indicative of an intention to destroy a building used for human dwelling. To constitute an offence under s. 511 of the Penal Code, it is not only necessary that the prisoner should have done an overt act towards the commission of the offence, but that the act itself should have been done in the attempt to commit it.—*Queen v. Doyal Bawri*, 3 B. L. R. A. Cr. 55 [or p. 123].

**Attestation—**

See CONFESSION, 1.

**Attestation of Confession—**

See EXAMINATION OF ACCUSED, 2.

**Autre fois Acquit—**

See ASSAULT.

**Award of Jury—**

See JURY, 2.

B.

**Bad Character—**

Evidence as to Accused's. See ACCOMPLICE, 3.

**Bail—**

**BAIL—Criminal Procedure Code (Act XXV. of 1861), ss. 411, 434, 436—“Accused person”—Power of Court of Session to admit to bail.]** A person sentenced to one month's imprisonment by

**Bail (contd.).—**

a Magistrate, from which sentence no appeal is allowed under s. 411 of Act XXV. of 1861, is not an accused person within the meaning of s. 436 of the same Act, so as to be admitted to bail by the Court of Session, when his case is referred to the High Court under s. 434 of the same Act.—*Queen v. Mahendranarayan Bangabhushan*, 1 B. L. R. A. Cr. 7 [or p. 5].

See NUISANCE, 2.

TRANSFER OF CASE, 3.

**Beng. Act III. of 1864 (Mofussil Municipality)—**

S. 66. See DAILY FINE, 2.

S. 67. See NUISANCE, 10.

**Beng. Act V. of 1864 (Canal-tolls)—**

S. 16. See OBSTRUCTING NAVIGATION.

**Beng. Act VII. of 1864 (Salt)—**

S. 16. See SALT.

**Beng. Act VI. of 1865 (Native Labourers)—**

SS. 31, 32. See LABOURERS' WAGES.

**Beng. Act VII. of 1865 (Slaughter-house)—**

S. 7. See SLAUGHTER-HOUSE, 1.

**Beng. Act IV. of 1866 (Calcutta Police)—**

S. 26. See SUMMARY CONVICTION.

**Beng. Act VI. of 1866 (Amending Beng. Act VI. of 1863)—**

Conviction under. See SENTENCE, 2.

**Bond—**

See FORGERY, 2.

**Bond to keep Peace—**

See RECOGNIZANCE, 1, 2, 6.

**Breach of Contract—**

See ARTIFICERS.

**Breach of Peace—**

See POSSESSION, 2.  
RECOGNIZANCE.

**British Burmah—**

See LORD'S DAY ACT.

**Burthen of Proof—**

See ENTICEMENT.

**Bye-laws of Municipality—**

See DAILY FINE, 1.

**C.****Cattle—**

Neglecting to take care of. See DISOBEDIENCE TO PUBLIC SERVANT, 2.

**Cattle-straying—**

CATTLE-STRAYING—*Criminal Procedure Code (Act XXV. of 1861), s. 62—Order by a Magistrate prohibiting the straying of cattle—Conviction for breach of such order.* An order by a Magistrate, prohibiting the straying of cattle within certain local limits, is not an order within the meaning of s. 62 of the Code of Criminal Procedure. There can be no conviction for disobedience of such order under s. 289 of the Penal Code.—*Queen v. Mozafar Khalifa*, 9 B. L. R. Ap. 36 [or p. 547].

**Cattle-trespass—**

CATTLE-TRESPASS—*Penal Code (Act XLV. of 1860), s. 425.* Mere neglect on the part of an owner of cattle to keep them from straying into fields, is not causing cattle to enter a compound within the meaning of s. 425 of the Penal Code. The section requires that, before the owner is convicted of the offence, it must be proved that he actually caused the cattle to enter, knowing that, by so doing, he was likely to cause damage.—*Major Forbes and another v. Girish Chandra Bhuttacharjee*, 6 B. L. R. Ap. 3 [or p. 315].

See NUISANCE, 8.

**Certificate—**

See POSSESSION, 1.

Practising without. See MOOKHTEAR, 1.

**Certificate-tax—**

CERTIFICATE-TAX—*Fine—Neglect.* The fine imposed under s. 17, Act IX. of 1868, for neglect to take out a certificate, must not be less than twice the amount for which such certificate should be taken out.—*Queen v. Ramgobind Chuckerbutty*, 2 B. L. R. Ap. 40 [or p. 76].

**Certiorari—**

See SENTENCE, 2.

**Character—**

Evidence as to Prisoner's Previous.

See ACCOMPLICE, 1.

**Charge—**

Alteration of, after Accused pleads guilty. See PRIVATE DEFENCE, 3.

Dismissal of, for Default. See ABSENCE OF COMPLAINANT, 1; DISCHARGE, 3.

**Charge to Jury—**

See JURY, 1, 4.

**Chemical Examiner's Report.—**

See REPORT OF CHEMICAL EXAMINER.

**Child's Evidence—**

See EVIDENCE, 11.

**Civil Process—**

See RESISTANCE OF CIVIL PROCESS.

**Collector under Stamp Act—**

Jurisdiction of. See STAMP.

**Commencement of Sentence—**

See SENTENCE, 4.

**Commitment—**

See EUROPEAN BRITISH SUBJECT.

EXAMINATION OF ACCUSED, 1.

JURISDICTION, 2.

WARRANT, 2.

Without Evidence. See TRANSFER OF CASE, 3.

**Committal—**

1. COMMITTAL—*Procedure—Direction to commit—Criminal Procedure Code (Act XXV. of 1861), ss. 427, 435.*

An offence under s. 457 of the Penal Code being triable by a Deputy Magistrate, the Sessions Judge has no power, under ss. 427 and 435 of Act XXV. of 1861, to quash the Deputy Magistrate's conviction, and direct the accused to be committed for trial.—Reference by the Officiating Additional Sessions Judge of the 24-Pergunnas in the Case of Guhini Musulmani v. Hakim Sirdar, 2 B. L. R. S. N. 2 [or p. 72].

2. COMMITTAL—*Criminal Procedure Code (Act X. of 1872), s. 296—Powers of a Sessions Court to order committal of accused discharged by a Magistrate.*

An order by a Judge, under s. 296 of Act X. of 1872, directing a Magistrate to commit an accused person, who has been discharged at a preliminary enquiry, to take his trial in a Court of Session, must specify the particular act constituting the offence charged. The Judge cannot direct a committal for offences with which the accused was in no way charged before the Magistrate.—Queen v. Tarucknath Mookerjee, 10 B. L. R. 285 [or p. 553].

See COMPENSATION.

DISCHARGE, 1.

FALSE EVIDENCE, 3, 4.

**Committing Magistrate—**

Evidence before. See EVIDENCE, 10.

**Common Prostitutes—**

COMMON PROSTITUTES—*Act XIV. of 1868, ss. 11, 21—Registry of common prostitutes—Jurisdiction of Magistrates to entertain pleas of irregularity in the registry—Possession of registry-ticket.* Under Act XIV. of 1868, the police are not empowered to put a woman on the register of "common prostitutes" against her will. The penalty prescribed by s. 11, Act XIV. of 1868, for disobedience of any of its rules, is for a "woman" who voluntarily registers herself as a "common prostitute." A Magistrate has authority to hear any objection urged by a woman charged with disobedience of the rules under Act XIV. of 1868 against the legality of her registry, or that she is not a common prostitute. The possession of a registry-ticket is not sufficient evidence of being a common prostitute.—In the Case of Lakhimani Rar, 3 B. L. R. A. Cr. 70 [or p. 133].

**Commutation of Sentence—**

See SENTENCE, 1, 5, 7.

**Compensation—**

COMPENSATION—*Power of a Magistrate—Criminal Procedure Code (Act XXV. of 1861), ch. 15—False evidence—Committal on a charge of perjury.* When a prosecutor fails to substantiate his charge by making contradictory statements, the Magistrate who tries the case under ch. 15 of the Criminal Procedure Code can award compensation to the accused, although he commit the prosecutor to take his trial on a charge of giving false evidence.—Queen v. Rupan Rai, 6 B. L. R. 296 [or p. 246].

See DISMISSAL OF COMPLAINT, 1.

**Competent Witness—**

See EVIDENCE, 11.

When a Judge is a. See WITNESS.

**Complaint—**

1. COMPLAINT—*Code of Criminal Procedure (Act XXV. of 1861), ss. 66, 273, 426, 439—Complaint to be reduced to writing—Irregularity in the commencement.* Under s. 66 of the Code of Criminal Procedure, the examination of the prosecutor should be reduced to writing, and signed by him. When a complaint is made before a Magistrate, but not reduced to writing, he cannot, under s. 273 of the Code of Criminal Procedure, refer the case to a Deputy Magistrate for trial. Ss. 426 and 439 do not apply to a case where the prosecution is not com-

**Complaint (contd.)—**

menced by a complaint, as directed in the Code. A conviction with such irregularity cannot stand good, merely because the amount of punishment would have been the same if proper proceedings had been instituted.—*Queen v. Mahim Chandra Chuckerbutty*, 3 B. L. R. A. Cr. 67 [or p. 131].

2. COMPLAINT—*Criminal Procedure Code (Act XXV. of 1861)*, ss. 66, 273, 439—*Complaint to be reduced to writing—Irregularity in the commencement.*] On receipt of a petition from the complainant, the Magistrate, without examining him, or reducing his examination into writing, and obtaining his signature thereto, or appending his own signature as Magistrate, referred the petition to a Deputy Magistrate for trial. The Deputy Magistrate tried and convicted the accused. On a reference from the Sessions Judge, on the ground that the proceedings were irregular under s. 66, Act XXV. of 1861, and that, therefore, the order of the Deputy Magistrate was without jurisdiction, held that the petition was sufficient, and that the Magistrate was justified in making over the petition to a Deputy Magistrate, who had the full powers of a Magistrate, for enquiry and trial.—*Queen v. Mahim Chandra Chuckerbutty* (3 B. L. R. A. Cr. 67) distinguished.—*Queen v. Umesh Chandra Chowdhry*, 5 B. L. R. 160 [or p. 197].

3. COMPLAINT—*Criminal Procedure Code (Act XXV. of 1861)*, ch. 11—*Complaint, Irregularity in recording—Power of Court of Session.*] A Court of Session is competent to proceed to the trial of a prisoner brought before it upon a charge by a Magistrate authorized to make a commitment, though the complaint or authorization be contained only in a letter from the Judge of that Court to the Magistrate of the district, sent with the record of the case, notwithstanding an irregularity or defect of form in recording the complaint. The complaint or authorization of the Court before which, or against the authority of which, an offence mentioned in ch. 11 of the Code of Criminal Procedure is alleged to have been committed, is a sufficient warrant for commencement of criminal proceedings. *Queen v. Mahim Chandra Chuckerbutty* (3 B. L. R. A. Cr. 67) overruled.—*Queen v. Narayan Naik*, 5 B. L. R. 660 [or p. 223].

**Complaint (contd.)—**

4. COMPLAINT—*Procedure—Criminal Procedure Code (Act XXV. of 1861)*, ss. 62, 308.] A Magistrate is not bound to adhere to any particular section of the law which may be mentioned by a complainant in his complaint, but may apply any section which he thinks applicable to the case, so long as the parties are not misled, and the proper procedure is observed. He may recall an order which he finds to be wrong, and substitute any other which he may think right under the law. Where a Magistrate dismissed a complaint under s. 308 of the Code of Criminal Procedure, it was held that it was competent for him to pass an order under s. 62 of that Code in the same case, provided he called on the defendants to show cause why s. 62 should not be applied.—In the Matter of the Petition of Kalidas Bhattacharjee : *Kalidas Bhattacharjee v. Mohendronath Chatterjee*, 5 B. L. R. Ap. 82 note [or p. 235].

5. COMPLAINT—*Criminal Procedure Code (Act XXV. of 1861)*, ss. 66, 194, 249—*Act VIII. of 1869, s. 36.*] A Magistrate of a district, before whom a complaint had been made, without complying with the provisions of s. 66, Act XXV. of 1861, sent the petition to be disposed of by a Deputy Magistrate; and when the Deputy Magistrate had proceeded to some extent with the case, the Magistrate took it up and tried it himself. Held that non-compliance with the provisions of s. 66 of Act XXV. of 1861 made the subsequent proceedings void. Held also that the Magistrate, having once sent the case to the Deputy Magistrate for trial, had no power to try the case himself without formally recording a proceeding under s. 36 of Act VIII. of 1869.—*Queen v. Girish Chandra Ghose*, 7 B. L. R. 513 [or p. 419].

6. COMPLAINT—*Criminal Procedure Code (Act XXV. of 1861)*, ss. 66, 67—*Act VIII. of 1869, s. 66B.*] A Magistrate of a district before whom a complaint had been made, without complying with the provisions of s. 66 of Act XXV. of 1861, sent the petition to be disposed of by a Deputy Magistrate not authorized to receive complaints without reference from the District Magistrate who tried and convicted the offender. Held, *per Kemp, J.*, that non-compliance with the provisions of s. 66 of

**Complaint (contd.)—**

Act XXV. of 1861 made the subsequent proceedings void. *Held, per Ainslie, J.*, that the order sending the petition to the Deputy Magistrate for disposal gave the latter officer power to receive the complaint under s. 66B of Act VIII. of 1869, and that the subsequent proceedings therefore were valid.—In the Matter of Iswar Chundra Koer *v.* Umesh Chandra Pal, 8 B. L. R. 19 [or p. 453].

7. COMPLAINT—*Criminal Procedure Code (Act XXV. of 1861), ss. 66, 273*—*Reference by District Magistrate to Subordinate Magistrate of complaint without previous examination of complainant.*] A District Magistrate is not bound, on receipt of a complaint, to examine the complainant under s. 66 of Act XXV. of 1861, before referring the complaint to a Subordinate Magistrate for disposal. The examination of the complainant by the Magistrate to whom the case has been referred is sufficient.—*Queen v. Haru*, 9 B. L. R. 146 [or p. 512].

8. COMPLAINT—*Criminal Procedure Code (Act XXV. of 1861), s. 67*—*Dismissal of complaint without enquiry.*] A District Magistrate removed a case from the file of the Joint-Magistrate to his own, after complaint had been made, and warrants issued by the Joint-Magistrate upon the footing of the complaint. The Magistrate, having removed the case, immediately suspended the warrants, and dismissed the complaint, on the ground that he had previously, in his executive capacity, made some inquiry into the matter out of which the complaint arose, and from information that he so gained was of opinion that the complaint ought to be rejected under s. 67 of the Criminal Procedure Code. The words of the section, so far as it is necessary to read it now, are: "If, in the judgment of the Magistrate, there be no sufficient ground for proceeding, he shall dismiss the complaint." *Held* that, when the Magistrate took the case from the Joint-Magistrate's file, he ought to have proceeded with it as from the stage at which he found it, and that therefore he committed a material error by not doing so. Therefore the order of the Magistrate, which suspended the warrants, and dismissed the complaint, was set aside, and the Joint-Magistrate was directed to carry out the investigation.—In the Matter

**Complaint (contd.)—**

of the Petition of Raghoo Parirah, 10 B. L. R. Ap. 26 [or p. 579].

See DISMISSAL OF COMPLAINT, 1, 2. WARRANT, 2.

**Confession.—**

1. CONFESSION—*Attestation of the Magistrate—Criminal Procedure Code (Act XXV. of 1861), s. 205.*] Under s. 205 of the Code of Criminal Procedure, it is not necessary for the Magistrate to state in the body of the examination that the statement comprised every question put to the accused and every answer given by him, and that he had had liberty to add to or explain his answers. Attestation at the foot of the examination is sufficient, but in case of doubt oral evidence should be admitted to prove the regularity of the proceeding.—*Queen v. Goshto Lal Dutt*, 7 B. L. R. Ap. 62 [or p. 448].

2. CONFESSION—*Evidence—Credibility of confession—Documents not in evidence before Sessions Judge.*] The words actually used by an accused, who is said to have confessed, ought to be ascertained. The Court should not accept merely the conclusions at which the witnesses, deposing to a confession, themselves arrived, from the answers which the accused gave to questions put by them. Where an accused makes two distinct statements—the one amounting to a confession of guilt, the other repudiating guilt—if the one statement is taken against the accused, the other also must be taken, for what it is worth, in his favour. The Court ought to weigh well the relative credibility of the two statements before it accepts the one in preference to the other. Documents which were in the record sent up by the Magistrate, but which were not put in evidence before the Sessions Judge, were looked at because they told in favour of the prisoner.—*Queen v. Soobjan*, 10 B. L. R. 332 [or p. 555].

3. CONFESSION—*Evidence Act (I. of 1872), s. 30*—*Confession of a prisoner when admissible against co-prisoner—Trial by jury.*] To render the confession of one prisoner jointly tried with another admissible in evidence against the latter, it must appear that that confession implicates the confessing person substantially to the same extent as it implicates the person against whom it is to

**Confession (contd.)—**

be used, in the commission of the offence for which the prisoners are being jointly tried.—*Queen v. Belat Ali*, 10 B. L. R. 453 [or p. 565].

4. **CONFESSION—Evidence Act (I. of 1872), ss. 30, 133—Confession of one prisoner when admissible against another—Accomplice—Corroborative evidence.** [The corroboration which is needed in order to make the testimony of an approver-witness trustworthy should be corroboration derived from evidence which is independent of accomplices, and vitiated by the accomplice-character of the witness, and further should be such as to support that portion of the accomplice's testimony which makes out that the prisoner was present at the time when the crime was committed, and participated in the acts of commission. The statement must not merely be generally true, but true in the particular points which affect the persons accused. Under s. 30 of the Evidence Act (I. of 1872), the statement of fact made by a prisoner, which amounts to a confession of guilt on his part, may be taken into consideration so far, and so far only, as that particular statement of fact itself extends, against the other prisoners who are being tried, as well as himself, for the offence which is thus confessed.—*Queen v. Mohes Biswas*, 10 B. L. R. 455 note [or p. 567].

See EVIDENCE, 9.

EXAMINATION OF ACCUSED, 2.

**Confession under Threat—**

See THREAT.

**Confiscation—**

See SALT.

**Conspiracy to wage War—**

See ASSESSORS, 1.

**Contagious Diseases' Act—**

See COMMON PROSTITUTES.

**Contempt of Court—**

CONTEMPT OF COURT—*Penal Code (Act XLV. of 1860), s. 174—Criminal Procedure Code (Act XXV. of 1861), s. 171—Power of Subordinate Magistrate.* [A Subordinate Magistrate has no power to try an offence punishable under s. 174 of the Penal Code committed against his own Court, but is bound, under s. 171 of the Code of Criminal Procedure, to send the case, if in his opinion there is sufficient ground for in-

**Contempt of Court (contd.)—**

vestigation, to a Magistrate having power to try or commit for trial. *Baijo Baul v. Gugun Misser*, and *Queen v. Gugun Misser* (8 W. R. Cr. R. 61) overruled.—*Queen v. Chandra Sekhar Roy*, 5 B. L. R. 100 [or p. 193].

**Contract—**

Breach of. See ARTIFICERS.

**Contradictory Statements—**

See FALSE EVIDENCE, 5, 7, 9, 10, 11.

**Conviction under Act VI. of 1866 (B.C.)—**

See SENTENCE, 2.

**Copies of Records—**

COPIES OF RECORDS—*Evidence—Documents—Prisoner, Right of, on trial.* [A prisoner applied for copies of certain documents filed in Court for the purpose of his defence. *Held* the Magistrate had erred in refusing his application. *Per* Loch, J.—A prisoner is entitled to have copies of all documents for which he asks, and which he thinks necessary for his defence. And it is for the officer trying the case, whether Magistrate or Judge, to determine at the hearing whether the documents filed by the prisoner are or are not admissible as evidence.—In the Matter of the Petition of Shib Prasad Panda, 6 B. L. R. Ap. 59 [or p. 329].

**Co-prisoner's Confession—**

See CONFESSION, 3, 4.

**Corroboration—**

See ACCOMPLICE, 1 to 4.

**Corroborative Evidence—**

See CONFESSION, 4.

**Co-sharers—**

See POSSESSION, 7.

**Costs—**

See TRANSFER OF CASE, 4.

**Counsel or Pleader—**

Right of, to prosecute. See PROSECUTION.

**Credibility of Confession—**

See CONFESSION, 2.

**Credible Information—**

See RECOGNIZANCE, 2.

**Criminal Breach of Trust—**

1. **CRIMINAL BREACH OF TRUST—Presumption—Revisional jurisdiction.** [A conviction for criminal breach of trust was reversed on appeal on the ground that the prisoner had only made default



**Criminal Breach of Trust** (*contd.*) in payment which was a matter of account. The High Court, however, under s. 404, Criminal Procedure Code, 1861, revised the proceedings, and restored the conviction on the ground that there was evidence of false account.—*Watson v. Golab Khan*, 1 B. L. R. S. N. xxi. [or p. 45].

2. **CRIMINAL BREACH OF TRUST**—*Penal Code (Act XLV. of 1860), s. 406*—*Dishonesty—Evidence—Conviction.*] In order to constitute the offence of criminal breach of trust within the meaning of s. 406 of the Penal Code, it must be shown that the accused was entrusted with the property, and that he dishonestly misappropriated it; there must be an intention on the part of the accused to cause wrongful gain or wrongful loss.—*Queen v. Rajkrishna Biswas*, 8 B. L. R. Ap. 1 [or p. 467].

#### **Criminal Courts—**

**CRIMINAL COURTS—Functions of—Jurisdiction of Assistant Magistrate—Penal Code (Act XLV. of 1860), s. 169—Code of Criminal Procedure (Act XXV. of 1861), ss. 11, 169, 171, 422.**] When an Appellate Court directs further evidence to be taken by a Subordinate Court under s. 422 of the Code of Criminal Procedure, it is competent to the Subordinate Court before which such evidence is given, if any offence against public justice, as described in s. 169, is committed before such Court by a witness whose evidence is being recorded therein, to send the case for investigation to a Magistrate under the provisions of s. 171. The words, "whether for the decision of such cases in the first instance or on appeal, or for commitment to any other Court or officer," in s. 11 of the Code of Criminal Procedure, are not an exhaustive enumeration of the functions of Criminal Courts.—*Queen v. Baktear Maifaraz*, 6 B. L. R. 698 [or p. 312].

#### **Criminal Force—**

See CUMULATIVE SENTENCES.

#### **Criminal Misappropriation—**

**CRIMINAL MISAPPROPRIATION—Penal Code (Act XLV. of 1860), s. 405—Partner.**] A partner who dishonestly misappropriates or converts to his own use any of the partnership-property with which he is entrusted, or which he has dominion over, is guilty of an offence

**Criminal Misappropriation** (*contd.*) under s. 405 of the Penal Code.—*Queen v. Okhoy Coomar Shaw*: In the Matter of the Petition of Nagendra Lal Chatterjee, 13 B. L. R. 307 [or p. 629].

See ABSENCE OF COMPLAINANT, 2.

#### **Crim. Pro. Code (Act XXV. of 1861)—**

S. 11. See CRIMINAL COURTS.

S. 28. See WAGING WAR.

S. 36. See TRANSFER OF CASE, 1.

S. 46. See SENTENCE, 4.  
WHIPPING, 2, 3.

S. 47. See SENTENCE, 4.

S. 48. See SENTENCE, 4.

S. 55. See ASSAULT.

S. 61. See EXCISE.

S. 62. See CATTLE-STRAYING.

COMPLAINT, 4.

DISOBEDIENCE TO PUBLIC SERVANT, 2.

NUISANCE, 1, 4, 5, 7, 8, 12.

POLICE-REPORT.

S. 64. See NUISANCE, 6.

S. 66. See COMPLAINT, 1, 2, 5, 6, 7.

DISMISSAL OF COMPLAINT, 2.

PROCEDURE, 2.

REGISTRATION, 1.

WARRANT, 1.

S. 67. See COMPLAINT, 6, 8.

S. 68. See DISCHARGE, 2.

WARRANT, 1, 2.

S. 76. See WARRANT, 1.

S. 77. See WARRANT, 2.

S. 169. See CRIMINAL COURTS.

SANCTION TO PROSECUTE, 3, 5.

S. 169. See STAMP.

S. 170. See SANCTION TO PROSECUTE, 2, 3.

S. 171. See CONTEMPT OF COURT.  
CRIMINAL COURTS.

STAMP.

TRIAL ON SUNDAY.

S. 172. See FALSE EVIDENCE, 4, 7.

S. 173. See FALSE EVIDENCE, 5.

S. 180. See DISMISSAL OF COMPLAINT, 2.

S. 183. See PROCLAMATION.

S. 184. See ATTACHED PROPERTY.  
PROCLAMATION.

S. 185. See ATTACHED PROPERTY.

S. 188. See WARRANT, 1.

S. 194. See COMPLAINT, 5.

S. 205. See CONFESSION, 1.

EXAMINATION OF ACCUSED, 2.

S. 207. See WARRANT, 1.

Crim. Pro. Code (Act XXV. of 1861) (*contd.*)—

- S. 209. See EVIDENCE, 3.
- S. 210. See EVIDENCE, 3.
- S. 211. See EVIDENCE, 3.
- S. 212. See NUISANCE, 2.
- S. 219. See JURISDICTION, 1.
- S. 222. See WARRANT, 1.
- S. 224. See REMAND, 2.  
WARRANT, 1.
- S. 225. See DISCHARGE, 2.
- S. 242. See FALSE EVIDENCE, 13.
- S. 248. See ABSENCE OF COMPLAIN-  
ANT, 2.
- S. 249. See COMPLAINT, 5.
- S. 250. See DISCHARGE, 1, 5.
- S. 251. See DISCHARGE, 1.
- S. 252. See WITNESSES FOR DE-  
FENCE, 5, 6.
- S. 253. See WITNESSES FOR DE-  
FENCE, 3, 5.
- S. 254. See WITNESSES FOR DE-  
FENCE, 5.
- S. 255. See DISCHARGE, 1.
- S. 259. See ABSENCE OF COMPLAIN-  
ANT, 2.
- S. 265. See WITNESSES FOR DE-  
FENCE, 1.
- S. 266. See WITNESSES FOR DE-  
FENCE, 6.
- S. 370. See DISMISSAL OF COM-  
PLAINT, 1.
- S. 273. See COMPLAINT, 1, 2, 7.  
JURISDICTION, 1, 4.
- S. 282. See RECOGNIZANCE, 1, 2.
- S. 283. See RECOGNIZANCE, 4.
- S. 290. See RECOGNIZANCE, 11.
- S. 293. See RECOGNIZANCE, 3.
- S. 298. See RECOGNIZANCE, 8, 9.
- S. 308. See COMPLAINT, 4.  
NUISANCE, 1, 9, 11, 13.  
SLAUGHTER-HOUSE, 2.
- S. 310. See NUISANCE, 9.  
SLAUGHTER-HOUSE, 2.
- S. 311. See NUISANCE, 9.  
SLAUGHTER-HOUSE, 2.
- S. 313. See NUISANCE, 9, 13.  
SLAUGHTER-HOUSE, 2.
- S. 316. See MAINTENANCE, 1.
- S. 318. See DISOBEDIENCE TO PUB-  
LIC SERVANT.  
POSSESSION.  
WITNESSES.
- S. 320. See NUISANCE, 3.
- S. 322. See JURY, 3.
- S. 362. See PLEA OF GUILTY.
- S. 363. See PLEA OF GUILTY.
- S. 366. See EXAMINATION OF AC-  
CUSED, 2.

Crim. Pro. (Code Act XXV. of 1861) (*contd.*)—

- S. 367. See EXAMINATION OF AC-  
CUSED, 2.  
WARRANT, 1.
- S. 370. See REPORT OF CHEMICAL  
EXAMINER.
- S. 372. See PROCEDURE, 1.
- S. 375. See WITNESSES FOR DE-  
FENCE, 4.
- S. 379. See ASSESSORS, 1.  
JURY, 3.
- S. 381. See FALSE EVIDENCE, 11, 13.
- S. 382, cl. 5. See FALSE EVIDENCE,  
13.
- S. 402. See ACQUITTAL.
- S. 403. See REVISION, 5.
- S. 404. See DISCHARGE, 2.  
NUISANCE, 7, 11.  
OPIUM.  
REMAND, 2.  
REVIEW.
- S. 405. See REVIEW.  
REVISION, 5.  
SENTENCE, 6.
- S. 407. See ACQUITTAL, 1.  
APPEAL, 4.
- S. 411. See APPEAL, 1.  
BAIL.
- S. 419. See ACCOMPLICE, 4.  
PRIVATE PROSECUTOR.
- S. 420. See APPEAL, 2.
- S. 421. See SENTENCE, 4.
- S. 422. See CRIMINAL COURTS.  
REMAND, 3.
- S. 426. See ACCOMPLICE, 4.  
APPEAL, 4.  
COMPLAINT, 1.  
SANCTION TO PROSE-  
CUTE, 2.
- S. 427. See COMMITTAL, 1.
- S. 428. See SENTENCE, 6.
- S. 434. See BAIL.  
NUISANCE, 11.  
PRIVATE PROSECUTOR.
- S. 435. See COMMITTAL, 1.  
DISCHARGE, 1, 4, 5.  
EXAMINATION OF AC-  
CUSED, 1.  
SANCTION TO PROSE-  
CUTE, 5.
- S. 436. See BAIL.
- S. 439. See COMPLAINT, 1, 2.  
REVIEW.
- Ch. 11. See COMPLAINT, 3.
- Ch. 14. See ABSENCE OF COMPLAIN-  
ANT, 2.  
POLICE-ENQUIRY.

**Crim. Pro. Code (Act XXV. of 1861) (contd.)—**

- Ch. 15. See ABSENCE OF COMPLAINANT, 2.  
 COMPENSATION.  
 WARRANT-CASE.  
 WITNESSES FOR DEFENCE, 1, 6.

**Crim. Pro. Code (Act VIII. of 1860)—**

- S. 36. See COMPLAINT, 5.  
 S. 66B. See COMPLAINT, 6.  
 S. 249. See FALSE CHARGE, 2.  
 S. 310. See JURY, 2.  
 S. 369. See EVIDENCE, 3.  
 S. 380. See WARRANT, 1.  
 S. 422. See APPEAL, 5.  
     REMAND, 1.  
 S. 435. See DISCHARGE, 1, 2.  
     DISMISSAL OF COMPLAINT, 3.  
     JURISDICTION, 2.  
 S. 445A. See APPEAL, 3.  
 S. 445C. See APPEAL, 3.

**Crim. Pro. Code (Act X. of 1872)—**

- S. 33. See EUROPEAN BRITISH SUBJECT.  
 S. 64. See TRANSFER OF CASE, 3.  
 S. 67. illa. See JURISDICTION, 6.  
 S. 142. See TRANSFER OF CASE, 3.  
 S. 228. See SUMMARY TRIAL.  
 S. 249. See EVIDENCE, 10.  
 S. 255. See JURY, 4.  
 S. 256. See JURY, 4.  
 S. 263. See JURY, 5, 6, 7, 8, 9.  
 S. 271. See JURY, 5.  
 S. 280. See ENHANCEMENT OF SENTENCE.  
 S. 283. See REVISION, 2.  
 S. 286. See REVISION, 2.  
 S. 287. See JURY, 5.  
 S. 288. See JURY, 5.  
 S. 294. See REVISION, 2.  
 S. 296. See COMMITTAL, 2.  
     REVISION, 4.  
 S. 297. See REVISION, 2, 3, 4.  
     TRANSFER OF CASE, 3.  
 S. 332. See POSSESSION, 8.  
 S. 333. See POSSESSION, 8.  
 S. 334. See POSSESSION, 8.  
 S. 389. See TRANSFER OF CASE, 3.  
 S. 390. See TRANSFER OF CASE, 3.  
 S. 391. See TRANSFER OF CASE, 3.  
 S. 398. See TRANSFER OF CASE, 3.  
 S. 425. See UNSOUNDNESS OF MIND.  
 S. 435. See JURISDICTION, 7.  
 S. 436. See JURISDICTION, 7.

**Crim. Pro. Code (Act X. of 1872) (contd.)—**

- S. 455. See FALSE EVIDENCE, 10.  
 S. 530. See POSSESSION, 8.  
 S. 536. See MAINTENANCE, 2.  
 S. 537. See MAINTENANCE, 2.  
 Ch. 7. See JURISDICTION, 8.  
 Ch. 15. See EVIDENCE, 11.  
 Ch. 18. See SUMMARY TRIAL.

**Criminal Trespass—**

1. CRIMINAL TRESPASS—*Penal Code (Act XLV. of 1860), ss. 380, 447.* Entrance of a member of a Hindu joint family into the family dwelling-house is not criminal trespass. The entry of a stranger into a family dwelling-house with the permission and license of one of the members is not criminal trespass.—In the Matter of the Petition of Prankrishna Chandra, 6 B. L. R. Ap. 80 [or p. 337].

2. CRIMINAL TRESPASS—*Penal Code (Act XLV. of 1860), s. 441—Intention to intimidate.* To obtain a legal conviction under s. 441, Penal Code, for criminal trespass, there must be an intention to intimidate, insult, or annoy a person in actual possession. It is not sufficient to enter a house where the owner is only in constructive possession.—Iswar Chandra Karmakar v. Sital Das Mitter, 8 B. L. R. Ap. 62 [or p. 482].

3. CRIMINAL TRESPASS—*Penal Code (Act XLV. of 1860), s. 441—Intention.* An act does not amount to criminal trespass under s. 441 of the Penal Code, unless it was committed with an intention of committing some offence, or of intimidating, insulting, or annoying some one. Where a party had been exercising a right of fishery for a considerable time, alleging a prescriptive right, the mere fact of continuing to do so after a notice of prohibition is not a criminal trespass.—In the Matter of the Petition of Shistidhur Parui, 9 B. L. R. Ap. 19 [or p. 540].

See RECOGNIZANCE, 4.

**Cross-examination—**

See EXAMINATION OF ACCUSED, 1.  
 WITNESSES FOR DEFENCE, 4.

**Culpable Homicide—**

1. CULPABLE HOMICIDE—*Provocation—Penal Code (Act XLV. of 1860), s. 300.* Culpable homicide, though committed under provocation, will amount to murder, unless it is proved not only that the act was done under the influence of some feeling which took away from the

**Culpable Homicide (contd.)—**

person doing it all control over his actions, but that that feeling had an adequate cause.—*Queen v. Hari Giri*, 1 B. L. R. A. Cr. 11 [or p. 7].

2. CULPABLE HOMICIDE—*Death caused by snake-charmers—Penal Code (Act XLV. of 1860), s. 300, cls. 2, 3.* Certain snake-charmers, by professing themselves able to cure snake-bites, induced several persons to let themselves be bitten by a poisonous snake. From the effect of the bite, three of these persons died. *Held* that the offence was murder under cls. 2 and 3 of s. 300 of the Penal Code, unless it could be brought within the 5th exception to that section. If the prisoners, really believing themselves to have the powers they professed to have, induced the deceased to consent to take the risk of death, the offence would be culpable homicide not amounting to murder.—*Queen v. Punai Fattama*, 3 B. L. R. A. Cr. 25 [or p. 105].

3. CULPABLE HOMICIDE—*Penal Code (Act XLV. of 1860), s. 300—Grave and sudden provocation.* Culpable homicide not amounting to murder is when a man kills another, being deprived of self-control by reason of grave and sudden provocation. But when the act is done after the first excitement had passed away, and there was time to cool, it is murder.—*Queen v. Yasin Sheikh*, 4 B. L. R. A. Cr. 6 [or p. 157].

See REVISION, 5.  
RIOTING.

**Culpable Homicide not amounting to Murder—**

1. CULPABLE HOMICIDE NOT AMOUNTING TO MURDER—*Grave provocation—Presumption—Loss of the power of self-control—Providing oneself with a deadly weapon—Penal Code (Act XLV. of 1860), s. 304.* The wife of the prisoner had been forcibly taken to the house of the deceased, a native physician, who alleged that her presence was necessary to the due performance of certain incantations. The prisoner, armed with a sword, and watching from the roof of the house, saw his wife being actually violated by the deceased. He jumped down from the roof, and struck deceased with his sword in several places, from the effects of which he died. *Held* that the prisoner's conviction for murder

**Culpable Homicide not amounting to Murder (contd.)—**

could not be sustained. The offence committed was culpable homicide not amounting to murder.—*Queen v. Ramtahal Kahar*, 3 B. L. R. A. Cr. 33 [or p. 109].

2. CULPABLE HOMICIDE NOT AMOUNTING TO MURDER—*Penal Code (Act XLV. of 1860), s. 304—Mitigation of sentence.* In his charge to the jury, the Judge should draw a distinction between the two classes of culpable homicide mentioned in s. 304 of the Penal Code, and direct them to find specially under which, if either, the prisoner was guilty.—*Queen v. Kali Charan Das*, 6 B. L. R. Ap. 86 [or p. 340].

See JURY, 1.

**Cumulative Sentences—**

CUMULATIVE SENTENCES—*Penal Code (Act XLV. of 1860), ss. 224, 225, 353.* Where substantially but one offence has been committed, and the acts, which are the basis of one charge, are the same which form the basis of another charge on which the prisoner has also been convicted, cumulative sentences on each charge should not be passed. Where prisoners were convicted under ss. 224 for escape, 225 for rescuing from lawful custody, and under s. 353 for using criminal force in so doing, and sentenced to separate punishments under each section, *held* that the prisoners had only done one act, and were guilty of only one offence, and should only have been found guilty under ss. 224 and 225 of "escape" and "rescuing," respectively, and sentenced accordingly.—*Queen v. Kalisankar Sandyal*, 3 B. L. R. A. Cr. 14 [or p. 98].

See WHIPPING, 3.

**D.****Dacoity—**

See ENHANCEMENT OF SENTENCE, 1.  
EXAMINATION OF ACCUSED, 2.

**Daily Fine—**

1. DAILY FINE—*Illegality of municipal bye-laws.* The petitioner was convicted under s. 18 of the Howrah municipal bye-laws, and fined Re. 1 for infringement thereof, as well as ordered to pay a daily fine of Rs. 2 until he complied with the bye-law. On reference, *held* that the daily fine was illegal.—In the Matter of the Petition of W. N. Love, 9 B. L. R. Ap. 35 [or p. 546].

**Daily Fine (contd.)—**

2. **DAILY FINE—Illegality of—Beng. Act III. of 1864, s. 66—Nuisance.** The following case was referred by the Magistrate of the 24-Pergunnas for the opinion of the High Court: "The defendant was, on the 18th July last, convicted before a Bench of Magistrates for infringing the provisions of s. 66, Beng. Act III. of 1864, in that he had kept on his land some bones more than 24 hours otherwise than in a proper receptacle. The Bench found him guilty, and sentenced him to pay a fine of Rs. 10, and further ordered him to remove the bones in three days, or in default to pay a fine of Rs. 2 for every day the nuisance continued unabated. It appears to me that, in accordance with the rulings of the High Court in the cases of *In re W. N. Love* (9 B. L. R. Ap. 35) and *In re Sagar Dutt* (1 B. L. R. O. Cr. 41), the latter part of the conviction is bad, as being in fact an adjudication in respect of an offence which had not then been committed. As such an order vitiates the entire conviction, I submit the proceedings with a view to their being quashed, should the High Court think this course necessary." The opinion of the Court was delivered by Jackson, J.: "We think it proper to follow the precedent in the case of *In re W. N. Love* (9 B. L. R. Ap. 35). In the case of *In re Sagar Dutt* (1 B. L. R. O. Cr. 41), the Court had before it a conviction before the Justices regulated by the English law, and which could not be amended. We set aside so much of the order before us as inflicts a fine prospectively of Rs. 2 for every day the nuisance remains."—In the Matter of the Chairman of the Municipal Commissioners for the Suburbs of Calcutta *v. Aneesooddeen Meah*, 12 B. L. R. Ap. 2 [or p. 624].

See SENTENCE, 2.

**Dead Witnesses' Deposition—**

See EVIDENCE, 3.

**Death caused by Snake-charmers—**

See CULPABLE HOMICIDE, 2.

**Defamation—**

**DEFAMATION—Penal Code (Act XLV. of 1860, s. 499.)** The accused, an inspector of police, was sent to enquire if it was true that one Brojonath was a leader of dacoits. He reported that it was false, and that the Banias of the village were

**Defamation (contd.)—**

trying to get him punished from an ill-feeling. He added: "I learnt from private enquiries that there is scarcely a woman in the houses of the Banias who has not passed a night or two with the defendant Brojonath." Commitment of the accused for trial for defamation under s. 499 of the Penal Code supported under the circumstances of the case.—In the Matter of the Petition of Rajnarain Sein, 6 B. L. R. Ap. 42 [or p. 325].

**Default—**

Dismissal of Charge for. See ABSENCE OF COMPLAINANT, 1.

See DISCHARGE, 3.

**Defaulting Witnesses—**

See TRIAL ON SUNDAY.

**Defence—**

See PROCEDURE, 1.

**Deposition—**

**DEPOSITION (IRREGULAR)—Act XIII. of 1865, s. 8.** The Magistrate took the depositions by reading over to the witnesses depositions made by them in another case, at the hearing of which the prisoner was not present, and procuring them to affirm the truth of the same. *Held* that the depositions were illegally taken, and therefore could not sustain a charge.—*Queen v. Rajkrishna Mitter*, 1 B. L. R. O. Cr. 37 [or p. 38].

**DEPOSITION—**

Recording of. See ACCOMPLICE, 3.

**Deposition of Absent Witness—**

See THREAT.

**Deposition of Dead Witness—**

See EVIDENCE, 3.

**Depositions before Magistrate—**

See ENTICEMENT.

**Deputy Commissioner—**

See APPEAL, 3.

**Detention of Accused and Witnesses—**

See WARRANT, 1.

**Direction to Commit—**

See COMMITTAL, 1, 2.

**Discharge—**

1. **DISCHARGE—Criminal Procedure Code (Act XXV. of 1861), ss. 250, 251, 255, 435—Act VIII. of 1869, s. 435—Discharge of accused by the Magistrate—Power of Sessions Judge.** Where no formal charge has been drawn up by the Magistrate under s. 250, Act XXV. of

**Discharge (contd.)—**

1861, and the accused has not been called upon under s. 251 to plead thereto, and was not tried thereunder, a release by the Magistrate of the accused does not amount to an acquittal under s. 255, but simply to a discharge under s. 250. Under such circumstances, s. 435, Act VIII. of 1869, empowers a Sessions Judge to direct the committal of the accused to take their trial.—*In re Jagabandhu Myti v. Gobardhan Bera*, 4 B. L. R. A. Cr. 1 [or p. 153].

2. DISCHARGE—*Criminal Procedure Code (Act XXV. of 1861 and Act VIII. of 1869)*, ss. 68, 225, 404, 435—*Fresh proceedings after discharge.*] Where an accused person was discharged by a Deputy Magistrate under s. 225 of the Code of Criminal Procedure after a preliminary enquiry, the Magistrate of the District may proceed against him afresh under s. 68 of the Criminal Procedure Code. *Per Markby, J.*—S. 435 (Act VIII. of 1869) provides for the revision of proceedings which have already been commenced; s. 68 (Act XXV. of 1861) provides for the institution of proceedings *de novo*.—In the Matter of the Petition of Ramjai Mazumdar, 6 B. L. R. Ap. 67 [or p. 333].

3. DISCHARGE—*Charge, Dismissal of, for default—Discharge for want of evidence.*] In answer to a reference from a Sessions Judge, the Court were of opinion that, in a case where the accused has been duly summoned or arrested under a warrant, and is present to meet any charge, and the complainant and his witnesses negligently fail to appear against him, if it be not shown to the Magistrate that the case is one in which he ought to adjourn the inquiry under s. 224, Code of Criminal Procedure, the accused person ought to be discharged. But also held that the question did not arise under the circumstances of the case, and the case must go back to the Magistrate for investigation.—*Taki Mahomed Mandal v. Krishna Nath Rai*, 7 B. L. R. 7 [or p. 357].

4. DISCHARGE—*Criminal Procedure Code (Act XXV. of 1861)*, s. 435—*Powers of a Court of Session—Remand—Meaning of words "without enquiry."*] Where an accused person has been discharged by a Magistrate under s. 250 of the Criminal Procedure Code,

**Discharge (contd.)—**

after enquiry into the case, the Court of Session cannot, under s. 435, remand the case for further enquiry.—In the Matter of the Petition of H. P. Caspersz, 9 B. L. R. 337 [or p. 522].

5. DISCHARGE—*Criminal Procedure Code (Act XXV. of 1861)*, ss. 250, 435—*Re-trial by a Magistrate—Powers of a Court of Session—Remand.*] Where a Magistrate had discharged an accused under s. 250 of the Criminal Procedure Code, and afterwards the Sessions Judge, having remanded the case for further enquiry, re-tried it, and convicted the accused, the High Court, while holding that the Sessions Judge had no power to make the order of remand, upheld the conviction.—In the Matter of the Petition of Jiat Sahu, 9 B. L. R. 339 [or p. 523].

See ASSAULT.

DISMISSAL OF COMPLAINT.

**Discharge of Accused—**

See ABSENCE OF COMPLAINANT, 1, 2.

**Discharge of Prisoner on Appeal—**

See ACCOMPLICE, 3.

**Discretion—**

See HABEAS CORPUS, 1.

**Dishonesty—**

See CRIMINAL BREACH OF TRUST, 2.

**Dismissal of Charge for Default—**

See ABSENCE OF COMPLAINANT, 1.

DISCHARGE, 3.

**Dismissal of Complaint—**

1. DISMISSAL OF COMPLAINT—*Criminal Procedure Code (Act XXV. of 1861)*, s. 270—*Dismissal without taking evidence.*] On the day fixed for the hearing of a complaint for trespass and assault made against three persons, the complainant appeared with his witnesses, the defendants also appeared; and on one of them being a child of eight years, the Magistrate dismissed the case without taking any evidence, and ordered compensation to be paid by the complainant to the defendants under s. 270 of Act XXV. of 1861. Held that the Magistrate was wrong. He should not have dismissed the case merely because one defendant was a child, but should have followed the procedure laid down in ss. 265 and 266. He could not impose a fine under s. 270 without taking evidence.—*Bilash v. Makroo*, 2 B. L. R. S. N. 15 [or p. 73].

**Dismissal of Complaint (contd.)—**

2. **DISMISSAL OF COMPLAINT—Criminal Procedure Code (Act XXV. of 1861), ss. 66, 180—Dismissal without recording evidence.]** A charged B before a Magistrate for wrongful confinement of her brother. Previous to the petition to the Magistrate, the charge had been investigated by the police, and reported to be false. The Magistrate, without recording the complaint under s. 66 of the Code of Criminal Procedure, sent for the police papers, and under s. 180 of the same Code dismissed the case. *Held* that the proceedings were illegal; that the Magistrate was bound, under s. 66 of the Code of Criminal Procedure, to record the examination of the complainant, before he could, under s. 180, dismiss the complaint.—*Dulali Bewa v. Bhuban Shaha*, 3 B. L. R. A. Cr. 53 [or p. 122].

3. **DISMISSAL OF COMPLAINT—Criminal Procedure Code (Act VIII. of 1869), s. 435—Power of a Magistrate in dealing with a case when dismissed without full and sufficient enquiry.]** *Semble.*—When a charge is dismissed by a Subordinate Magistrate without enquiry, a Magistrate has no power, under s. 435 of Act VIII. of 1869, to order a trial before another Magistrate, but can only order a commitment to the Court of Session.—*Queen v. Hiralal Sing*, 5 B. L. R. Ap. 48 [or p. 231].

4. **DISMISSAL OF COMPLAINT—Jurisdiction of Magistrate—Criminal Procedure Code (Acts XXV. of 1861 and VIII. of 1869), ss. 244, 180, 308.]** The accused was charged before a Deputy Magistrate with an offence under s. 431, Penal Code. The Deputy Magistrate examined the complainant, took bail from the accused, but refused to examine the complainant's witnesses, although present, and delayed the investigation unnecessarily for a long time. The Magistrate of the district then called for the proceedings, and, having looked at them, considered that there was no case for the interference of the Criminal Courts, and discharged the prisoner, although he was present and under bail. *Held* that the Magistrate was not only competent but bound to discharge the prisoner, if his conclusion that no offence was made out was correct. But *held* also that the Magistrate's conclusion was wrong, and that the act complained of, if true, did amount to an offence under

**Dismissal of Complaint (contd.)—**s. 431 of the Penal Code. Therefore the Magistrate's order was set aside, and further enquiry ordered.—*Niamatulla v. Gopal Saha*, 6 B. L. R. Ap. 6 [or p. 317].

5. **DISMISSAL OF COMPLAINT—Investigation of complaint—Theft—Defence—Dismissal.]** A Magistrate ought to hear evidence in support of a charge before dismissing the complaint. A bare assertion by an accused, charged with committing theft, of a proprietary right in the alleged stolen property, is no reason for a Magistrate to refuse to entertain the charge of theft.—*Queen v. Kali Charan Misser*, 7 B. L. R. Ap. 55 [or p. 446].

**Dismissal without Enquiry.**

See COMPLAINT, 8.

**Disobedience of Order—**

See CATTLE-STRAYING.

**Disobedience of Summons—**

See TOLLS.

**Disobedience to Public Servant—**

1. **DISOBEDIENCE TO PUBLIC SERVANT—Criminal Procedure Code (Act XXV. of 1861), s. 318—Penal Code (Act XLV. of 1860), s. 188.]** When an order, under s. 318 of the Criminal Procedure Code, was made between A on the one side, and B and the then tenants of B on the other, declaring that A was in possession of the property in dispute, *held* that this order was only binding on the actual parties to the case before the Magistrate, and that subsequent tenants of B could not be criminally punished for disobeying the order in question.—In the Matter of Gopal Burnawar, 3 B. L. R. A. Cr. 13 [or p. 97].

2. **DISOBEDIENCE TO PUBLIC SERVANT—Penal Code (Act XLV. of 1860), s. 188—Criminal Procedure Code (Act XXV. of 1861), s. 62.]** A Magistrate issued an order warning owners of cattle to take proper care of them, and that in case of disobedience or neglect they would be punished according to law, and did punish them for disobedience under s. 188 of the Penal Code. *Held* that the Magistrate was not competent, under s. 62 of the Code of Criminal Procedure, to pass such an order. The order contemplated under this section is in the nature of an injunction, and such an order passed by a Magistrate would not be legal. That the conviction under s. 188 of the Penal Code was illegal.—In the Matter of Amiraddi, 3 B. L. R. A. Cr. 45 [or p. 117].

**Disobedience to Public Servant**  
(*contd.*)—

3. DISOBEDIENCE TO PUBLIC SERVANT—*Arms' Act (XXXI. of 1860), s. 26—Penal Code (Act XLV. of 1860), s. 188—Criminal Procedure Code) Act XXV. of 1861), ss. 250, 251—Carrying fire-arms without license—Disobedience to an order promulgated by a public servant.*] A Magistrate issued a notification that all persons desirous of carrying arms should take out a license enabling them to do so under s. 26 of Act XXXI. of 1860; and certain persons were, in consequence of his notification, arrested and brought before him, charged in a police-report with carrying arms without license. No summons or warrant had been applied for, or any complaint lodged before the Magistrate previous to the arrest of the prisoners. No charge in writing was framed as required under ss. 250, 251 of the Criminal Procedure Code. No evidence was taken; but the prisoners admitted carrying the fire-arms. The Magistrate convicted them, under s. 188 of the Penal Code, of disobedience to an order duly promulgated by a public servant. There was no evidence that the disobedience would cause or tend to cause annoyance, obstruction, or injury to human life, health, or safety. *Held* that the convictions must be quashed. Necessity of observing the rules laid down in the Criminal Procedure Code remarked on.—*Queen v. Nandkumar Bose*, 3 B. L. R. Ap. 149 [or p. 139].

**Disputed Possession—**

See POSSESSION.

**Divorce—**

See MAINTENANCE, 2.

**Document—**

See EVIDENCE, 2.

**Documents—**

See CONFESSION, 2.

Admissibility of, in Evidence. See ASSESSORS, 1.

**E.****Enhancement of Sentence—**

1. ENHANCEMENT OF SENTENCE—*Criminal Procedure Code (Act X. of 1872), s. 280.*] Two prisoners were convicted by the Sessions Court of dacoity, and sentenced, the first to rigorous imprisonment for three years, and the second to similar imprisonment for six

**Enhancement of Sentence** (*contd.*) months. The High Court, under s. 280, Code of Criminal Procedure, enhanced the punishment, as there were no mitigating circumstances for such lenient and inadequate sentences.—*Queen v. Goojree Panday*, 11 B. L. R. Ap. 3 [or p. 601].

2. ENHANCEMENT OF SENTENCE—*Criminal Procedure Code (Act X. of 1872), s. 280—Murder.*] Taking into consideration the circumstances, the High Court, on appeal, enhanced the punishment received by a prisoner at the Sessions Court.—*Queen v. Soffrudi Palwar*, 13 B. L. R. Ap. 23 [or p. 670].

See REMAND, 1.

REVISION, 5.

SENTENCE, 5.

**Enquiry—**

Dismissal without. See DISMISSAL OF COMPLAINT, 3.

**Enticement—**

ENTICEMENT—*Penal Code (Act XLV. of 1860), s. 498—Presumption of marriage—Burthen of proof—Procedure—Depositions before the Magistrate.*] In a charge under s. 498 of the Penal Code, the proof that the woman and a man, other than the accused, were living together, is sufficient to throw the burden of proof on the accused that they were not man and wife. Evidence taken before the Magistrate, but not used at the trial, cannot be referred to on appeal.—*Queen v. Wazira*, 8 B. L. R. Ap. 63 [or p. 483].

**Error in Law—**

See REVISION, 2, 3, 5.

**Escape from Custody—**

See CUMULATIVE SENTENCES—

**European British Subject—**

EUROPEAN BRITISH SUBJECT—*Commitment by Magistrate—Crime committed at a place more than 120 miles from Calcutta—Jurisdiction—Powers of Indian Legislature—Regs. XX. of 1825 and XIII. of 1833—4 Geo. IV., c. 81—Criminal Procedure Code (Act X. of 1872), s. 33.*] A British-born European soldier in a regiment stationed at Hazaribagh was committed by the Deputy Commissioner of that place to the High Court on a charge of the murder of a comrade. Upon an application to have the commitment quashed and the prisoner handed over to the Military Authorities in accordance with Reg. XX. of 1825, it was held that the provisions of



**European British Subject (contd.)**

Reg. XX. of 1825 as to the course to be taken in dealing with European British subjects who have committed offences were rescinded in Hazaribagh by Reg. XIII. of 1833, s. 3, as being rules for the administration of criminal justice within the meaning of that section. Assuming the Regulation was in force, *held* that 4 Geo. IV., c. 81, and Reg. XX. of 1825, though they gave jurisdiction to the Military Authorities in certain cases, did not wholly exclude the jurisdiction of the Civil as opposed to the Military Courts, and that, inasmuch as the proceedings before the Deputy Commissioner had been taken at the request of the Military Authorities, and assented to by them, such proceedings were not void, and the commitment was valid.—*Queen v. William Jackson*, 13 B. L. R. 474 [or p. 654].

See JURISDICTION.

**Evidence—**

1. EVIDENCE—*Evidence at former trial—Procedure.*] Where the evidence of witnesses taken in the absence of the prisoner at a former trial was read out to them, and put in on their assenting to it as a true record of the facts, *held* that the proceeding was irregular and prejudicial to the prisoner, that such witness should have been subjected to a fresh oral examination, and that then the former depositions might have been put in, not to add to his testimony, but to corroborate it. A new trial was ordered.—*Queen v. Bishonath Pal*, 3 B. L. R. A. Cr. 20 [or p. 102].

2. EVIDENCE—*Document—Misdirection.*] Upon a plea of *alibi* by the prisoners that they had left the place on the 12th of April 1869, and reached Port Canning on the 28th of the same month, and were not at Patna on the 30th May, the prosecutor adduced in evidence a written statement engrossed on two pieces of stamp-paper, one bearing the endorsement of the stamp-vendor as sold on the 13th, and the other on the 18th April, filed on the 20th April, and alleged to bear the verification of the prisoners. No evidence was adduced to prove that the prisoners had signed it. The Judge drew the attention of the jurors to this document, and adverted to it in these terms: "If the written statement was drawn up on an earlier date than the date it bears, it could not have

**Evidence (contd.)—**

been prepared earlier than the day on which the principal stamp was bought, i.e., the 18th. *Held* that the document should not have been received in evidence; and that there was a misdirection which contributed materially towards the jury finding the prisoners guilty.—*Queen v. Gajraj*, 3 B. L. R. A. Cr. 43 [or p. 116].

3. EVIDENCE—*Criminal Procedure Code (Act XXV. of 1861, ss. 209, 210, 211, and Act VIII. of 1869, s. 369)—Deposition of dead witness—Tender of pardon to prisoner.*] When it is proposed to read the deposition of a witness alleged to be dead, the death of the witness should first be strictly proved, unless it is admitted on the other side, and the reading of the deposition not objected to. Procedure as to tendering a pardon to a prisoner before examining him as a witness discussed.—*Queen v. Gagal Magalu*, 4 B. L. R. Ap. 50 [or p. 184].

4. EVIDENCE—*Admissibility of—Record of proceedings in Calcutta Small Cause Court.*] The summons-book of the Small Cause Court, Calcutta, is admissible in evidence, though not signed by the presiding Judge.—*Queen v. Nakur Sirkar*, 6 B. L. R. 729 [or p. 313].

5. EVIDENCE—*Admissibility of—Record of proceedings in Small Cause Court.*] The record of proceedings in the Small Cause Court is not admissible in evidence, unless authenticated by the signature of the presiding Judge.—*Queen v. Shib Chandra Das*, 6 B. L. R. 730 note [or p. 314].

6. EVIDENCE—*Records—Conviction quashed.*] The prisoners were convicted, under s. 154 of the Penal Code, upon evidence taken in another case to which the prisoners were not parties. The conviction was set aside.—In the Matter of the Petition of C. G. D. Betts, 6 B. L. R. Ap. 83 [or p. 339].

7. EVIDENCE—*Intoxication—Recording evidence.*] Evidence taken on the trial of one prisoner wrongly admitted as evidence on the trial of another. Intoxication wrongly treated as an aggravation of offence.—*Queen v. Zulfukar Khan*, 8 B. L. R. Ap. 21 [or p. 474].

8. EVIDENCE—*Act I. of 1872, s. 32, cl. 2—Letter of advice.*] The prisoner was charged with forging a railway-re-

**Evidence (contd.)—**

ceipt for the purpose of obtaining from the East Indian Railway Company certain goods entrusted to them for transit. The delivery of the goods was sought to be proved by the letter of advice sent by the consignor to the consignee. *Held* that, under no circumstances, a letter of advice is relevant under s. 32, cl. 2, Act I. of 1872, and therefore not receivable in evidence.—*Queen v. Tarinicharan Dey*, 9 B. L. R. Ap. 42 [or p. 549].

9. EVIDENCE—*Act I. of 1872, s. 8, ill. k—Admission—Confession.*] A prisoner was indicted for theft and dishonestly receiving stolen property. The prosecutor, while travelling by train to Calcutta, discovered the loss of the property, and reported his loss to a railway-police-inspector at the first station at which the train stopped after he became aware of the theft, prisoner not then being present. This statement was tendered in evidence, and admitted under s. 8, ill. k, of the Evidence Act. Evidence was also tendered of a statement made by the prisoner to the constable who arrested him, to the effect that some of the property had been given him by his sister, and that he had bought the rest, and this was admitted; the Court remarking then that there was a distinction in the Evidence Act between "admission" and "confession."—*Queen v. MacDonald*, 10 B. L. R. Ap. 2 [or p. 571].

10. EVIDENCE—*Criminal Procedure Code (Act X. of 1872), s. 249—Evidence given before the committing officer.*] In a case in which the accused was charged with murder, the Sessions Judge considered the evidence given before him by the witnesses for the prosecution to be false, but nevertheless convicted the accused, acting under s. 249 of the Code of Criminal Procedure, and relying on the evidence which had been given by the same witnesses before the committing officer. *Held* that s. 249 did not apply to this case; that the discretion conferred by that section should be exercised upon substantial materials, rightly before the Court, and reasonably sufficient to guide the judgment of the Court to the truth of the matter, and not upon mere speculation or conjecture; and that, under that section, a Judge may base his judgment on the evidence given before the Magistrate in the presence of the accused, when there

**Evidence (contd.)—**

are special and particular reasons for considering that evidence to be honest and true, and when that evidence is, to a certain extent, corroborated by independent testimony before himself.—*Queen v. Amanulla*, 12 B. L. R. Ap. 15 [or p. 624].

11. EVIDENCE—*Admissibility of child's—Competent witness—New trial—Oaths' Act (X. of 1873), ss. 5, 13—Evidence Act (I. of 1872), s. 118—Criminal Procedure Code (Act X. of 1872), ch. 15.*] The accused was charged with throwing B and C down a well. She was charged with the murder of B under s. 302 of the Penal Code, and on that charge she was tried and acquitted. Thereupon the Joint-Magistrate without holding any further preliminary enquiry, committed her on a charge under s. 307 of attempting to murder C. The only eye-witness of the offence, according to the Sessions Judge, was a child, and as she did not understand the nature of an oath or solemn affirmation, her evidence was taken on simple affirmation. The jury found the prisoner guilty, and she was sentenced to ten years' transportation. *Held* that the omission to administer either an oath or solemn affirmation, although knowingly made, did not render the child's evidence inadmissible. *Held* also that, the omission by the Joint-Magistrate to hold a preliminary enquiry on the charge under s. 307 being an irregularity which prejudiced the prisoner in her defence, the proceedings should be quashed, and a new trial held.—*Queen v. Mussamat Itwarya*, 14 B. L. R. 54 [or p. 673].

12. EVIDENCE—*Criminal proceedings in the mofussil—Admissibility of wife's evidence for or against husband or person charged jointly with him.*] Upon a criminal trial in the mofussil, the evidence of a wife is admissible for or against her husband or person charged jointly with him. [Norman, J., dissented].—*Queen v. Khyroolla*, Sup. Vol. Ap. 11 [or p. 764].

**EVIDENCE—**

See CONFESSION, 2.

ENTICEMENT.

RECOGNIZANCE, 1, 2, 5, 9.

STATEMENTS OF ACCUSED.

WAGING WAR.

**EVIDENCE—**

Admissibility of Documents in. See ASSESSORS, 1.

**Evidence (contd.)—**

Dismissal of Complaint without taking. See DISMISSAL OF COMPLAINT, 1, 2.

Improper Admission of. See ACCOMPLICE, 3.

Mode of Recording. See POSSESSION, 8.

Want of. See DISCHARGE, 3.

**Evidence Act (II. of 1855)—**

S. 24. See PRIVILEGED COMMUNICATION.

S. 28. See FALSE EVIDENCE, 12.

S. 32. See FALSE EVIDENCE, 13.

**Evidence Act (I. of 1872)—**

S. 3. See JURISDICTION, 7.

S. 8. ill k. See EVIDENCE, 9.

S. 24. See THREAT.

S. 30. See CONFESSION, 3, 4.

S. 32, cl. 2. See EVIDENCE, 8.

S. 118. See EVIDENCE, 11.

S. 133. See CONFESSION, 4.

**Evidence as to Prisoner's Previous Character—**

See ACCOMPLICE, 1.

**Evidence of Accomplice—**

See ACCOMPLICE, 1 to 4.

**Evidence of Accused's Bad Character—**

See ACCOMPLICE, 3.

**Evidence of Approver—**

See ACCOMPLICE, 2.

**Evidence of Judge—**

See WITNESS.

**Evidence of Previous Conviction—**

See PREVIOUS CONVICTION.

**Examination of Accused—**

1. EXAMINATION OF ACCUSED—*Cross-examination—Commitment by Sessions Judge—Interference of High Court—Criminal Procedure Code (Act XXV. of 1861), s. 435.* It is a matter of discretion for the Magistrate himself to Judge whether during the enquiry it is right and proper that the accused should be examined or not. Therefore it is wrong for a Judge to censure a Magistrate for not examining an accused.—*In the Matter of Shama Sankar Biswas*, 1 B. L. R. S. N. 16 [or p. 45].

2. EXAMINATION OF ACCUSED—*Criminal Procedure Code (Act XXV. of 1861), ss. 205, 366, 367—Attestation by Magistrate—Postponement of trial*

**Examination of Accused (contd.)—**

*for evidence of a witness—Discretion of Judge—New trial.* A Deputy Magistrate committed certain prisoners for trial on a charge of dacoity. Some of the prisoners had confessed before the Deputy Magistrate, but he failed to record the examination of the prisoners, or to attest it as required by s. 205 of the Code of Criminal Procedure. The Sessions Judge therefore refused to admit the examination of the prisoners by the Deputy Magistrate in evidence, and also refused to postpone the trial for the purpose of summoning the Deputy Magistrate and taking his evidence in the matter. *Held* (1), the examination of the prisoners was inadmissible in evidence; (2), that it being wholly within the discretion of the Judges, under s. 366, to say whether or not he should postpone the trial or summon any witness to give his evidence, the High Court as a Court of Revision would not interfere or order a new trial.—*Queen v. Radhu Jana*, 3 B. L. R. A. Cr. 59 [or p. 126].

**Examination of Complainant—**

See COMPLAINT, 7.

**Examination of Witnesses—**

EXAMINATION OF WITNESSES—*And passing sentence in absence of accused.* It is illegal to examine the witnesses for the defence and to pass sentence in the absence of the accused.—*Bihooram v. Allaho Kolita*, 1 B. L. R. S. N. 8 [or p. 44].

**Excise—**

EXCISE—*Act XXI. of 1856—Abkari laws—Criminal Procedure Code (Act XXV. of 1861, and Act VIII. 1869), s. 61—Fine, Realisation of.* The provisions of s. 61 of the Criminal Procedure Code do not apply to fines imposed under Act XXI. of 1856; such fines cannot be levied by distress and sale of the offender's property.—*Queen v. Jungli Beldar*, 8 B. L. R. Ap. 47 [or p. 477].

**Executive Order—**

EXECUTIVE ORDER—*Act V. of 1861, s. 17—Order of executive nature.* The High Court, while considering that an order by a Magistrate professing to act under s. 17 of Act V. of 1861 was illegal, refused to interfere, on the ground that the order was one of an executive nature.—*In the Matter of the Petition of Rohoman Sirkar*, 10 B. L. R. Ap. 4 [or p. 572].

## F.

**False Account—**

See CRIMINAL BREACH OF TRUST, 1.

**False Charge—**

1. FALSE CHARGE—*Theft—Police-enquiry and order thereon—Counter-charge of bringing a false complaint.*] S T brought a charge of theft against B before a Magistrate. The case was made over to the Deputy Magistrate, on whose suggestion the Magistrate ordered that there should be a police-enquiry. The Police Superintendent reported that, in his opinion, the charge was false, and that the plaintiff should be summoned for bringing a false charge; and the Magistrate, while declaring that he would not encourage charges of "false complaint," said that the injured party might swear an information, if she chose. S T then petitioned to be allowed to call witnesses in support of her charge of theft, and objected to the police-proceedings. The Magistrate recorded the following order: "The case has been dismissed, and the accused, Mrs. B, has received permission to prosecute the woman, S T, for false charge; the present petition may be put in defence in that case." *Held* that the order of the Magistrate must be quashed—(1) because he had no jurisdiction, the case having been made over to the Deputy Magistrate; (2) because the order above was not a judicial dismissal of the case. The case remanded for the trial of the original charge as brought by S T.—*Shanto Teorni v. Mrs. Belilias*, 3 B. L. R. Ap. 151 [or p. 141].

2. FALSE CHARGE—*Criminal Procedure Code (Act VIII. of 1869), s. 249—Penal Code (Act XLV. of 1860), s. 211.*] Procedure before framing a charge under s. 211 of the Penal Code.—In the Matter of the Petition of Gaur Mohan Sing, 8 B. L. R. Ap. 11 [or p. 471].

3. FALSE CHARGE—*Penal Code (Act XLV. of 1860), ss. 108, 109, 211—Giving evidence in support of a false charge—Abetment of such charge.*] A person cannot be convicted of abetment of a false charge, solely on the ground of his having given evidence in support of such charge.—*Queen v. Ram Panda*, 9 B. L. R. Ap. 16 [or p. 539].

See SANCTION TO PROSECUTE, 4.

**False Document—**

See FORGERY, 1.

**False Evidence—**

1. FALSE EVIDENCE—*Judicial proceeding—Charge—Evidence—Handwriting of Magistrate—Penal Code (Act XLV. of 1860), s. 193.*] It is essential, in order to sustain a charge under s. 193 of the Penal Code, that it should be proved that there was a judicial proceeding, and that the false statement alleged to have been made in the course of that proceeding was made. A charge under this section should specify not only the judicial proceeding in the course of which the prisoner is accused of having made the false statement, but the particular stage of the proceeding in which the statement is made. The knowledge by the Sessions Judge of the handwriting of the judicial officer before whom the statement was made is no evidence of the statement having been made before that officer.—*Queen v. Fatik Biswas*, 1 B. L. R. A. Cr. 13 [or p. 9].

2. FALSE EVIDENCE—*Penal Code (Act XLV. of 1860), ss. 191, 192—Verification—Mofussil Small Cause Courts' Act (XI. of 1865), s. 21.*] A made an application for a new trial under s. 21 of Act XI. of 1865. He filed a memorandum of his grounds verified as a plaint, and therein knowingly made a false statement. *Held* (Glover, J., dissenting) that he had not thereby committed an offence under s. 191 or 192 of the Penal Code.—*In re Haran Mandal*, 2 B. L. R. A. Cr. 1 [or p. 54].

3. FALSE EVIDENCE—*Power of Sessions Judge—Penal Code (Act XLV. of 1860), ss. 193, 194.*] The Sessions Judge has no power to commit a man for having given false evidence before the Magistrate, but he can commit him for having given false evidence in his own Court. In the trial of a prisoner for murder, a witness stated on oath before the Sessions Court that another had committed the murder, whereas before the Magistrate he had stated, as was the fact, that the prisoner had committed the murder. *Held* that such witness was guilty under s. 193, and not under s. 194 of the Penal Code, as he did not know that he would cause a conviction for murder.—*Queen v. Hardyal*, 3 B. L. R. A. Cr. 35 [or p. 111].

4. FALSE EVIDENCE—*Powers of Judicial Commissioner to commit—False deposition—Alternative statements.*] A Judicial Commissioner has no power, under s. 172 of the Code of Criminal Procedure,

**False Evidence (contd.)—**

(Act XXV. of 1861), to commit a witness for a false deposition given before the Assistant Commissioner. The evidence of a writer in the Judicial Commissioner's office, to the effect that "the document shewn to him is a deposition taken before the Assistant Commissioner; it appears to have been taken in due form upon solemn affirmation, and is attested by the signature of the Assistant Commissioner," is not sufficient evidence of the prisoner having duly deposed. *Per* Norman, J.—*Query*, notwithstanding the decision of the Full Bench as to the correctness of convictions for perjury upon alternative statements.—*Queen v. Mati Khowa*, 3 B. L. R. A. Cr. 36 [or p. 112].

5. FALSE EVIDENCE—*Preliminary investigation by Magistrate—Criminal Procedure Code (Act XXV. of 1861), s. 173.* A Munsif sent a witness before a Magistrate in order that the latter might hold a preliminary investigation on a charge of giving false evidence under s. 193 of the Penal Code. The Magistrate, without completing the investigation, sent the case back to the Munsif, who finally committed the prisoner. *Held* that, while the Munsif could have committed the prisoner himself under s. 173 of the Criminal Procedure Code, without sending him before the Magistrate to conduct the preliminary investigation, on a charge of giving false evidence, the Magistrate had acted irregularly in not himself completing the enquiry. Case remanded to the Magistrate accordingly.—*Queen v. Jan Mahommed*, 3 B. L. R. A. Cr. 47 [or p. 118].

6. FALSE EVIDENCE—*Contradictory statements of a witness.* The statement made by a witness before the Magistrate was opposed to the statement made by him before the Sessions Court. On a charge of perjury being made, *held* that a statement made by the accused before one Court was no evidence of the falsity of a contrary statement before another Court to support a conviction of giving false evidence, and that neither the Judge nor jury had any right to assume that an explanation could not have been given consistent with both the statements.—*Queen v. Kola*, 4 B. L. R. A. Cr. 4 [or p. 155].

7. FALSE EVIDENCE—*Criminal Procedure Code (Act XXV. of 1861), s. 172—Variance in evidence.* Where a witness makes a statement before the Court

**False Evidence (contd.)—**

of Session, which contradicts that made by him before the committing officer, and no evidence is given to show which statement is true, it cannot, under s. 172, Act XXV. of 1861, be said that an offence has been committed under the cognizance of the Court of Session. A Judge's duty in dealing with the contradictory statement of a witness discussed.—*Queen v. Nomal*, 4 B. L. R. A. Cr. 9 [or p. 159].

8. FALSE EVIDENCE—*Penal Code (Act XLV. of 1860), s. 193—Charge under s. 193 of the Penal Code—Charge for giving false evidence, Form of.* Six persons were charged in the same charge as follows: "That you, on or about the—— day of June——, at Tajpur, committed the offence of voluntarily giving false evidence in the stage of a judicial proceeding, and that you have thereby committed an offence under s. 193 of the Penal Code." *Held* that the charge was bad and defective: *first*, as it charged a number of persons jointly with giving false evidence; *second*, as it did not show what statement the accused persons made; *third*, as it did not mention the day and year when the offence was committed; *fourth*, as it did not indicate the Court or officer before whom the false evidence was given. To support a charge of giving false evidence under s. 193, it must be shown that the accused intentionally made a particular statement false to his own knowledge.—*Queen v. Maharaj Misser*, 7 B. L. R. Ap. 66 [or p. 450].

9. FALSE EVIDENCE—*Contradictory statements—Two charges—Plea of guilty on one charge—Acquittal on the other.* Where a prisoner is charged separately for having given false evidence with regard to two statements directly opposed to each other, a plea of guilty on one of the charges does not involve an acquittal on the other. A Sessions Court is bound to take evidence and try a charge before it can acquit a prisoner of that charge.—*Queen v. Hossain Ali*, 8 B. L. R. Ap. 25 [or p. 475].

10. FALSE EVIDENCE—*Alternative charge—Finding—Contradictory statements—Criminal Procedure Code (Act X. of 1872), s. 455, sch. iii.—Penal Code (Act XLV. of 1860), s. 193.* Where a person was convicted of giving false evidence upon an alternative charge in the form given in sch. iii. of the Criminal Procedure

**False Evidence (contd.)—**

Code, held by the majority of the Court (Jackson and Phear, JJ., dissenting) that the conviction was good, notwithstanding the jury had not distinctly found which of the two statements charged was false. *Held per* Jackson, J., that such a charge is bad, and further that an alternative finding upon such charge is invalid. *Held per* Phear, J., that, although a person may be lawfully tried upon such a charge, still the Court or jury must, for a conviction, find specifically which branch of the alternative is true.—*Queen v. Mahomed Hoomayoon Shaw*, 13 B. L. R. 324 [or p. 632].

11. FALSE EVIDENCE — *Alternative finding — Contradictory statements — Criminal Procedure Code (Act XXV. of 1861), s. 381.* In cases of alternative charges, it is preferable that a distinct finding on one or other of the said charges should be come to, and that some attempt at least be made to obtain evidence upon one or other of the said charges before judgment is given, and a finding arrived at in what is known as the alternative form. Such a finding should not be come to where the two statements are not absolutely contradictory of each other, or where one of such statements is heresay. Every presumption in favour of the possible reconciliation of the statements should be made.—*Queen v. Bidu Noshyo*, 13 B. L. R. 325 note [or p. 633].

12. FALSE EVIDENCE—*Evidence Act (II. of 1855), s. 28—Penal Code (Act XLV. of 1860), s. 193.* A person cannot be convicted in the mofussil of giving false evidence upon the uncorroborated evidence of a single witness (Campbell, J., dissenting).—*Queen v. Lalchand Kowrah*, Sup. Vol. 417 [or p. 689].

13. FALSE EVIDENCE — *Alternative charge and conviction — Penal Code (Act XLV. of 1860), s. 122—Criminal Procedure Code (Act XXV. of 1861), ss. 242, 381, 382, cl. 5—Evidence Act (II. of 1855), s. 32.* The prisoner, who as a witness in a former case had made one statement before the Magistrate and a contrary one before the Sessions Judge, was tried and convicted of having either given false evidence before the Judge or given false evidence before the Magistrate. *Held* (Norman and Campbell, JJ., doubting) the conviction was right. *Held* also (Campbell, J., differing) the evi-

**False Evidence (contd.)—**

dence taken before the Judge was admissible on the charge of having given false evidence before the Magistrate.—*Queen v. Mussamat Zamiran*, Sup. Vol. 521 [or p. 732].

See COMPENSATION.

SANCTION TO PROSECUTE, 1, 3.

**False Personation—**

FALSE PERSONATION — *Penal Code (Act XLV. of 1860), s. 419—Registration Act (XX. of 1866), ss. 93, 94.* A vendor proceeded, in company with three persons, to Dacca to register her deed of sale. Falling ill on the way, the three companions went to the registrar's office; one of them there personated the vendor, and got registry of the deed. She was convicted of cheating by false personation, and the other two of abetting that offence. *Held*, on revision, that as there was no intention apparent on the part of the accused to injure or defraud any one, the convictions should have been under ss. 93 and 94 of Act XX. of 1866, and not under s. 419 of the Penal Code.—*Queen v. Luthi Bewa*, 2 B. L. R. A. Cr. 25 [or p. 69].

**Family Dwelling-house—**

See CRIMINAL TRESPASS, 1.

**Filthy State of Premises—**

See NUISANCE, 10.

**Fine—**

See CERTIFICATE-TAX.

DAILY FINE.

Distribution of. See OPIUM.

Realization of. See EXCISE.

**Fire-arms—**

See DISOBEDIENCE TO PUBLIC SERVANT, 3.

**Fire-ball—**

Possession of. See ATTEMPT TO COMMIT OFFENCE.

**Fishery—**

See MISCHIEF.

**Force—**

See CUMULATIVE SENTENCES.

**Forfeited Property—**

See ATTACHED PROPERTY.

**Forfeiture of Recognizance—**

See RECOGNIZANCE, 3, 5, 7, 8.

**Forgery—**

1. FORGERY—*Penal Code (Act XLV. of 1860), ss. 5, 29, 463—False document.* To constitute the offence of forgery, the simple making of a false document is suffi-

**Forgery (contd.)—**

cient. It is not necessary that the document should be published, or made in the name of a really existing person. A writing, which is not legal evidence of the matter expressed, may yet be a document within the meaning of s. 29 of the Penal Code, if the parties framing it believed it to be, and intended it to be, evidence of such matter.—*Queen v. Shifait Ali*, 2 B. L. R. A. Cr. 12 [or p. 61].

2. **FORGERY** — *Specially registered bond—Registration Act (XX. of 1866), s. 53—Sanction to prosecute—Criminal Procedure Code (Act XXV. of 1861), s. 170.* A specially registered bond was presented before the Small Cause Court Judge, for execution, under s. 53, Act XX. of 1866, and a decree passed upon it in usual form. Subsequently the Registrar sanctioned the prosecution of the decree-holder, on the ground that the bond was a forgery. The Small Cause Court Judge thereupon, on application made, without taking any evidence or making further enquiry, set aside the decree, and sanctioned the prosecution under s. 170 of the Criminal Procedure Code. *Held* that he was justified in sanctioning the prosecution, but not in setting aside the decree.—*Queen v. Nawab Sing*, 3 B. L. R. A. Cr. 9 [or p. 94].

See SANCTION TO PROSECUTE, 2, 3.

**Forgery of Railway Receipts—**

See EVIDENCE, 8.

**Form of Charge—**

See FALSE EVIDENCE, 8, 10.

**Formal Charge—**

See DISCHARGE, 1.

**Former Trial—**

Evidence at. See EVIDENCE, 1.

**Fraud—**

See ATTACHED PROPERTY..

**Fraudulent Removal of Property.**

**FRAUDULENT REMOVAL OF PROPERTY** — *Penal Code (Act XLV. of 1860), s. 206—Act X. of 1859, s. 145—Fraudulent removal of property to prevent seizure in execution.* A Deputy Magistrate convicted certain persons under s. 206, Penal Code, of having fraudulently removed property to prevent its being attached in execution of a decree under Act X. of 1859. The Judge was of opinion that the offence was one provided for by s. 145 of Act X. of 1859, and was not

**Fraudulent Removal of Property (contd.)—**

therefore triable by the Magistrate. *Held* that the trial and conviction was right under s. 206.—*Gaur Chandra Chuckerbutty v. Krishna Mohan Sing*, 2 B. L. R. S. N. 4 [or p. 72].

See PARTNER, 1,

**Fresh Proceedings after Discharge—**

See DISCHARGE, 2.

**Fresh Recognizance—**

See RECOGNIZANCE, 8.

**Functions of Criminal Courts—**

See CRIMINAL COURTS.

**G.****Gazette—**

See ASSESSORS, 1.

**Grave Provocation—**

See CULPABLE HOMICIDE, 1, 3.  
CULPABLE HOMICIDE NOT  
AMOUNTING TO MURDER, 1.

**Grievous Hurt—**

See JURISDICTION, 4.  
THREAT.  
WHIPPING, 2.

**H.****Habeas Corpus—**

1. **HABEAS CORPUS—Minor—Discretion—Return—Affidavit—Amendment.** The return to a writ of *habeas corpus* must be taken to be true, and cannot be controverted by affidavit. In England, 56 Geo. III., c. 100, s. 4, allows affidavits to be used to controvert the return in criminal matters, but that statute does not apply to this country. The return to a writ of *habeas corpus* can, however, be amended. A girl under sixteen years of age has not such a discretion as enables her, by giving her consent, to protect any one from the criminal consequences of inducing her to leave the protection of a lawful guardian; but where the return to the writ of *habeas corpus* stated that a girl was above the age of sixteen (though her mother stated her to be of the age of thirteen years and nine months), the Court *held* that she was of years of discretion to choose for herself under whose protection she would remain.—*Queen v. Vaughan*; In the Matter of S. M. Ganesh Sundari Debi, 5 B. L. R. 418 [or p. 213].

**Habeas Corpus (contd.)—**

2. **HABEAS CORPUS—Jurisdiction of High Court—Power to issue writ into the mofussil—Habeas Corpus Act, 31 Car. II., c. 2—Reg. III. of 1818—Act III. of 1858—Act XXXIV. of 1850—13 Geo. III., c. 63, s. 36—37 Geo. III., c. 142, s. 8—21 Geo. III., c. 70—3 & 4 Will. IV., c. 85, s. 43.]** A Mahomedan subject of the Crown was arrested in Calcutta, taken into the mofussil, and there detained in jail, under a warrant of the Governor-General in Council in the form prescribed by Reg. III. of 1818. *Held* that such arrest and detainer were not acts of State, but matters cognizable by a Municipal Court. On an application to the High Court to issue a writ of *habeas corpus* to the Superintendent (a European British subject) of the jail, *held* that the Supreme Court had power to issue writs of *habeas corpus* to persons in the mofussil, and that the same power is continued to the High Court. Reg. III. of 1818 was applicable only to natives and those subject to the jurisdiction of the Provincial Courts. It was passed under 37 Geo. III., c. 142, s. 8, not 13 Geo. III., c. 63, s. 36. It was passed by a legislative authority having full powers in that behalf. Considering the circumstances under which it was enacted, Act III. of 1858, which extended the effect of that Regulation to Calcutta, was not *ultra vires*. As the person against whom the writ was applied for had acted under the written order of the Governor-General in Council, the Court would not direct the writ to issue.—In the Matter of Ameer Khan, 6 B. L. R. 392 [or p. 251].

3. **HABEAS CORPUS—Reg. III. of 1818—Act XXXIV. of 1850—Act III. of 1858—3 & 4 Will. IV., c. 85, s. 43—Allegiance—Prerogative—Appeal—Detention—Warrant—Arrest.]** Assuming the power of a Judge of the High Court to issue a writ of *habeas corpus*, and assuming the right of appeal against an order refusing such writ, *held* that it appearing that the prisoner was in custody under a warrant in the form prescribed by Reg. III. of 1818, the detention was legal. The detention, to be legal, need only be covered by an actually existing warrant of the Governor-General in Council in the form prescribed, without regard to the lawfulness of the arrest. The Regulation is not confined to prisoners of war or foreigners held in confinement for politi-

**Habeas Corpus (contd.)—**

cal reasons. The substance of Reg. III. of 1818 was expressly re-enacted by Act XXXIV. of 1850 and Act III. of 1858, and therefore, as the result of these later Acts alone, the detention would be legal. These Acts are not contrary to the powers conferred on the Indian Legislature by 3 & 4 Will. IV., c. 85, s. 43.—In the Matter of Ameer Khan, 6 B. L. R. 459 [or p. 291].

**Handwriting of Magistrate—**

See FALSE EVIDENCE, 1.

**High Court—**

**HIGH COURT—Original Criminal Jurisdiction—24 & 25 Vic., c. 104, s. 15.]** A Judge of the High Court making an order in the Original Criminal Jurisdiction of that Court is not a Court subject to the control of the Court under s. 15 of the 24 & 25 Vic., c. 104.—In the Matter of the Petition of the Government of Bengal.—Queen v. Ameer Khan, 7 B. L. R. 244, 250 note [or pp. 385, 388].

**High Courts' Crim. Pro. Act (X. of 1875)—**

S. 147. See TRANSFER OF CASE, 4.

**High Court's Power—**

See TRANSFER OF CASE, 2.

**High Court's Power of Revision—**

See REVISION.

**High Court's Power of Superintendence—**

See REMAND, 2.

**High Seas—**

**HIGH SEAS—Offence on the—Punishment—Procedure—17 & 18 Vic., c. 104, s. 267; and 18 & 19 Vic., c. 91, s. 27—12 & 13 Vic., c. 96; and 23 & 24 Vic., c. 88—Act XIII. of 1865.]** In prosecuting a British subject for an offence committed on board a British ship upon the high seas, *held*, 1 (*dubitante*, Phear, J.), that he must be charged with an offence under English law; 2, that the punishment must be according to English law; 3, that the trial must be according to the procedure of the local Court. Therefore, where a British subject was charged before the High Court with having committed an offence under 7 Will. IV. and 1 Vic., c. 85, s. 2, on board a British ship, upon the high seas, within the admiralty jurisdiction of the Court, and found guilty of an offence under 14 & 15 Vic., c. 19, s. 5, *held* that the conviction was good, and



**High Seas (contd.)—**

that the prisoner would be rightly punished with "rigorous imprisonment," which is defined by s. 53 of the Penal Code to be "imprisonment with hard labour," and that the trial had been rightly proceeded with under Act XIII. of 1865. It ought to appear upon the face of a charge that it had been delivered to the Clerk of the Crown by a Justice of the Peace or a Magistrate, but its not so appearing is a formal defect only, to which objection can only be taken under s. 41 of Act XVIII. of 1862 before the jury has been sworn, and it is not ground for arrest of judgment.—*Queen v. Thompson*, 1 B. L. R. O. Cr. 1 [or p. 16].

**House-breaking—**

See PRIVATE DEFENCE, 1.

**Howrah Municipal Bye-laws—**

See DAILY FINE, 1.

**Hurt—**

See APPEAL, 4.

ASSAULT.

JURY, 3.

**Hurt with Dangerous Weapons—**

See SENTENCE, 3.

**I.****Illegal Arrest—**

See TOLLS.

**Illegal Gratification—**

See PUBLIC SERVANT.

**Illegal Sentence—**

See DAILY FINE.

**Improper Admission of Evidence—**

See ACCOMPLICE, 3.

**Indian Councils' Act (26 Vic., c. 67)—**

Ss. 22, 42. See JURISDICTION, 8.

**Indian Legislature—**

Powers of. See EUROPEAN BRITISH SUBJECT.

**Information to Police—**

Omission to give. See ABETMENT. REMAND, 3.

**Injury—**

See NUISANCE, 6, 7.

**Insanity—**

See JURY, 7.

UNSOUNDNESS OF MIND.

**Intention—**

See CRIMINAL TRESPASS, 2, 3.

**Interlocutory Proceedings—**

Revision of. See TRANSFER OF CASE, 3.

**Intoxication—**

See EVIDENCE, 7.

**Irregular Deposition—**

See DEPOSITION.

**Irregular Proceedings—**

See TOLLS.

TRIAL ON SUNDAY.

**Irregularity—**

See COMPLAINT, 1, 2, 3.

**Issue of Summonses or Warrant without specifying Charge—**

See ARMS' ACT, 1.

**J.****Joint Charges—**

See ACQUITTAL.

**Joint Trial—**

See CONFESSION, 3.

**Judge when a Competent Witness—**

See WITNESS.

**Judge's Summing-up—**

See ACCOMPLICE, 3.

**Judgment of Acquittal—**

See REVISION, 4, 5.

**Judicial Commissioner's Powers to Commit—**

See FALSE EVIDENCE, 4.

**Judicial Notice—**

See STATEMENTS OF ACCUSED.

**Jurisdiction—**

1. JURISDICTION — *Criminal Procedure Code (Act XXV. of 1861), s. 273—Jurisdiction of Deputy Magistrate, s. 219—Penal Code (Act XLV. of 1860), s. 174—Non-attendance in obedience to order from public servant.*] In consequence of the default of appearance by the person bailed, the surety was compelled to pay the penalty mentioned in the recognizance. The Deputy Magistrate applied for and received the permission of the District Magistrate to try the accused under s. 174 of the Penal Code. *Held* that the Deputy Magistrate had no jurisdiction to try the case, it not having been referred to him "either on complaint preferred directly to the Magistrate, or on the report of a police-officer." *Held* also that, notwithstanding s. 219 of Act XXV. of 1861, the ac-

**Jurisdiction (contd.)—**

cused might have been proceeded against under s. 174 of the Penal Code.—*Queen v. Tajumaddi Lahory*, 1 B. L. R. A. Cr. 1 [or p. 1].

2. JURISDICTION — *Criminal Procedure Code (Act VIII. of 1869), s. 435—Jurisdiction of Sessions Judge—Offences triable by a Magistrate.*] The Sessions Judge has no jurisdiction to annul a conviction and order a commitment for an offence triable by a Magistrate. S. 435, Act VIII. of 1869, relates to offences triable by the Sessions Judge.—*In the Case of Wazir Sing*, 3 B. L. R. A. Cr. 65 [or p. 130].

3. JURISDICTION — *Magistrate's and Sessions Judge's—Registration Act (XX. of 1866), s. 95.*] The Sessions Judge has jurisdiction to try a case of abetting false personation of a witness before a Registrar of Assurances under s. 95 of the Registration Act (XX. of 1866). The word "instituted" in that section should be construed to mean commenced.—*Queen v. Sheogolam Das*, 6 B. L. R. 692 [or p. 308].

4. JURISDICTION — *Criminal Procedure Code (Act XXV. of 1861), s. 273—Grievous hurt.*] A Magistrate has no power, under s. 273 of the Code of Criminal Procedure, to refer a case of grievous hurt for trial to a Deputy Magistrate having only the powers of a Subordinate Magistrate of the second class.—*Gabind Chandra Biswas v. Hem Chandra Bardar*, 6 B. L. R. Ap. 115 [or p. 351].

5. JURISDICTION — *Prosecutor also Judge—Sub-Registrar.*] A Sub-Registrar, who is also a Magistrate, cannot investigate a case against one of his subordinates in the Registry Office, and afterwards himself try and convict him.—*In re Bharat Chandra Sen*, Petitioner, 8 B. L. R. 423 note [or p. 455].

6. JURISDICTION — *Criminal Procedure Code (Act X. of 1872), s. 67, ill. a—Penal Code (Act XLV. of 1860), ss. 499, 503.*] Where an offence was alleged to have been committed during a journey from Bombay to Calcutta, and was in fact committed between Bombay and Allahabad, at which latter place the complainant and the person by whom the offence was alleged to have been committed separated, and proceeded to Calcutta by different trains, *held* that the

**Jurisdiction (contd.)—**

Magistrate of Howrah had no jurisdiction to try the charge. To bring the matter within his jurisdiction, the journey should have been continuous from one terminus to the other without any interruption by either party.—*Queen v. Piran*, 13 B. L. R. Ap. 4 [or p. 663].

7. JURISDICTION — *Criminal Procedure Code (Act X. of 1872), ss. 435, 436—Registration Act (VIII. of 1871), s. 82—Evidence Act (I. of 1872), s. 3—Sub-Registrar—Offence committed during a judicial proceeding—Meaning of word "Court".—Penal Code (Act XLV. of 1860), s. 228.*] A was charged before an Assistant Magistrate by a sub-registrar with having committed an offence under s. 228 of the Penal Code, and fined. *Held* that the sub-registrar should have tried the matter himself under ss. 435 and 436 of the Criminal Procedure Code, and as the Magistrate acted without jurisdiction, the order must be quashed. By s. 82 of the Registration Act, a sub-registrar is a public officer, and proceedings before him are judicial proceedings within the meaning of s. 228 of the Penal Code, and as he is legally authorized to take evidence, he is a "Court" as defined by the Evidence Act, s. 3.—*In the Matter of the Petition of Sardhari Lal*, 13 B. L. R. Ap. 40 [or p. 671].

8. JURISDICTION—*European British subject—Criminal Procedure Code (Act X. of 1872), ch. 7—24 & 25 Vic., c. 204, s. 9—26 Vic., c. 67 (Indian Councils' Act), ss. 22, 42—Letters Patent, 1862, cl. 21—Letters Patent, 1865—34 & 35 Vic., c. 34.*] A European British subject in the mofussil was convicted by a Magistrate under the provisions of ch. 7 of Act X. of 1872. He appealed to the High Court on the ground (*inter alia*) that the Magistrate had no jurisdiction to try the case, inasmuch as the Governor-General in Council had not the power under 24 & 25 Vic., c. 67, to subject a European British subject to any jurisdiction other than that of the High Court, and therefore the provisions of Act X. of 1872, under which the prisoner had been tried, were *ultra vires* and illegal. *Held* that the jurisdiction of the High Court as given by the Letters Patent is subject to the legislative powers of the Governor-General in Council, and therefore the Magistrate had jurisdiction to

**Jurisdiction (contd.).—**

try the case.—*Queen v. Gerald Meares*, 14 B. L. R. 106 [or p. 677].

See EUROPEAN BRITISH SUBJECT.

RECOGNIZANCE, 3.

TRANSFER OF CASE.

WAGING WAR.

**Jurisdiction of Collector—**

See STAMP.

**Jurisdiction of High Court.**

See STATEMENTS OF ACCUSED.

**Jurisdiction of Magistrate—**

See DISMISSAL OF COMPLAINT, 4.

**Jury—**

1. JURY—*Charge to—Culpable homicide not amounting to murder—Punishment—Penal Code (Act XLV. of 1860), s. 304.* In charging a jury in a case of culpable homicide not amounting to murder, a Judge should call upon the jury to state which description of culpable homicide they consider the accused to have committed, s. 304 of the Penal Code prescribing different punishments for that offence. Where the Judge omitted to require the jury to do this, the High Court held that the conviction was for the lighter description of the offence.—*Queen v. Amir Khan*, 6 B. L. R. Ap. 87 note [or p. 340].

2. JURY—*Criminal Procedure Code (Act VIII. of 1869), s. 310—Award of jury—Appointment of jury.* A Magistrate cannot receive and enforce the award of a jury under s. 310 of the Criminal Procedure Code, delivered long after the day fixed for the purpose. A jury appointed under s. 310 is not properly constituted when only the foreman is appointed by the Magistrate, and the rest of the members by the parties.—*Queen v. Hargabind Pal*, 7 B. L. R. Ap. 57 [or p. 447].

3. JURY—*Trial by—Special verdict—Criminal Procedure Code (Act XXV. of 1861)—Penal Code (Act XLV. of 1860), ss. 330, 348.* The prisoners were tried under s. 330 of the Penal Code (for voluntarily causing hurt to a girl), and under s. 348 (for wrongfully confining her). Circumstances of aggravation were alleged, as lifting up and using a sword, of lowering the girl into a well, and of pricking her with thorns. The jury in their verdict stated that they disbelieved these allegations, and also the charge of illegal confinement, but that they believed that

**Jury (contd.).—**

some slaps had been given. The Judge then asked the jury whether they convicted on either, and, if so, which head of charge. They answered that they believed the prisoners had beaten the girl, and that they convicted them under s. 330. Held that the question put by the Judge to the jury was a proper one, and not one of law. The conviction was upheld. Such a case is not governed by the rule of English law as to special verdicts.—*Queen v. Hari Prasad Gangooly*, 8 B. L. R. 557 [or p. 461].

4. JURY—*Charge of Judge—How to sum up evidence—Verdict—Criminal Procedure Code (Act X. of 1872), ss. 255, 256.* The High Court (Kemp and Phear, JJ.) laid down at some length the duties of a Judge in his charge to the jury and in his summing up of the evidence.—*Queen v. Rajcoomar Bose*, 10 B. L. R. Ap. 36 [or p. 582].

5. JURY—*Verdict of, set aside—Acquittal—Criminal Procedure Code (Act X. of 1872), ss. 263, 271, 287, 288.* On a trial by jury before a Sessions Judge, the jury returned a verdict of guilty. The Judge disagreed with the verdict, and submitted the case to the High Court. Held that the High Court had power to set aside the verdict of the jury, and to direct an acquittal. S. 263 of the Criminal Procedure Code (Act X. of 1872) explained.—*Queen v. Koonjo Leth*, 11 B. L. R. 14 [or p. 585].

6. JURY—*Criminal Procedure Code (Act X. of 1872), s. 263—Verdict when to be set aside.* Macpherson, J.—“The evidence against the prisoners, in whose interest the Judge has referred this case to the High Court under s. 263, is certainly not very strong, inasmuch as it consists solely of the statement of the prosecutrix. Nevertheless the evidence is quite sufficient, if believed. The jury did believe it: and how can we say that they were wrong in doing so? It is as likely as not that they were right. And is the High Court to set aside a verdict in such a case? I think we ought not to interfere with a verdict, unless we can say decidedly that we think that it is clearly wrong. If we are to interfere in every case of doubt—in every case in which it may with propriety be said that the evidence would have warranted a different verdict—then we must hold that real trial

**Jury (contd.)—**

by jury is absolutely at an end, and that the verdict of a jury is of no more weight than the opinion of assessors. I presume that, if this were the intention of the Legislature, it would have said so. But the Legislature has not said so. As it is, I consider that the Court should exercise the powers vested in it by s. 263 only in cases in which it finds the verdict of the jury clearly and undoubtedly wrong. This is not such a case, although I may admit that there may be room for doubts being entertained as to the facts. Therefore I think the verdict of the jury should remain undisturbed so far as this Court is concerned, and that the Sessions Judge must pass sentence on the prisoners.—*Queen v. Sham Bagdi*, 13 B. L. R. Ap. 19 [or p. 667].

7. **JURY—Criminal Procedure Code (Act X. of 1872), s. 263—Verdict when to be set aside—Murder—Insanity.** In dealing with a reference made by a Sessions Judge under s. 263, Code of Criminal Procedure, in consequence of his disagreeing from the verdict of the jury, the High Court must deal with it as an appeal by the prosecution, and has authority to convict the accused persons on the facts, and to pass sentence accordingly; s. 257 of the Code, by which the Court has to decide which view of the facts is correct, being read as qualified by s. 263. The fact of unsoundness of mind is one which must be clearly and distinctly proved before any jury is justified in returning a verdict under s. 84 of the Penal Code. The High Court, considering the verdict of the jury utterly wrong and entirely against the evidence, convicted the prisoner, on the facts, of culpable homicide amounting to murder, and sentenced him to transportation for life.—*Queen v. Nobin Chunder Banerjee*, 13 B. L. R. Ap. 20 [or p. 667].

8. **JURY—Verdict when to be set aside—Criminal Procedure Code (Act X. of 1872), s. 263.** Where a Sessions Judge had disagreed with a jury's verdict of not guilty, and referred the case to the High Court, the High Court refused to interfere, it being impossible to say that the jury were so entirely mistaken in their verdict—that they were so patently wrong—that the High Court ought to exercise the extraordinary powers given under s. 263.—*Queen v. Mussamut Itwarya*, 14 B. L. R. Ap. 1 [or p. 685].

**Jury (contd.)—**

9. **JURY—Criminal Procedure Code (Act X. of 1872), s. 263—Verdict when to be set aside.** The powers given to the High Court by s. 263 are not to be lightly exercised, and the unanimous verdict of a jury ought not to be set aside even if the Sessions Judge disagrees with it, unless that verdict is clearly and patently wrong, and unsustainable on the evidence.—*Queen v. Hurro Manji*, 14 B. L. R. Ap. 2 note [or p. 685].

**JURY—**

See NUISANCE, 13.

Acquittal by. See PRIVILEGED COMMUNICATION.

Charge to. See CULPABLE HOMICIDE NOT AMOUNTING TO MURDER, 2.

Misdirection. See EVIDENCE, 2.

Trial by. See CONFESSION, 3.

Verdict of. See REVISION, 1.

**Jute-warehouse (Unlicensed)—**

See SENTENCE, 2.

**L.****Labourers' Wages—**

**LABOURERS' WAGES—Act VI. of 1865 (B.C.), ss. 31, 32—Protector of labourers, Powers of—Wages of labourers—Mode of taking account.** Until an enquiry is made under s. 31, Act VI. of 1865 (B.C.), the Protector of Labourers is not competent to act under s. 32. The procedure under s. 31 must be conducted in accordance with s. 444 of the Criminal Procedure Code. To support a conviction under s. 32, Act VI. of 1865 (B.C.), it must be shown that the wages or part of the wages due have remained unpaid for more than six months. But in an account current, the payments are not to be appropriated for the wages of the month in which the payment was made.—In the Matter of the Northern Assam Tea Company, 3 B. L. R. A. Cr. 39 [or p. 114].

**Land Acquisition Act (VI. of 1867)—**

S. 8. See RIGHT OF WAY.

**Letter of Advice—**

See EVIDENCE, 8.

**Letters—**

See WAGING WAR.

**Letters Patent (1862)—**

Cl. 21. See JURISDICTION, 8.

**Letters Patent (1865)—**

See JURISDICTION, 8.

S. 29. STATEMENTS OF ACCUSED.  
TRANSFER OF CASE, 2.

S. 36. See APPEAL, 2.

**Levy of Fine—**

See EXCISE.

**License—**Carrying Firearms without. See DIS-  
OBEDIENCE TO PUBLIC SERVANT, 3.**License for Jute-warehouse.**

See SENTENCE, 2.

**License for Slaughter-house—**

See SLAUGHTER-HOUSE, 1.

**Likelihood of Breach of Peace—**

See POSSESSION.

RECOGNIZANCE.

**Limitation of Period of Prosecu-  
tion—**

See ASSESSORS, 1.

**Lord's Day Act—**LORD'S DAY ACT—*British Burmah*  
—*Abkari rules.*] The Lord's Day Act  
does not extend to criminal cases in British  
Burmah. A was convicted and fined  
for the breach of an abkari rule. *Held*  
that the conviction could not be supported,  
on the ground that the abkari rule had  
not the force of law.—*D. Abraham v.*  
*Queen*, 1 B. L. R. A. Cr. 17 [or p. 11].**Lottery Office—**LOTTERY OFFICE—*Act XXVII. of*  
*1870, ss. 10, 294A.*] No charge for the  
offence (of keeping a lottery office) under  
s. 10, Act XXVII. of 1870, 294A, can be  
entertained without the authority of the  
Local Government.—*Queen v. Nga Cho*,  
6 B. L. R. Ap. 98 [or p. 346].**Lurking House-trespass—**

See SEPARATE OFFENCES.

**M.****Mahomedan Law—**

See MAINTENANCE.

**Mainprize—**MAINPRIZE—*Writ of—Power of High*  
*Court to issue it.*] A writ of mainprize  
could only be issued where the party ap-  
plying for it was bailable, and had offered  
securities, but bail had been refused; it  
could not be issued to a prisoner con-  
fined under Reg. III. of 1818, which au-  
thorizes his detention absolutely and un-  
conditionally, and gives him no right to**Mainprize (contd.)—**demand to be released on bail. The writ  
is one which could be issued only on the  
Common Law Side of the Court of Chan-  
cery in England. The power of the Com-  
mon Law Side of the Court of Chan-  
cery to issue such writ was not conferred  
on the Supreme Court; nor is there any-  
thing in the Charter of the High Court  
to give that Court power to issue it.—In  
the Matter of Ameer Khan, 6 B. L. R.  
456 [or p. 290].**Maintenance—**1. MAINTENANCE—*Criminal Proce-*  
*dure Code (Act XXV. of 1861), s. 316*  
—*Willingness of father to support chil-*  
*dren.*] The prosecutrix applied for an  
order against her husband under s. 316  
of Act XXV. of 1861 for maintenance.  
The Deputy Magistrate held that she  
had failed to establish her right to main-  
tenance under s. 316, but awarded main-  
tenance to her for their two infant chil-  
dren, although the husband was willing to  
take charge of them, and also to support  
the mother, if she would live with him.  
On reference by the Sessions Judge, the  
High Court held that the Deputy Magis-  
trate's order was illegal, and remarked  
as follows: "The Deputy Magistrate  
finds that the wife is not entitled to re-  
ceive maintenance, as she has not been  
able to prove that her husband ill-treated  
her, or was living in adultery with another  
woman." There is no evidence that the  
husband is unwilling to support his infant  
children; on the contrary, he states that  
he is willing to do so, provided they reside  
under his roof, and not in his father-in-  
law's house. The order of the Deputy  
Magistrate is quashed.—*Panchudas v.*  
*Srimati Shudhamayi*, 8 B. L. R. Ap. 19  
[or p. 472].2. MAINTENANCE—*Order for—Crim-*  
*inal Procedure Code (Act X. of 1872),*  
*ss. 536, 537—Mahomedan law—Divorce.*] The complainant prayed for and obtained  
an order for maintenance on the 18th  
May 1872 in the Court of a Full-powered  
Magistrate, who at that time declared  
that the plea of divorce set up by the hus-  
band has not been proved. On the 20th  
June following, the woman petitioned,  
saying that the husband had failed to  
carry out the orders of the Court, and the  
case was made over to the Deputy Ma-  
gistrate for needful orders with regard to  
the realization of the money due. On the

**Maintenance (contd.)—**

23rd July the Deputy Magistrate declared that, as the husband had divorced his wife in the presence of the Court, she was not entitled to maintenance. On reference the High Court held that, even if such divorce made such an alteration in the circumstance as to justify the Court, on the application of the husband, in altering the order for maintenance, yet the defendant would not be relieved from obeying the order during the time which had elapsed up to the date when and until that change of circumstances had occurred.—*Nepoor Aurut v. Jurai*, 10 B. L. R. Ap. 33 [or p. 580].

**Marriage—**

Presumption of. See ENTICEMENT.

**Material Error—**

See REVISION, 2, 3.

**Minor—**

See HABEAS CORPUS, 1.  
PROSTITUTION.

**Mischief—**

MISCHIEF—*Penal Code (Act XLV. of 1860), s. 425—Wrongful loss—Proof of title.*] The right to a fishery was in dispute between the zemindar of Bally and the zemindar of Moharajpore. The former obtained a decree in the Civil Court declaring the fishery to be his, in proceedings to which the latter was not a party; and the servants of the Bally zemindar thereupon removed a bamboo-bar, which the Moharajpore people had erected to prevent the passage of fish. For this they were convicted of mischief under the Penal Code, and punished by fine. *Held*, on reference to the High Court, that the conviction could not stand, as the Moharajpore zemindar had not shown that he was legally entitled to the fishery, and as it did not appear that the defendants were acting otherwise than from a *bona-fide* belief that the Moharajpore zemindar was encroaching on their master's rights.—*Bakar Halsana v. Dinobandhu Biswas*, 3 B. L. R. A. Cr. 17 [or p. 100].

See CATTLE-TRESPASS.

RECOGNIZANCE, 4.

**Misdirection—**

See EVIDENCE, 2.

PRIVILEGED COMMUNICATION.

**Misprison of Treason—**

See ASSESSORS, 1.

**Mitigation of Sentence—**

See SENTENCE, 6.

**Mofussil Municipal Act (III. of 1864 B.C.)—**

S. 67. See NUISANCE, 10.

**Mofussil Small Cause Courts' Act (XI. of 1865)—**

S. 21. See FALSE EVIDENCE.

**Mookhtear—**

1. MOOKHTEAR—*Act XX. of 1865, s. 34—Conviction by Magistrate for practising as mookhtear in Revenue Court without certificate—Jurisdiction.*] Where an officer is acting in two capacities, *vis.*, as Assistant Collector and Assistant Magistrate, he should not, in his capacity of Magistrate, convict a person of an offence committed before him as Collector; therefore he has no authority as Magistrate to fine a person under s. 34, Act XX. of 1865, for practising in his Court as Collector without a certificate.—*In the Matter of Ramdial Sing*, 5 B. L. R. Ap. 89 [or p. 237].

2. MOOKHTEAR—*Act XX. of 1865, s. 16—Charge, Copy of—Magistrate, Power of, to suspend mookhtear.*] A Magistrate suspended a mookhtear from practice in his Court or in any Court subordinate to him in that zilla. From the record it appeared that the only notice the mookhtear received was one in which he was directed to show cause why he ought not to be suspended from practice. No charge was set out in this notice, and therefore the requirements of s. 16 had not been complied with. The High Court directed the Magistrate to proceed according to law, and send a copy of any charge he may wish to make, or that may be made against the mookhtear, to the mookhtear, and also a notice fixing the day on which such charge would be taken into consideration.—*In the Matter of the Petition of Golab Khan*, 6 B. L. R. Ap. 83 [or p. 338].

3. MOOKHTEAR—*Act XX. of 1865, ss. 15, 16—Mookhtear, Dismissal of—Professional conduct—Reasonable cause.*] The High Court has power, under s. 15, Act XX. of 1865, to suspend or dismiss a mookhtear from his office, when it sees "reasonable cause," although he might not have committed any act of "professional misconduct" under s. 16.—*In the Matter of the Petition of Gholab Khan*, 7 B. L. R. 179 [or p. 380].

4. MOOKHTEAR—*Act XX. of 1865, ss. 11, 13—Meaning of the word "practice"—Mookhtear.*] The writing a petition for

**Mookhtear (contd.)—**

a party who presents it in Court is not acting as a mookhtear within the meaning of s. 11, Act XX. of 1865; and the writer is not liable to punishment under s. 13 for practising as a mookhtear without a certificate.—*In re Kali Charan Chund*, 9 B. L. R. Ap. 18 [or p. 539].

**Mookhtear and Client—**

See PRIVILEGED COMMUNICATION.

**Municipal Bye-laws—**

See DAILY FINE, 1.

**Murder—**

See CULPABLE HOMICIDE.

ENHANCEMENT OF SENTENCE, 2.

EUROPEAN BRITISH SUBJECT.

EVIDENCE, 10, 11.

FALSE EVIDENCE, 3.

JURY, 7.

REVISION, 5.

UNLAWFUL ASSEMBLY, 1, 2, 3.

**N.****Navigation—**

See OBSTRUCTING NAVIGATION.

**Neglect—**

See CATTLE-TRESPASS.  
CERTIFICATE-TAX.

**New Trial—**

See EXAMINATION OF ACCUSED, 2.

**Non-attendance in Obedience to Order—**

See JURISDICTION, 1.

**Notes of Evidence—**

See TRANSFER OF CASE, 4.

**Nuisance—**

1. NUISANCE—*Criminal Procedure Code (Act XXV. of 1861)*, ss. 62, 308—*Removal of nuisances—Order to prevent obstructions.*] When a case falls both under s. 62 and under s. 308 of the Criminal Procedure Code, the order of the Magistrate ought not to be absolute in the first instance. He should give the defendant an opportunity to show cause against the order. *Semble.*—Whether a case comes under either of these two sections, or under both, the order of the Magistrate ought to contain a clear statement of the facts upon the basis of which the Magistrate has made the order.—*In the matter of Harimohan Malo*: *Queen v. Jayakrishna Mookerjee*, 1 B. L. R. A. Cr. 20 [or p. 13].

**Nuisance (contd.)—**

2. NUISANCE—*Bail—Criminal Procedure Code (Act XXV. of 1861)*, s. 212.] S. 62 of Act XXV. of 1861, whereunder a person may be restrained from doing certain acts, does not authorize an order whereby a person is commanded to destroy the banks of his tank on the ground that the public were obstructed in their enjoyment of a river.—*Queen v. Sheikh Golam Darbesh*, 1 B. L. R. S. N. 27 [or p. 46].

3. NUISANCE—*Obstructing a road—Criminal Procedure Code (Act XXV. of 1861)*, s. 320.] Where A complained merely to the Magistrate that "a certain road had been obstructed by B and others," *held* that the Magistrate was not bound to enquire into the matter under s. 320 of Act XXV. of 1861.—*Queen v. Rassul Nushy*, 2 B. L. R. Ap. 9 [or p. 75].

4. NUISANCE—*Criminal Procedure Code (Act XXV. of 1861)*, s. 62—*Removal of nuisance—Power of Magistrate.*] Under s. 62 of the Code of Criminal Procedure, a Magistrate has no power to issue an order, *ex parte*, to cut down trees, on the representation of a party, supported by the report of the police that the existence of the trees was a nuisance.—*Queen v. Ram Chandra Mookerjee*, 5 B. L. R. 131 [or p. 195].

5. NUISANCE—*Criminal Procedure Code (Act XXV. of 1861)*, s. 62—*Prohibitory order.*] Under s. 62 of the Code of Criminal Procedure, a Magistrate cannot pass a prohibitory order without having previously issued a rule to show cause why the order should not be passed.—*Queen v. Rai Lachmipat Sing*, 5 B. L. R. Ap. 81 [or p. 234].

6. NUISANCE—*Obstruction—Annoyance—Procedure—Criminal Procedure Code (Act XXV. of 1861)*, s. 64.] Under s. 64 of the Code of Criminal Procedure a Magistrate can direct any person to abstain from any act, or to take certain order with certain property in his possession or under his management, whenever such Magistrate shall consider such direction is likely to prevent obstruction, annoyance, or injury, or risk of obstruction, to any person lawfully employed, or is likely to prevent a riot or an affray.—*Queen v. Kalika Prasad*, 5 B. L. R. Ap. 82 note [or p. 235].

**Nuisance (contd.)—**

7. **NUISANCE—Criminal Procedure Code (Act XXV. of 1861), ss. 62, 404—Judicial power of Magistrate—Obstruction, annoyance, and injury.** [An order of a Magistrate, under s. 62, Criminal Procedure Code, *e. g.*, prohibiting one of two rival proprietors of two different hauts from holding his haut on certain days of the week in order to prevent obstruction, annoyance, and injury, is not a judicial order, and is therefore not open to revision by the High Court under s. 404, Criminal Procedure Code. *Per Phear, J.* (dissenting).—The power conferred by s. 62, Criminal Procedure Code, is of a judicial character within the meaning of the word "judicial" in s. 404; and an order of a Magistrate in exercise of that power is in the nature of an injunction, and is therefore subject to revision by the High Court under s. 404, Criminal Procedure Code.—*Queen v. Abbas Ali Chowdhry*, 6 B. L. R. 74 [or p. 239].

8. **NUISANCE—Order to prevent obstructions—Cattle-trespass—Criminal Procedure Code (Act XXV. of 1861), s. 62, Act III. of 1857.** [The order contemplated by s. 62 of the Code of Criminal Procedure is a particular and specific order addressed to a particular person or particular persons to do or abstain from a particular act or particular acts. That section does not empower a Magistrate to pass a general order to persons not to allow their cattle or horses to run at large on the public roads, nor can such an order be passed under Act III. of 1857, which applies only to injury done by cattle to crops, &c., and to the sides of public roads and embankments.—*Queen v. Amiruddin*, 6 B. L. R. 78 note [or p. 241].

9. **NUISANCE—Criminal Procedure Code (Act XXV. of 1861), ss. 308, 310, 311, 313—Slaughter-house.** [Where a Magistrate, under s. 308, Criminal Procedure Code, has ordered the suppression of a trade or occupation as a nuisance and injurious to the health of the community, the High Court will not interfere, unless they find either (i.) that there was no reasonable evidence before the Magistrate of the trade being injurious to the health and comfort of the community, or (ii.) that the cause shown was such as ought to have satisfied the Magistrate that his order for suppressing the trade was not reasonable and proper. The Court take

**Nuisance (contd.)—**

the findings of fact by the Magistrate to be correct, unless they see that there is not on the record any evidence to warrant such findings.—*Municipal Commissioners for the Suburbs of Calcutta v. Amanat Ali*, 7 B. L. R. 516 [or p. 421].

10. **NUISANCE—Act III. of 1864 (B. C.), s. 67—Fine for suffering premises to be in a filthy state.** [Where an owner of land admittedly lived in another district, and there was no evidence that he suffered the land to be in a filthy state, the discretion which s. 67 of Act III. of 1864 (B.C.) gives the Court of fining either the owner or the tenant was held to be very improperly exercised where it fined the owner, and the proceedings were accordingly quashed.—*Queen v. Dwarka Nath Hazra*, 8 B. L. R. Ap. 9 [or p. 470].

11. **NUISANCE—Thoroughfare—Public place—Obstruction—Magistrate—Jurisdiction—Criminal Procedure Code (Act XXV. of 1861), ss. 308, 404, 434—Right to begin.** [Where, in a proceeding before a Magistrate under s. 308 of the Code of Criminal Procedure, for the removal of an obstruction from a thoroughfare or public place, the accused appears and shows cause, it is the duty of the Magistrate to enquire whether there is a thoroughfare or public place, and whether there is an obstruction. If the Magistrate makes the enquiry upon evidence before him, he does not act without jurisdiction, or in excess of jurisdiction. The High Court cannot set aside his order except for an error in law, or an excess of jurisdiction. It is not a ground for interference that the Magistrate has come to an erroneous decision upon the evidence.—*Angelo v. Cargill*, 9 B. L. R. 417 [or p. 534].

12. **NUISANCE—Criminal Procedure Code (Act XXV. of 1861), s. 62—Rival hâts—Power of Magistrate—Riot—Affray.** [A Magistrate has power, under s. 62 of Act XXV. of 1861, to prohibit a particular landholder from holding a *hât* on a particular spot, on a particular day, at least for a temporary period, if he is satisfied, upon reasonable grounds, that the order is likely to prevent, or tends to prevent, a riot or an affray.—*In the Matter of the Petition of Bykuntram Shaha Roy*, 10 B. L. R. 434 [or p. 561].



**Nuisance (contd.)—**

13. **NUISANCE—Criminal Procedure Code (Act XXV. of 1861), ss. 308, 313.** Where persons who were served with notice under s. 313 of the Code of Criminal Procedure to remove a nuisance showed cause before the Magistrate, but did not ask him to take evidence or to summon a jury, the High Court declined to interfere with the order passed by the Magistrate under s. 308 to remove the nuisance, as there appeared no illegality in the order. The Magistrate should, however, in these cases, fully record the grounds on which he acts, and his reasons for rejecting the objections made to the removal of the nuisance.—*Queen v. Ala Buksh*, 7 B. L. R. 482 note [or p. 411].

See **POLICE-REPORT.**

**SLAUGHTER-HOUSE, 2.**

**O.****Oath (Act X. of 1873)—**

1. **OATH—Act X. of 1873, s. 13—Omission to take evidence on oath or affirmation.** The word "omission" in s. 13 of Act X. of 1873 includes any omission, and is not limited to accidental or negligent omissions. [Jackson, J., dissented.]—*Queen v. Sewa Bhogta*, 14 B. L. R. 294 [or p. 682].

2. **OATH—Act X. of 1873, s. 13—Omission to take evidence on oath or affirmation.** S. 13 of Act X. of 1873 does not render the evidence of a child of nine years of age inadmissible, if the evidence has been advisedly, and not by an omission, recorded without any oath or affirmation.—*Queen v. Anunto Chuckerbutty*, 14 B. L. R. 295 note [or p. 683].

Ss. 5, 13. See **EVIDENCE, 11.**

**Obstructing Navigation—**

**OBSTRUCTING NAVIGATION—Act V. (B. C.) of 1864, s. 16.** To render a person liable to punishment under s. 16, Act V. (B. C.) of 1864, for obstructing the line of navigation of a Government canal, it must be shown that he wilfully obstructed the navigation.—*Queen v. Kabil Manji*, 2 B. L. R. A. Cr. 23 [or p. 68].

**Obstruction—**

See **NUISANCE, 1, 2, 3, 6, 7, 8, 11.**

**Offence to be specified in Warrant—**

See **WARRANT, 3.**

**Omission to administer Oath—**

See **EVIDENCE, 11.**

**Omission to give Information—**

See **REMAND, 3.**

**Omission to give Information to Police—**

See **ABETMENT.**

**Opium—**

**OPIUM—Criminal Procedure Code (Act XXV. of 1861), s. 404—Act XIII. of 1867, ss. 20, 30.** Upon the conviction of certain persons under s. 20, Act XIII. of 1867, for illicit possession of opium, the Magistrate sentenced them to payment of a fine, and directed that, upon the realization thereof, one-half should be paid to the inspector of police who had apprehended the prisoners, but refused to pay the other half in accordance with s. 30 (for reasons set forth in his order) to the person who gave the information. On a reference by the Sessions Judge to the High Court, held that the High Court could not interfere under s. 404 of the Code of Criminal Procedure. The distribution of the fine under s. 30, Act XIII. of 1867, forms no part of the Magistrate's judgment.—*Queen v. Ramdial Sing*, 8 B. L. R. Ap. 7 [or p. 468].

**Order—**

Disobedience of. See **CATTLE-STRAYING.**

See **DISOBEDIENCE TO PUBLIC SERVANT.**

**Order for Bail—**

See **TRANSFER OF CASE, 3.**

**Order of Executive Nature—**

See **EXECUTIVE ORDER.**

**Order of Public Servant—**

Non-attendance in obedience to. See **JURISDICTION, 1.**

**P.****Pardon—**

See **EVIDENCE, 3.**

**Particeps Criminis—**

See **WITNESSES FOR DEFENCE, 2.**

**Partner—**

1. **PARTNER—Fraudulent removal of property by—Penal Code (Act XLV. of 1860), s. 424.** The prisoners were convicted of dishonestly removing certain account-books under s. 424 of the Penal Code. The books belonged to a partnership-business, in which the accused was a partner. The books therefore were the property of the prisoner jointly with his co-partners. The books were kept at the

**Partner (contd.)—**

head-quarters of the firm at Cutwa, and were removed by the prisoner at night. There had been some disputes between the members of the firm; and, upon the removal of the books being made the subject of a charge against the prisoner, he said that it was a false charge, got up against him. The High Court found that the object of the removal was to defraud the co-partners, and that there was nothing in s. 424 which would limit the offence to creditors only. The conviction was accordingly upheld. This case was distinguished from that of *Queen v. Allah Bux* (see next ruling), where the charge was one of theft only.—*Queen v. Gour Benode Dutt*, 13 B. L. R. 308 note [or p. 630].

2. **PARTNER—Theft by—Penal Code (Act XLV. of 1860), s. 378.** K, the gomasta of a shop, was coming out of the Small Cause Court with some account-books belonging to that shop. A, who had a share in that shop, took these books out of the possession of K, and kept them against the will of K, saying they were his. The Deputy Magistrate found A guilty of theft, and convicted him. On reference, the High Court quashed the conviction, on the grounds (1) that when property is in the possession of a person's servant it is in that person's possession within the meaning of s. 27 of the Penal Code, and therefore s. 378 does not include under the offence of theft the case where one joint-proprietor takes into his own sole possession property belonging to himself and his co-proprietors, which had been previously in their joint possession; (2) that the books were not taken dishonestly, and that, if any offence was committed, it was not theft.—*Queen v. Allah Buksh*, 13 B. L. R. 310 note [or p. 631].

See **CRIMINAL MISAPPROPRIATION. THEFT.**

**Passing Sentence in Accused's Absence—**

See **EXAMINATION OF WITNESSES.**

**Peace—**

Recognizance to keep. See **RECOGNIZANCE**, 6.

Security to keep. See **RECOGNIZANCE**, 1, 2.

**Penal Code (Act XLV. of 1860)—**

S. 5. See **FORGERY**, 1.

S. 29. See **FORGERY**, 1.

S. 59. See **SENTENCE**, 1, 7.

**Penal Code (Act XLV. of 1860) (contd.)—**

S. 73. See **SOLITARY CONFINEMENT.**

S. 74. See **SOLITARY CONFINEMENT.**

S. 97. See **PRIVATE DEFENCE**, 1 to 3.

S. 99. See **PRIVATE DEFENCE**, 3.

S. 102. See **PRIVATE DEFENCE**, 3.

S. 107. See **ABETMENT.**

S. 108. See **FALSE CHARGE**, 3.

S. 109. See **FALSE CHARGE**, 3.

S. 116. See **SUMMARY CONVICTION.**

S. 121. See **ASSESSORS**, 1.  
**WAGING WAR.**

S. 143. See **APPEAL**, 1.  
**ABSENCE OF COMPLAINANT**, 1.

S. 148. See **RIOTING.**  
**SENTENCE**, 3.  
**UNLAWFUL ASSEMBLY**, 3.

S. 149. See **UNLAWFUL ASSEMBLY**, 1 to 3.

S. 154. See **EVIDENCE**, 6.

S. 161. See **PUBLIC SERVANT.**

S. 169. See **CRIMINAL COURTS.**

S. 174. See **ATTACHED PROPERTY.**  
**CONTEMPT OF COURT.**  
**JURISDICTION**, 1.

S. 182. See **SANCTION TO PROSECUTE**, 4.

S. 186. See **RESISTANCE OF CIVIL PROCESS.**

S. 188. See **DISOBEDIENCE TO PUBLIC SERVANT.**

S. 191. See **FALSE EVIDENCE**, 2.

S. 192. See **FALSE EVIDENCE**, 2.

S. 193. See **FALSE EVIDENCE**, 1, 3, 8, 10, 12.  
**SANCTION TO PROSECUTE**, 1, 3.

S. 194. See **FALSE EVIDENCE**, 3.

S. 202. See **ABETMENT.**  
**REMAND**, 3.

S. 206. See **FRAUDULENT REMOVAL OF PROPERTY.**

S. 211. See **APPEAL**, 1.  
**FALSE CHARGE.**  
**SANCTION TO PROSECUTE**, 4.

S. 224. See **CUMULATIVE SENTENCES.**

S. 225. See **CUMULATIVE SENTENCES.**

S. 228. See **JURISDICTION**, 7.

S. 300. See **CULPABLE HOMICIDE**, 1 to 3.  
**UNLAWFUL ASSEMBLY**, 1 to 3.

S. 302. See **EVIDENCE**, 11.

**Penal Code (Act XLV. of 1860)**

(contd.)—

- S. 304. See CULPABLE HOMICIDE NOT AMOUNTING TO MURDER, 1, 2.
- JURY, 1.
- RIOTING.
- S. 324. See SENTENCE, 3.
- S. 325. See WHIPPING, 2.
- S. 330. See JURY, 3.
- S. 342. See ABSENCE OF COMPLAINANT, 1.
- WHIPPING, 2.
- S. 347. See ABSENCE OF COMPLAINANT, 3.
- S. 348. See JURY, 3.
- S. 352. See ASSAULT.
- S. 353. See CUMULATIVE SENTENCES.
- S. 363. See UNLAWFUL ASSEMBLY, 2.
- S. 372. See PROSTITUTION.
- S. 373. See PROSTITUTION.
- S. 376. See SENTENCE, 1.
- S. 378. See THEFT.
- PARTNER, 2.
- WHIPPING, 2.
- S. 380. See CRIMINAL TRESPASS, 1.
- POLICE-INQUIRY.
- SEPARATE OFFENCES.
- S. 382. See ABETMENT.
- S. 405. See CRIMINAL MISAPPROPRIATION.
- S. 406. See CRIMINAL BREACH OF TRUST.
- S. 419. See FALSE PERSONATION.
- S. 424. See PARTNER, 1.
- S. 425. See CATTLE-TRESPASS.
- MISCHIEF.
- S. 431. See DISMISSAL OF COMPLAINT, 4.
- S. 436. See ATTEMPT TO COMMIT OFFENCE.
- S. 441. See CRIMINAL TRESPASS, 23.
- S. 447. See APPEAL, 1.
- CRIMINAL TRESPASS, 1.
- S. 456. See SEPARATE OFFENCES.
- S. 457. See COMMITTAL, 1.
- SEPARATE OFFENCES.
- S. 463. See FORGERY, 1.
- S. 465. See SANCTION TO PROSECUTE, 2.
- S. 471. See SANCTION TO PROSECUTE, 3.
- S. 498. See ENTICEMENT.
- S. 499. See DEFAMATION.
- JURISDICTION, 6.
- S. 503. See JURISDICTION, 6.
- S. 511. See ATTEMPT TO COMMIT OFFENCE.
- SENTENCE, 1.

**Perjury—**

See COMPENSATION.

FALSE EVIDENCE, 4.

SANCTION TO PROSECUTE, 1, 3.

**Plaint—**

Verification of. See FALSE EVIDENCE, 2.

**Plea of Guilty—**

PLEA OF GUILTY—*Criminal Procedure Code (Act XXV. of 1861), ss. 362, 363—Assessors.*] A conviction of a prisoner on a plea of guilty before a Court of Session is valid, although there were no assessors.—*Queen v. Srikant Charal*, 2 B. L. R. F. B. 23 [or p. 50].

**Pleader or Counsel—**

Right of, to prosecute. See PROSECUTION.

**Police—**

Omission to give Information to. See ABETMENT.

**Police-enquiry—**

POLICE-ENQUIRY — *Criminal Procedure Code (Act XXV. of 1861), ch. 14.*] F S laid before the Magistrate a complaint under s. 380 of the Penal Code. The Magistrate ordered a police-enquiry, and, on the report made by the police, dismissed the complaint. The Sessions Judge referred the case to the High Court on the ground that, in cases under ch. 14 of the Criminal Procedure Code, the Magistrate could not order a police-enquiry (*Harachand Nowlaka's case*, 8 W. R. Cr. 12), and ought not, therefore, to have acted on the result of such enquiry. *Per Glover, J.* (dissenting from *Harachand Nowlaka's case*).—Under s. 133, a Magistrate may order a police-enquiry "into any offence punishable under the Penal Code." *Per Loch, J.*—The Magistrate has no authority to order an enquiry into this case by the police. It is a case which comes under the provisions of ch. 14 of the Code of Criminal Procedure, and though some of the provisions of ch. 12 have been extended to complaints coming under ch. 14, yet the power to order an enquiry by the police, under s. 180 of the Code, does not appear to be included among the provisions so extended. The Magistrate had examined the complainant under s. 66 of the Criminal Procedure Code, and dismissed the complaint under s. 67. *Held*, therefore, that the Court could not interfere in the case.—Revision of Proceed-

**Police-enquiry (contd.)—**

ings in the Case of Foktu Shah, 2 B. L. R. S. N. 6 [or p. 73].

See FALSE CHARGE, 1.

**Police-officer—**

1. **POLICE-OFFICER—Offence by—Act V. of 1861, ss. 8, 29.]** A District Superintendent of Police suspended a police-officer, and directed him to remain in the police-lines. The police-officer disobeyed this order, whereupon he was arrested, and convicted, under s. 29 of Act V. of 1861, for withdrawing himself from the duties of his office. The High Court, being of opinion that the accused was not a police-officer within the meaning of the Act, quashed the conviction.—*Queen v. Dinanath Gangooly*, 8 B. L. R. Ap. 58 [or p. 479].

2. **POLICE-OFFICER—Offence by—Act V. of 1861, s. 29.]** A head-constable was investigating a police-case in the garden of F in Sylhet. While he was so engaged, one J came and informed him of an impending disturbance at another place, at which he declined to do anything upon the information. The head-constable subsequently went into the house of F, who repeated to him the news conveyed by J. The head-constable replied that, on finishing the enquiry in the case on hand, he would attend to the matter. After finishing his enquiry he went to eat. In the meantime the disturbance spoken of had taken place. On his way home he met the sub-inspector proceeding to the scene of the riot, who told him to finish his breakfast soon, and join the police-party. After some of the principal rioters had been captured, the head-constable joined in, and succeeded in making prisoners of a few of the rioters. Upon these facts the head-constable was charged by the District Magistrate with having committed an offence punishable under s. 29 of Act V. of 1861, in that he did not take personally any prompt action on first receiving information of a breach of the peace likely to take place. The defence was that, when the accused got information of the disturbance, he was, at the time, engaged, as a police-officer, in enquiring into the case of another party suspected of having committed an offence, and that he could not attend to anything else until he had finished the enquiry. The Magistrate, however, convicted the accused, and sentenced him to rigorous imprisonment for

**Police-officer (contd.)—**

three months. The High Court quashed the conviction.—*Queen v. Radhu Sing*, 8 B. L. R. Ap. 60 [or p. 481].

**Police Magistrate—**

See SUMMARY CONVICTION.

**Police Magistrate's Notes of Evidence—**

See TRANSFER OF CASE, 4.

**Police-report—**

**POLICE-REPORT—Criminal Procedure Code (Act XXV. of 1861), s. 62.]** There is nothing in s. 62, Criminal Procedure Code, to justify a Magistrate in making an order under that section on the mere report of a police-officer.—*Queen v. Bhyro Dayal Sing*, 3 B. L. R. A. Cr. 4 [or p. 91].

See POSSESSION, 5.

·RECOGNIZANCE, 6, 9.

WARRANT, 2.

**Possession—**

1. **POSSESSION — Certificate — Act XXVII. of 1860—Criminal Procedure Code (Act XXV. of 1861), s. 318.]** A and B had a dispute about possession of a certain muth. A was declared by the Magistrate, under s. 318 of the Criminal Procedure Code, to be in possession. Subsequently, B got a certificate under Act XXVII. of 1860, and applied to the Magistrate for possession, which was given to him. *Held* that the Magistrate's order giving possession to B was irregular, and must be set aside.—*Mahant Dhanraj Giri Goswami v. Sripati Giri Goswami*, 2 B. L. R. A. Cr. 27 [or p. 70].

2. **POSSESSION—Criminal Procedure Code (Act XXV. of 1861), s. 318—Jurisdiction of Magistrate—Likelihood of breach of peace.]** A Magistrate has no power to decide a question of possession, under s. 318, Act XXV. of 1861, until he has recorded a proceeding stating the grounds of his being satisfied that the dispute for possession is likely to induce a breach of the peace.—*In the Case of Kashi Kishor Roy v. Tarini Kant Lahori*, 3 B. L. R. A. Cr. 76 [or p. 136].

3. **POSSESSION—Criminal Procedure Code (Act XXV. of 1861), s. 318—Evidence on oath—Actual possession.]** In a proceeding under s. 318 of the Criminal Procedure Code, to determine the right of actual possession, it is necessary that

**Possession (contd.)—**

evidence should be taken upon oath.—*Queen v. Kali Chandra Shah*, 7 B. L. R. 322 [or p. 403].

4. **POSSESSION—Breach of peace—Code of Criminal Procedure (Act XXV. of 1861), s. 318.** In a case under s. 138 of the Code of Criminal Procedure, a Magistrate need not summon witnesses, but may proceed on investigations conducted by the district police if he considers that they show that a breach of the peace is likely to occur. In proceedings under ch. 20 of the Code of Criminal Procedure, a Magistrate should not hold a lengthened and protracted investigation, but should make a speedy and summary enquiry into the fact of possession, and pass, with as little delay as possible, an order declaring the party whom he finds entitled to retain it until ousted by due course of law.—*Queen v. Ballabh Kant Bhuttacharjee*, 7 B. L. R. 324 note [or p. 404].

5. **POSSESSION—Criminal Procedure Code (Act XXV. of 1861), s. 318—Evidence—Police-report—Breach of peace.** A Magistrate, before proceeding under s. 318 of the Criminal Procedure Code, must be satisfied by evidence that a dispute likely to induce a breach of the peace exists. A police-report is not evidence.—In the Matter of the Petition of Bhadreswari Chowdhurani, 7 B. L. R. 329 [or p. 408].

6. **POSSESSION—Actual possession—Criminal Procedure Code (Act XXV. of 1861), ss. 282, 318—Breach of peace.** The possession of a master by his servant—of a landlord by his immediate tenant, the person who pays rent to him—of the person who has the property in the land by the usufructuary—come within the meaning of the words “actual possession” in s. 318 of the Code of Criminal Procedure. Their meaning is not limited to bodily possession. But a person is not in “actual possession” where the rents are paid by the actual occupier, not to him, but to an intermediate holder. All that is required to make a proceeding under s. 318 proper and valid, is that the Magistrate should be satisfied that a dispute exists, and he is to record the grounds of his being so satisfied. There is nothing which defines upon what grounds he shall be satisfied, or limits him to being satisfied by evidence given before him. If a Magistrate is satisfied that the circumstances of a case require it, he

**Possession (contd.)—**

may make an order under s. 282, notwithstanding that he has taken recognizances under s. 282.—In the Matter of the Petitions of J. D. Sutherland, 9 B. L. R. 229 [or p. 514].

7. **POSSESSION—Criminal Procedure Code (Act XXV. of 1861), s. 318—Parties to proceedings under s. 318—Who are to be served with notices under s. 318—Right of a party in proceedings under s. 318 to summon witnesses—Discretion of Magistrate.** In proceedings under s. 318 of Act XXV. of 1861, the fact that the Magistrate did not serve notices on all the co-sharers of the disputed estate was held not to invalidate the proceedings. The only parties entitled to notice are those concerned in the dispute which is likely to induce a breach of the peace.—In the Matter of the Petition of Gabinda Chandra Ghose, 9 B. L. R. Ap. 39 [or p. 548].

8. **POSSESSION—Criminal Procedure Code (Act X. of 1872), ss. 332, 333, 334, 530—Mode of recording evidence.** Where a case of dispute regarding land was instituted under the old Code of Criminal Procedure, the High Court held that the evidence must be recorded in the manner provided for by s. 334 and the following sections of the new Code.—*Khetter Monee Dassee v. Sreenath Sircar*, 11 B. L. R. Ap. 5 [or p. 602].

See DISOBEDIENCE TO PUBLIC SERVANT, 1.

**Possession of Arms—**

See ARMS' ACT, 1, 2.

**Possession of Fire-ball—**

See ATTEMPT TO COMMIT OFFENCE.

**Postponement of Sentence—**

See SENTENCE, 4.

**Postponement of Trial—**

See EXAMINATION OF ACCUSED, 2.

**Power of District Magistrate—**

See PROCEDURE, 2.

**Power of Sessions Court—**

See DISCHARGE, 1, 4, 5.

**Power of Sessions Court to admit to Bail—**

See BAIL.

**Power of Single Judge of High Court—**

See APPEAL, 6.

**Powers of Indian Legislature—**  
See EUROPEAN BRITISH SUBJECT.

**Prejudice—**  
See TRANSFER OF CASE, 3.

**Preliminary Investigation—**  
See FALSE EVIDENCE, 5.

**Presumption—**  
See CRIMINAL BREACH OF TRUST, 1.  
CULPABLE HOMICIDE NOT  
AMOUNTING TO MURDER, 1.

**Presumption of Marriage—**  
See ENTICEMENT.

**Previous Character—**  
Evidence as to Prisoner's. See AC-  
COMPLICE, 1.

**Previous Conviction—**  
PREVIOUS CONVICTION—*Evidence of*  
—*Kaifut.*] A kaifut or report from the  
record-office that A had been convicted  
of a crime is no evidence of a previous  
conviction.—*Queen v. Sheikh Ramzan*,  
6 B. L. R. Ap. 151 [or p. 356].

**Private Defence—**  
1. PRIVATE DEFENCE—*House-break-*  
*ing—Limits of right of defence of prop-*  
*erty—Penal Code (Act XLV. of 1860),*  
*s. 97.*] The right of private defence of  
property against house-breaking does  
not extend to causing the death of the  
house-breaker when he has made his  
escape from the premises empty-handed,  
and is at some distance from the place.  
No more harm should be done than is  
necessary to effect his capture.—*Queen*  
*v. Bolaki Jolahad*, 1 B. L. R. S. N. 8  
[or p. 44].

2. PRIVATE DEFENCE—*Right of—*  
*Penal Code (Act XLV. of 1860), s. 97.*] A  
party in possession of land is legally  
entitled to defend his possession against  
another party seeking to eject him by  
force.—*Queen v. Tulsi Sing*, 2 B. L. R.  
A. Cr. 16 [or p. 63].

3. PRIVATE DEFENCE—*Right of—*  
*Penal Code (Act XLV. of 1860), ss. 97,*  
*99, 102—Charge, Altering after accused*  
*pleads guilty.*] The right of private de-  
fence as described in s. 97 of the Penal  
Code is subject to the restrictions men-  
tioned in s. 99, that is, it should be ex-  
ercised only in the defence of one's own  
body or that of another person against  
an offence affecting the human body.  
Under s. 102, the right commences only  
on a reasonable apprehension of danger

**Private Defence (contd.)—**  
to the body caused by an attempt or  
threat to commit an offence; and by s. 99,  
cl. 4, the right is restricted to not inflict-  
ing more harm than it is necessary to  
inflict for the purpose of defence. When  
an accused pleads guilty to a charge al-  
ready framed, the Sessions Judge has no  
power to alter the charge upon the evi-  
dence in the record. Upon a charge of  
murder the accused pleaded "guilty." The  
Sessions Judge, taking into consid-  
eration the circumstances of the case,  
reduced the charge to homicide not  
amounting to murder. *Held* that the  
proceeding was illegal.—*Queen v. Go-*  
*bardhan Bhuyan*, 4 B. L. R. Ap. 101  
[or p. 190].  
See RIOTING.

**Private Individual not bound to  
give Information to Police—**  
See ABETMENT.

**Private Prosecutor—**  
PRIVATE PROSECUTOR—*Counsel—*  
*Pleader—Criminal Procedure Code (Act*  
*XXV. of 1861), ss. 419, 434.*] Private  
prosecutor not allowed to appear on a  
reference to the High Court under s. 434  
of the Criminal Procedure Code.—*Queen*  
*v. Ramjai Mazumdar*, 6 B. L. R. Ap. 46  
[or p. 327].

**Privileged Communication—**  
PRIVILEGED COMMUNICATION—*Evi-*  
*dence Act (II. of 1855), s. 24—Mookhtear*  
*and client—Verdict of jury—Procedure*  
*in revision.*] The question whether a  
communication between the accused and  
a witness is privileged, is a question of  
law for the Judge to decide. Communi-  
cations between mookhtears and their  
clients are not privileged within s. 24 of  
Act II. of 1855. The High Court sitting  
as a Court of Revision cannot interfere  
to set aside a verdict of acquittal by a  
jury on the ground of misdirection by  
the Judge.—*Queen v. Chandrakant*  
*Chuckerbutty*, 1 B. L. R. A. Cr. 8 [or  
p. 5].  
See REVISION, 2.

**Procedure—**  
1. PROCEDURE—*Defence—Criminal*  
*Procedure Code (Act XXV. of 1861),*  
*s. 372.*] Under s. 372 of the Code of  
Criminal Procedure an accused should  
be called upon to enter upon his defence  
and to produce his evidence when the  
case for the prosecution has been brought

**Procedure (contd.)—**

to a close. Where, therefore, one witness for the prosecution was recalled after the prisoner had made his defence, and the prisoner had no opportunity of calling evidence with reference to the evidence of that witness, the High Court quashed the conviction, and ordered a new trial.—*Queen v. Asanulla*, 6 B. L. R. 693 note [or p. 309].

2. **PROCEDURE—Magistrate of a district—Criminal Procedure Code (Act XXV. of 1861), s. 66.]** A Magistrate of a District is competent, under s. 66 of the Criminal Procedure Code and the Circular Order No. 6, dated the 16th March 1864, to make over a petition presented by a complainant for enquiry and trial to a Deputy Magistrate who exercises the full powers of a Magistrate.—*Queen v. Umesh Chandra Chowdhry*, 9 B. L. R. 147 note [or p. 513].

See COMMITTAL, I.  
COMPLAINT, 4.

**Process of Civil Court—**

See RESISTANCE OF CIVIL PROCESS.

**Proclamation—**

**PROCLAMATION — Criminal Procedure Code (Act XXV. of 1861), ss. 183, 184—Time for appearance of person against whom proclamation issued—Appearance after time fixed—Confiscation after appearance.]** In order to lay a sufficient foundation for the issue of a proclamation under s. 183, and the accompanying order of attachment under s. 184, Code of Criminal Procedure, the Magistrate must, upon some sufficient materials, find judicially that the person against whom the proclamation is to be issued has absconded or concealed himself for the purpose of avoiding the service of the warrant of arrest previously issued against him. The period of 30 days which is prescribed in s. 183 as the minimum period within which the person is to be required by the proclamation to appear was intended by the Legislature to run from the date in which the publication in the mode prescribed by the same section should be effected. The declaration of forfeiture directed to be made in s. 184, if not made before the person affected by the proclamation has come in, ought not to be made at all.—In the *Matter of the Petition of Ramkishore Sein*, 10 B. L. R. Ap. 14 [or p. 574].

**Prohibitory Order—**

See NUISANCE, 5.

**Proof of Title—**

See MISCHIEF.

**Property—**

See FRAUDULENT REMOVAL OF PROPERTY.

Fraudulent Removal of. See PARTNER, I.

**Proprietary Right—**

See DISMISSAL OF COMPLAINT, 5.

**Prosecution—**

**PROSECUTION—Criminal Procedure Code (Acts XXV. of 1861 and VIII. of 1869)—Counsel—Pleader.]** A counsel or pleader is entitled to appear and act on behalf of the prosecution in the Criminal Courts.—In the *Matter of Chandi Charan Chatterjee v. Chandra Kumar Ghose*, 5 B. L. R. Ap. 70 [or p. 233].

**Prosecution—**

Limitation of Period of. See ASSESSORS, I.

**Prosecutor also Judge—**

See JURISDICTION, 5.

**Prostitution—**

**PROSTITUTION—Obtaining possession and disposing of minor for—Penal Code (Act XLV. of 1860), ss. 372, 373.]** S, a married Mahomedan girl under 16, while living with N, her grandmother, and in the absence of her husband, formed an adulterous intrigue with two Hindus, with the knowledge of N; S and N were then induced by the Hindus to remove to another village that S might take up the trade of prostitute: they there met J, a public woman, with whom they went to reside, and who introduced visitors to S, and received the money paid by them, in exchange for the board and food supplied to S and N. N was convicted, under s. 372, Penal Code, of disposing of a minor for the purpose of prostitution, and J was convicted, under s. 373, Penal Code, of obtaining possession of a minor for the purpose of prostitution. *Held per Jackson, J.*—That, on the facts proved, no offence was committed under the Penal Code. *Per Glover, J.*—N and J were both guilty under ss. 372 and 373 respectively, and their appeals should be dismissed.—*Queen v. Nourjan*, 6 B. L. R. Ap. 34 [or p. 323].

**Protector of Labourers—**

See LABOURERS' WAGES.

**Provocation—**

See CULPABLE HOMICIDE, 1, 3.

CULPABLE HOMICIDE NOT AMOUNTING TO MURDER, 1.

**Public Servant—**

**PUBLIC SERVANT—***Illegal gratification—Penal Code (Act XLV. of 1860), s. 161.* A peon of the Collector's Court, who received no fixed pay from the government, but was remunerated by fees whenever employed to serve any process, and was placed on the register of supernumerary peons, had been ordered by the Magistrate to do duty on a particular day at the office of the special sub-registrar, where he was detected receiving an eight-anna piece from a person, and was prosecuted for receiving an illegal gratification as a public servant. *Held* that the peon was a public servant under the definition in the 9th clause of s. 21 of the Penal Code, and the trial of the charge against him must be proceeded with.—*Queen v. Ramkrishna Das*, 7 B. L. R. 446 [or p. 410].

**PUBLIC SERVANT—**

See DISOBEDIENCE TO PUBLIC SERVANT.

Non-attendance in Obedience to Order of. See JURISDICTION, 1.

**Purda-nashin Women—**

**PURDA-NASHIN WOMEN—***Examination of—Privileges of, as witnesses.* Privileges of purda-nashin ladies when attending Court in palanquins as witnesses considered. The general rule is that the lady should be admitted into Court in her palanquin, and give her evidence in it, after being properly identified.—*Queen on the prosecution of Bibi Rookia Banu v. John Blessington Roberts*, 1 B. L. R. S. N. 5 [or p. 43].

**R.****Railway Receipt—**

Forgery of. See EVIDENCE, 8.

**Rape—**

Attempt at. See SENTENCE, 1.

**Reading out Evidence—**

See EVIDENCE, 1.

**Recalling Witness for Prosecution—**

See PROCEDURE, 1.

**Receiving Stolen Property—**

See EVIDENCE, 9.

STOLEN PROPERTY.

**Recognizance—**

1. **RECOGNIZANCE—***Security to keep peace—Criminal Procedure Code (Act XXV. of 1861), s. 282.* *Per* Loch, J.—Before making an absolute order directing a person to enter into a bond to keep the peace, the Magistrate must take evidence on which he bases the order in the presence of the accused or his agent. *Glover, J., dissenting.*—*Maghan Misra v. Chamman Teli*, 2 B. L. R. A. Cr. 7 [or p. 57].

2. **RECOGNIZANCE—***Procedure—Credible information—Summons to keep peace—Bond to keep peace—Criminal Procedure Code (Act XXV. of 1861), s. 282.* A summons under s. 282 of the Code of Criminal Procedure to show cause why the person summoned should not enter into a bond to keep the peace can legally issue on information, if it be credible, contained in a case which was brought against the person summoned for illegal assembly, of which he was acquitted. The order directing that the defendant should enter into the bond cannot, however, be made until the Magistrate has taken fresh evidence, properly given, on the appearance of the accused before him (or of his agent), and before he has adjudicated judicially on such evidence that it is necessary for the preservation of the peace that a bond should be taken.—Reference in the Matter of Narsing Narayan, 2 B. L. R. A. Cr. 7 note [or p. 58].

3. **RECOGNIZANCE—***Jurisdiction—Criminal Procedure Code (Act XXV. of 1861), s. 293.* A executes in District T a recognizance to keep the peace towards B. A was afterwards convicted in District S of having assaulted B in that district. *Held*, A had forfeited his recognizance, and the Magistrate in District T could proceed against him under 293 of the Criminal Procedure Code.—*Queen v. Sham Sundar Chowdhry*, 2 B. L. R. A. Cr. 11 [or p. 60].

4. **RECOGNIZANCE—***Criminal Procedure Code (Act XXV. of 1861), s. 282.* A charge of criminal trespass and mischief was dismissed. Thereupon the Magistrate recorded an order in the presence of both parties, calling on them to show cause, on a day fixed, why they should not enter into recognizances to keep the peace. *Held* that it was not necessary also to issue a summons to them under s. 283



**Recognizance (contd.)—**

of the Criminal Procedure Code.—*Queen v. Chowdhry*, 2 B. L. R. Ap. 28 [or p. 76].

5. **RECOGNIZANCE—Forfeiture of—Evidence to be taken in presence of accused.**] Before a Magistrate can declare that recognizances to keep the peace have been forfeited, he must record legal evidence in the presence of the accused, proving that he was about to do something which would cause a breach of the peace.—In the Case of *Kalikant Roy Chowdhry*, 3 B. L. R. Ap. 155 [or p. 142].

6. **RECOGNIZANCE—Report of police-officer—Adjudication upon reasonable grounds for apprehension.**] The report of a police-officer, though it justifies the issue of a summons, is not sufficient ground on which to bind a man over in a recognizance to keep the peace. The Magistrate must adjudicate on the question whether there is reasonable ground for believing that the defendant is likely to commit a breach of the peace, after taking evidence in the presence of the person charged, and giving him an opportunity to cross-examine the witnesses. The *onus* lies on the person who has obtained the summons to prove that the defendant is likely to commit a breach of the peace.—*Behari Patak v. Mahomed Hyat Khan*, *Dunne v. Hem Chandra Chowdhry*, *Government v. Behari Lal Brajabasi*, 4 B. L. R. F. B. 46 [or p. 147].

7. **RECOGNIZANCE—Forfeiture of.**] On the application of A, a recognizance was taken from B that he would keep the peace for six months under a penalty of Rs. 500. Before the expiry of the period, B assaulted C. *Held* that there was a forfeiture of the recognizance.—*Jaha Bax v. Government*, 6 B. L. R. Ap. 66 [or p. 332].

8. **RECOGNIZANCE—Criminal Procedure Code (Act XXV. of 1861), s. 298.**] A was bound over to keep the peace for a year. Before the expiry of the period, he was involved in fresh disputes with other persons. The Deputy Magistrate, instead of referring the case to the Court of Session under 298 of the Code of Criminal Procedure, directed A to enter into another recognizance for a further period of one year. *Held* that the order was illegal.—*Queen v. Kalinath Biswas*, 6 B. L. R. Ap. 116 [or p. 352].

9. **RECOGNIZANCE—Criminal Procedure Code (Act XXV. of 1861), s. 298—**

**Recognizance (contd.)—**

—*Judicial enquiry—Evidence—Report of police-officer.*] The existence of a dispute likely to cause a breach of the peace must be first proved by legal evidence before the Magistrate can proceed to call upon the parties to enter into recognizances to keep the peace. The report made by a police-officer that there is a likelihood of there being a breach of the peace is not legal evidence to prove the existence of any dispute likely to cause a breach of the peace.—*Abhaya Chowdhry v. T. Brae*, 6 B. L. R. Ap. 148 [or p. 355].

10. **RECOGNIZANCE—Surety—Forfeiture of bond.**] A surety who was bail for an accused person having failed to produce him on the day appointed, the Deputy Magistrate ordered that the bail-bond be forfeited, and a warrant be issued for the attachment and sale of the moveable property, *first*, of the accused, and, *secondly*, of the surety. No recognizance had been signed by the accused, and no notice had been given to the surety to show cause. On a reference by the Magistrate the Deputy Magistrate's order was set aside as being illegal.—*Queen v. Durga Das Bhattacharjee*, 7 B. L. R. Ap. 37 [or p. 445].

11. **RECOGNIZANCE—Criminal Procedure Code (Act XXV. of 1861), s. 290.**] Under s. 290 of the Criminal Procedure Code, an order to execute a second recognizance during the time the first recognizance is in force is illegal.—*Queen v. Kumodinikant Banerjee Chowdhry*, 9 B. L. R. Ap. 30 [or p. 542].

12. **RECOGNIZANCE—Magistrate bound to observe wording of summons.**] The accused was called upon by a summons to show cause why he should not be required to enter into his own recognizances to keep the peace for six months, the amount specified being Rs. 200. Subsequently, on appearing before the Magistrate, he was required to enter into his own recognizances to the amount of Rs. 4,000, and to find two sureties in Rs. 1,000 each, the period being at the same time extended to one year. On a reference by the Sessions Judge, the High Court quashed the order, observing that the Magistrate was not authorized by law in either increasing the amount, altering the nature of the security, or extending the period for which it was required, but was bound to observe, in all respects,

**Recognizance (contd.)—**

the wording of the summons.—*Queen v. Isree Pershad Singh*, 9 B. L. R. Ap. 44 [or p. 550].

See JURISDICTION, 1.

**Record of Small Cause Court—**

See EVIDENCE, 4, 5.

**Recording Depositions—**

See ACCOMPLICE, 3.

**Records—**

Prisoner entitled to have Copies of.

See COPIES OF RECORDS.

**Records of Another Case—**

See EVIDENCE, 6.

**Reference—**

See PRIVATE PROSECUTOR.

**Refusal to Summon Witnesses—**

See WITNESSES FOR DEFENCE, 1 to 6.

**Registered Bond—**

See FORGERY, 2.

**Registration Act (XX. of 1866)—**

Ss. 93, 94. See FALSE PERSONATION.

S. 95. See JURISDICTION, 3.

**Registration—**

1. REGISTRATION—*Act XX. of 1866*, s. 95—*Sub-registrar's power to commit—Sanction to prosecute.*] A sub-registrar under Act XX. of 1866 has no power to investigate regarding the committal of an offence committed before him in the registration of any document, but should cause the complainant to proceed under s. 66 of the Code of Criminal Procedure, before the Magistrate, or before an officer authorized to receive such complaint. The sanction of the registrar, under s. 95, Act XX. of 1866, related to a prosecution to be instituted by the sub-registrar for an offence under the Act.—*Queen v. Haridas Kundu*, 4 B. L. R. Ap. 69 [or p. 186].

2. REGISTRATION—*Act XX. of 1866—Trial by Magistrate of charge instituted by him as Sub-registrar.*] The proceedings of a Magistrate who tries prisoners charged with having committed offences under ss. 93 and 94 of the Registration Act (XX. of 1861) are not illegal, and without jurisdiction, or otherwise bad, merely because the prosecution was (with the sanction of the registrar to whom he was subordinate) instituted against the accused by the same Magistrate in his capacity of sub-registrar. Under such circumstances, where it can be done, it would be better if the case were tried by

**Registration (contd.)—**

some other person.—*Queen v. Hira Lal Das*, in the Matter of the Petition of the Government of Bengal, 8 B. L. R. 422 [or p. 455].

**Registration (Act VIII. of 1871):**

S. 82. See JURISDICTION, 7.

**Registry—**

See COMMON PROSTITUTES.

**Reg. IX. of 1793—**

S. 73. See REVIEW.

**Reg. III. of 1818—**

See HABEAS CORPUS, 2, 3.

MAINPRIZE.

WAGING WAR.

**Reg. XX. of 1825—**

See EUROPEAN BRITISH SUBJECT.

**Reg. XIII. of 1833—**

See EUROPEAN BRITISH SUBJECT.

**Reg. XIV. of 1870—**

Ss. 3, 4. See REVIEW.

**Remand—**

1. REMAND—*Criminal Procedure Code (Act VIII. of 1869, s. 422, Act XXV. of 1861, s. 422)—Power of Appellate Court.*] A remand of a case under s. 422, Act VIII. of 1869, can only be for the purpose of taking further evidence and certifying the result thereof to the Appellate Court, and not for the purpose of retrying the case upon such fresh evidence. After remand under this section, the Appellate Court can only try the case as an ordinary appeal, and has no power to enhance the punishment.—Anonymous case, 3 B. L. R. A. Cr. 62 [or p. 128].

2. REMAND—*High Court's power of superintendence—24 & 25 Vic., c. 104—Adjournment—Enquiry by Magistrate—Criminal Procedure Code (Act XXV. of 1861), ss. 224, 404.*] Where a Magistrate had adjourned an enquiry for a cause not contemplated by s. 224 of the Criminal Procedure Code, the High Court, in exercise of the power of superintendence conferred by s. 15 of 24 & 25 Vic., c. 104, set aside the order of remand.—In the Matter of the Petition of Mathuranath Chuckerbutty, 9 B. L. R. 354 [or p. 528].

3. REMAND—*Criminal Procedure Code (Act XXV. of 1861), s. 422—Penal Code (Act XLV. of 1860), s. 202.*] Where a person had been found guilty by a Magistrate of the offence of intentionally omitting to give information of an offence

**Remand (contd.)—**

which he was bound to give, and on appeal the Judge found that there had been no evidence given of the omission, *held, per Kemp, J.* (Glover, J., *contra*), the Judge could not remand the case for additional enquiry under s. 422 of the Criminal Procedure Code.—In the Matter of the Petition of Udai Chand Mukhopadhyaya, 9 B. L. R. Ap. 31 [or p. 543].

See DISCHARGE, 4, 5.

FALSE EVIDENCE, 5.

WARRANT, 2.

**Remand without Evidence—**

See TRANSFER OF CASE, 3.

**Removal of Property Fraudulently—**

See FRAUDULENT REMOVAL OF PROPERTY.

PARTNER, 1.

**Rent—**

Arrears of. See TOLLS.

**Report of Chemical Examiner—**

REPORT OF CHEMICAL EXAMINER—*Criminal Procedure Code (Act XXV. of 1861), s. 370.* Under s. 370 of the Code of Criminal Procedure, the original report of the Chemical Examiner bearing his signature, and not a copy of the report, should be put in evidence.—*Queen v. Biswambhar Das*, 6 B. L. R. Ap. 122 [or p. 352].

**Report of Police-officer—**

See RECOGNIZANCE, 6, 9.

WARRANT, 2.

**Rescuing from Custody—**

See CUMULATIVE SENTENCES.

**Resistance of Civil Process—**

RESISTANCE OF CIVIL PROCESS—*Penal Code (Act XLV. of 1860), s. 186—Jurisdiction of Criminal Courts—Criminal Procedure Code (Act XXV. of 1861).* The resistance of process of a Civil Court is punishable, under the Code of Criminal Procedure, by a Court of criminal jurisdiction.—*Queen v. Bhagai Dafadar*, 2 B. L. R. F. B. 21 [or p. 49].

**Retrial—**

See ASSAULT.

**Return—**

See HABEAS CORPUS, 1.

**Reverse—**

Meaning of. See ACCOMPLICE, 4.

**Review—**

REVIEW—*Of judgment in criminal cases—Criminal Procedure Code (Act XXV. of 1861), ss. 404, 405, 439—Reg. IX. of 1793, s. 73—Reg. XIV. of 1870, ss. 3, 4—Act XVII. of 1862.* The High Court cannot review its judgment passed in a criminal case before it on appeal.—*Queen v. Godai Raout*, Sup. Vol. 436 [or p. 695].

**Review of Order in Criminal Case—**

See ATTACHED PROPERTY.

**Revision—**

1. REVISION—*Power of High Court as a Court of—Verdict of a jury.* The verdict of a jury cannot be reversed by a Court of Revision, even if it be a verdict of "guilty." The only remedy for the prisoner in such a case is an appeal (which can only be on a question of law), or an application to the Executive Government. Nor can a verdict, pronounced by a jury, of "not guilty," be reversed by the High Court on revision, and it is clear that no appeal lies from such a verdict.—*Queen v. Gorachand Ghose*, 3 B. L. R. F. B. 1 [or p. 79].

2. REVISION—*Criminal Procedure Code (Act X. of 1872), ss. 283, 286, 294, 297—Power of High Court—"Material error"—Privileged communications.* Where the High Court sent for the record of a case, and it appeared therefrom doubtful whether the evidence was sufficient to support the conviction, the Court refused to interfere, there being no material error in law, or in the proceedings, which rendered such conviction illegal and improper. *Per Glover, J.*—The power of the High Court under s. 294 of Act X. of 1872 is limited to sentences and orders passed by subordinate Courts as distinct from judgments of such Courts, and a judgment cannot be interfered with (except in cases where the law gives an appeal on the facts), unless it be shown that it is contrary to law. *Per Pontifex, J.*—The High Court cannot, under s. 294 of Act X. of 1872, interfere with a conviction, unless there has been some material error of law which renders such conviction illegal and improper in law. *See.* Communications between a prosecutor in a criminal case and his attorney, and between the attorney and his clerk, as to the case, are not privileged.—In the Matter of the Petition of Bellios, 12 B. L. R. 249 [or p. 617].

**Revision (contd.)—**

3. REVISION — *Criminal Procedure Code (Act X. of 1872)*, s. 297—"Material error." To justify the setting aside of proceedings on a trial, the error must be a material error within the meaning of s. 297 of the new Criminal Procedure Code—material in that section being equivalent to "unless such error or defect has occasioned a failure of justice" in s. 283.—*Queen v. Ramkanu*, 12 B. L. R. 253 note [or p. 619].

4. REVISION — *Criminal Procedure Code (Act X. of 1872)*, ss. 296, 297—*Powers of High Court—Sentence of acquittal.* In a case in which the accused was charged under ss. 141, 441, and 352 of the Penal Code, the Deputy Magistrate, after hearing two of the prosecutor's witnesses only, and without taking the evidence of the remaining witnesses named by the prosecutor, two of whom at least were present at the trial, and without examining the prosecutor himself in the presence of the accused, passed a judgment of acquittal under s. 211 of the Criminal Procedure Code. The Magistrate, being of opinion that such judgment was illegal, reported the case, and forwarded the record thereof to the High Court under s. 296 of the Criminal Procedure Code with a request that the Court would pass "an order directing the re-trial of the accused with observance of the proper procedure." The High Court (Markby and Birch, JJ.): "We do not think that we have power to do what the Magistrate asks—namely, to set aside the acquittal of the prisoner, and to direct a re-trial. The proceedings of the Deputy Magistrate were undoubtedly illegal, but they have resulted in the acquittal of the prisoner, and we are not empowered by the Criminal Procedure Code to interfere when a prisoner has been improperly acquitted. If a prisoner has been improperly discharged, we may order him to be tried, or to be committed for trial, under the second clause of s. 297. If the Legislature had also intended us to interfere when the prisoner was acquitted, it would undoubtedly have been so expressed in that clause."—*Queen v. Hatu Khan*, 12 B. L. R. Ap. 22 [or p. 627].

5. REVISION—*Code of Criminal Procedure (Act XXV. of 1861)*, ss. 403, 404, 405, 407, 419—*Powers of High Court—Enhancement of punishment—Murder—Culpable homicide.* Under s. 404 of the

**Revision (contd.)—**

Criminal Procedure Code, the High Court may set aside a judgment of acquittal for error in law. The High Court, as a Court of Revision, has power to enhance a punishment. The High Court may send the case back to the Court of Session with an order to pass the proper sentence. The High Court may act as a Court of Revision after it has acted as a Court of Appeal in order to correct an error which cannot be set right by appeal. Culpable homicide and murder distinguished.—*Queen v. Gorachand Gope*, Sup. Vol. 443 [or p. 700].

See ACQUITTAL.

**Revision of Interlocutory Proceedings—**

See TRANSFER OF CASE, 3.

**Right of Counsel or Pleader to Prosecute—**

See PROSECUTION.

**Right of Way—**

RIGHT OF WAY — *Land Acquisition Act (VI. of 1857)*, s. 8.] When land is taken by the Government under Act VI. of 1857, the land is absolutely vested in the Government under s. 8, free from any right of way previously enjoyed by the public over such land.—In the Matter of the Petition of H. B. Fenwick, 6 B. L. R. Ap. 47 [or p. 328].

**Right to Begin—**

See NUISANCE, 11.

**Riot—**

See NUISANCE, 6, 7, 12.

**Rioting—**

RIOTING—*Culpable homicide—Penal Code (Act XLV. of 1860)*, ss. 148, 304.] The prisoners who, in resisting a sudden attack made upon them by certain persons for the purpose of cutting their crop, and when they had no time to complain to the police, inflicted a wound on one of them with a bamboo, from the effects of which the man died, were convicted by the Sessions Judge, under ss. 148 and 304 of the Penal Code. The High Court acquitted the prisoners, holding that the force used, or the injuries inflicted, were not such as to exceed their right of private defence of property.—*Queen v. Guru Charan Chang*, 6 B. L. R. Ap. 9 [or p. 319].

**Rioting with Deadly Weapons—**

See SENTENCE, 3.

UNLAWFUL ASSEMBLY, 3.

**Rival Haute—**

See NUISANCE, 12.

**Rowana—**

See SALT.

**S.****Salt—**

**SALT—Confiscation of—Rowana—**  
*Pass—Act VII. of 1864 (B.C.), s. 16.*  
 If salt exceeding five seers is found within the limits prescribed by s. 12 of Act VII. of 1864 (B.C.), unprotected by a rowana or pass, the salt is contraband, and liable to seizure, and the parties transporting it are punishable under s. 16. It matters not whether any attempt or intention to sell is proved or not.—*Queen v. Ofatulla*, 6 B. L. R. 381 [or p. 248].

**Sanction of Registrar—**

See REGISTRATION, 1, 2.

**Sanction to Prosecute—**

1. **SANCTION TO PROSECUTE—Perjury—***Penal Code (Act XLV. of 1860), s. 193.* Sanction to a prosecution for perjury may be given by the Court before which the perjury was committed, at any time, even after the order for commitment to the Sessions has been made.—*In re Queen v. Golak Sing*, 3 B. L. R. A. Cr. 10 [or p. 95].

2. **SANCTION TO PROSECUTE—Criminal Procedure Code (Act XXV. of 1861), ss. 170, 426—Forgery—***Penal Code (Act XLV. of 1860), s. 465.* In a suit by A for arrears of rent above Rs. 100, a decree was passed against B, C, and D, wherein certain documents filed by them were held to be forgeries. A applied for and obtained an order from the Deputy Collector who tried the suit for leave to prosecute B and C in the Criminal Court. A afterwards applied to the Collector for leave to prosecute B, C, and D, whereupon the Collector passed the following order: "Sanction has already been given once by the Deputy Collector. I, however, have no objection to give it a second time, as the petitioner desires it." D was convicted by the Sessions Judge on a charge under s. 471 of the Penal Code. On appeal by D, held that no proper leave had been obtained to prosecute D, and this defect was not cured by the subsequent proceedings, and the conviction must be quashed.—*Queen v. Mahima Chandra Chuckerbutty*, 7 B. L. R. 26 [or p. 361].

**Sanction to Prosecute (contd.)—**

3. **SANCTION TO PROSECUTE—Sufficiency of sanction—***Criminal Procedure Code (Act XXV. of 1861), ss. 169, 170—Forgery and perjury—**Penal Code (Act XLV. of 1860), ss. 471, 193.* Where persons were charged with offences under ss. 471 and 193 of the Penal Code, committed in proceedings before a Civil Court, and for which, therefore, the sanction of the Civil Court was necessary under ss. 169 and 170 of Act XXV. of 1861, held that the sanction, which simply gave permission, and did not specify the particular act or acts of forgery, and the particular words which constituted the perjury, was insufficient.—*Queen v. Gabind Chandra Ghose*, 7 B. L. R. 28 note [or p. 362].

4. **SANCTION TO PROSECUTE—***Penal Code (Act XLV. of 1860), ss. 182, 211.* In a case against the accused under s. 211, Penal Code, the Joint-Magistrate, in the course of the trial, altered the charge from a private one under s. 211 to a public one under s. 182, and convicted the accused on the facts. There being no sanction to prosecute under s. 182, the Sessions Judge referred the case to the High Court. The High Court altered the conviction to one under s. 211, as the accused was not prejudiced in his trial.—*Kirti Ojha v. Rajkumar*, 7 B. L. R. 29 note [or p. 363].

5. **SANCTION TO PROSECUTE—Criminal Procedure Code (Act XXV. of 1861), ss. 169, 435—Sanction for prosecution of certain offences—***Jurisdiction of Court of Session.* A Court of Session has no power to interfere under s. 435 of Act XXV. of 1861 with an order of a Magistrate permitting a prosecution under s. 169 of Act XXV. of 1861.—*Gopal Mazumdar v. Haro Sundari Bais-tami*, 8 B. L. R. Ap. 20 [or p. 473].

See FORGERY, 2.

**Security to keep Peace—**

See RECOGNIZANCE, 1.

**Seizure—**

See FRAUDULENT REMOVAL OF PROPERTY.

**Sentence—**

1. **SENTENCE—Attempt at rape—Punishment—Commutation of sentence—***Penal Code (Act XLV. of 1860), ss. 59, 376, 511.* A was convicted of an attempt to commit rape, and was sentenced

**Sentence (contd.)—**

by the Judge to rigorous imprisonment for 7 years, which he commuted, under s. 59 of the Penal Code, to transportation for the same term. *Held* that, under ss. 376 and 511 of the Penal Code, a sentence to imprisonment for the offence committed could not be for a longer term than 5 years, and such sentence could not be commuted, under s. 59, to transportation for a longer term.—*Queen v. Joseph Meriam*, 1 B. L. R. Cr. 5 [or p. 4].

2. **SENTENCE—Writ of certiorari—Conviction under Act VI. of 1866 (B.C.).** Sagar Dutt was convicted before a Justice of the Peace, for using a warehouse, &c., in the town of Calcutta, for the keeping and storing of jute, other than jute screwed for shipment, without a license, and for his said offence was fined Rs. 300, and adjudged to pay a further fine of Rs. 25 for every day, after the conviction, in which the offence was continued. *Held* that the conviction was bad.—In the Matter of Sagar Dutt: *Queen v. Justices of the Peace*, 1 B. L. R. O. Cr. 41 [or p. 40].

3. **SENTENCE—Charge—Rioting armed with deadly weapons—Causing hurt with dangerous weapons—Penal Code (Act XLV. of 1860), ss. 148, 324.** Where prisoners were charged under s. 148 of the Penal Code of rioting armed with deadly weapons, and also under s. 324 of voluntarily causing hurt by dangerous weapons, they should have been sentenced only under one or other of these sections, the charges being, properly speaking, only alternative charges. The High Court refused to interfere with the reception by the Sessions Judge of the uncorroborated evidence of accomplices.—*Queen v. Dina Sheikh*, 3 B. L. R. A. Cr. 15 note [or p. 98].

4. **SENTENCE—Postponement of—Criminal Procedure Code (Act XXV. of 1861), ss. 46, 47, 48, 421.** A sentence of imprisonment ought to commence from the time that the sentence is passed, unless there is some lawful reason for ordering it to commence at some future period. Except as in the cases provided for by ss. 46, 47, and 48 of the Criminal Procedure Code, a Magistrate cannot authorise a sentence passed by him to take place from some future date; nor, except as provided for by s. 421 of the

**Sentence (contd.)—**

Code of Criminal Procedure, can a sentence, which is to take place immediately, be suspended.—In the Matter of Krishnanand Bhuttacharjee, 3 B. L. R. A. Cr. 50 [or p. 120].

5. **SENTENCE—Punishment, Enhancement of—Commutation of sentence—Whipping—Rigorous imprisonment.** Upon conviction of the offence of house-breaking, the accused was sentenced by the Deputy Magistrate to six months' rigorous imprisonment, and to be whipped. On appeal, the Judge found that, as this was the first offence, the additional punishment of whipping was illegal, and, setting aside so much of the sentence, passed a sentence of three months' rigorous imprisonment, in addition to the six months' rigorous imprisonment passed by the Deputy Magistrate. *Held* that the commutation of the punishment was illegal.—*Queen v. Banda Ali*, 6 B. L. R. Ap. 95 [or p. 343].

6. **SENTENCE—Mitigation of—Criminal Procedure Code (Act XXV. of 1861), ss. 405, 428.** The High Court can, under ss. 405 and 428 of the Criminal Procedure Code, mitigate a sentence passed by a Magistrate, and confirmed or altered on appeal by the Sessions Judge, on the ground that the sentence was excessive.—In the Matter of the Petition of Bisummbhur Shaha, Sup. Vol. 484 [or p. 728].

7. **SENTENCE—Act XV. of 1862, s. 1—Commutation of sentence—Penal Code (Act XLV. of 1860), s. 59.** An officer, who, in the exercise of the powers described in s. 1, Act XV. of 1862, has passed a sentence of imprisonment for seven years, has power, under s. 59 of the Penal Code, to commute that sentence into one of transportation for the like period. (Jackson, J., dissented.)—*Queen v. Boodhooa*, Sup. Vol. 869 [or p. 745].

**SENTENCE—**

See **ENHANCEMENT OF SENTENCE.**

**WHIPPING.**

Alteration of Verdict and. See **ACQUITTAL.**

**Sentence of Acquittal—**

See **REVISION**, 4, 5.

**Sentence on Accused in his Absence—**

See **EXAMINATION OF WITNESSES.**

**Separate Offences—**

**SEPARATE OFFENCES**—*Penal Code (Act XLV. of 1860), ss. 380, 456, 457—Lurking house-trespass—Theft.*] The prisoner was convicted by the Magistrate of two separate offences under ss. 456 and 380 of the Penal Code, and sentenced for both. On appeal, the Sessions Judge, holding that the offence proved was under s. 457, ordered a new trial for offences under ss. 457 and 380. *Held* that there ought not to be a new trial, but that the conviction and sentence under s. 380 should be set aside.—*Queen v. Ramcharan Kairi*, Sup. Vol. 488 [or p. 730].

See **APPEAL**, 1.

**Sessions Court—**

Power of. See **DISCHARGE**, 1, 4, 5.

**Single Judge's Power—**

See **APPEAL**, 6.

**Slaughter-house—**

**1. SLAUGHTER-HOUSE**—*License—Act VII. of 1865 (B.C.), s. 7.*] R was fined by the Deputy Magistrate for using an unlicensed slaughter-house. He subsequently gave an ijara or lease to A to carry on the business. R was prosecuted again for evading the law by "slaughtering cattle or allowing cattle to be slaughtered" without a license. He was fined Rs. 200 by the Deputy Magistrate. On appeal to the Sessions Judge, he was acquitted. On the motion of the Municipal Commissioners for a rule to set aside the order of the Sessions Judge, it was *held*—*Per Jackson, J.*—That R, by giving a lease to B, had parted with his interest, and had ceased to have any power to allow or disallow the slaughtering of cattle. That s. 7 provides penalties only, and does not describe an offence, or relate to a conviction. It is quite another question whether the act itself is an offence irrespective of s. 7, and whether R could be dealt with as an abettor. *Per Mitter, J. (dissenting).*—The Judge has found that the lease was given by R with the avowed object of continuing the slaughter-house, and admittedly for the express purpose of evading the law; the case therefore falls within the express words of the section, "or allows cattle to be slaughtered."—In the Matter of the Petition of The Municipal Commissioners for the Suburbs of Calcutta, 6 B. L. R. Ap. 28 [or p. 320].

**2. SLAUGHTER-HOUSE**—*Criminal Procedure Code (Act XXV. of 1861), ss.*

**Slaughter-house (contd.)—**

*308, 310, 311, 313—Nuisance.*] The condition and the conduct of an old-established slaughter-house is proved to be, in fact, an offensive nuisance, and dangerous to the health of neighbours; but the evidence did not show it was in a worse condition than at any time since its establishment. The occupiers, when summoned, refused to ask for a jury under s. 310, Criminal Procedure Code. *Held* that the Magistrate was justified in suppressing the "trade or occupation" under s. 308. No length of enjoyment can legalize a public nuisance.—Municipal Commissioners of the Suburbs of Calcutta *v.* Mahomed Ali, 7 B. L. R. 499 [or p. 412].

See **NUISANCE**, 9.

**Small Cause Court—**

Record of Proceedings of. See **EVIDENCE**, 4, 5.

**Snake-Charmers—**

Death caused by. See **CULPABLE HOMICIDE**, 2.

**Solitary Confinement—**

**SOLITARY CONFINEMENT**—*Penal Code (Act XLV. of 1860), ss. 73, 74.*] Solitary confinement must not be imposed for the whole term of a person's imprisonment. Under s. 74 of the Penal Code it is to be imposed at intervals.—In the Matter of Nyan Suk Mether, 3 B. L. R. A. Cr. 49 [or p. 120].

**Special Verdict—**

See **JURY**, 3.

**Specially Registered Bond—**

See **FORGERY**, 2.

**Specification of Offence—**

See **WARRANT**, 3.

**Stamp—**

**STAMP**—*Procedure—Jurisdiction of Collector under Stamp Act (X. of 1862), s. 2—Criminal Procedure Code (Act XXV. of 1861), ss. 169, 171.*] An application was made to a Collector, under s. 50, cl. 2 of Act X. of 1862, to replace a damaged stamp by a new one. As it appeared that the stamp had been tampered with for fraudulent purposes, the Collector made over the parties to the Magistrate for trial. *Held* that the document not being given in evidence in any proceeding in Court, the Collector was not bound to proceed under ss. 169 and 171 of the Criminal Procedure Code.—*In re Queen v.*

**Stamp (contd.)—**

Gour Mohan Sen, 3 B. L. R. A. Cr. 6 [or p. 92].

**Statement before Magistrate—**

See ASSESSORS, 2.

**Statements of Accused—**

STATEMENTS OF ACCUSED—*Evidence*

—*Answers to police-constable or Magistrate—Jurisdiction—Arrest of judgment—S. 29 of the Letters Patent—S. 41 of Act XVIII. of 1862—Judicial notice.*

G D presented a Government Promissory Note, at the Bank of Bengal, bearing a forged endorsement, and was arrested. A police-constable asked N if he knew G D. N replied that he knew him as a common man. The police-constable then asked N if he knew any thing about the Note. N replied that he did not. No threat or inducement was held out, nor was any caution administered to N. *Held* that the statements made by N in answer to the questions of the police-constable were admissible. N was afterwards brought before R, the Deputy Magistrate of Serampore, who told him, before any depositions were taken, that he (N) was charged with having received a stolen Promissory Note, and R asked him if he wished to say any thing. N replying in the affirmative, R, without administering any caution to him, asked him how or where he had obtained the Note, and other questions, the answers to which were taken down. N was again brought up before R, and was asked whether a Promissory Note then produced was the one he had delivered to G D to take to the Bank. R told N that he was not bound to answer the question, but that, if he did, the answer would be taken down; and that, if he objected to answer, that would also be noted. R committed N to take his trial before the High Court. *Held* that on the trial the answers of N to the questions of R, whether R acted as a Justice of the Peace for Bengal, or as a Magistrate, were admissible. Where the High Court had jurisdiction to try a prisoner for the offence committed, if a charge had been made against him by a person authorized to make that charge, and the prisoner pleaded 'not guilty,' *held* that proof need not be given that the officer had authority to send up the charge. Objections to the jurisdiction should be made before pleading to the general issue. The construction of s. 29

**Statements of Accused (contd.)—**

of the Letters Patent is, that the High Court has power, if in its discretion it thinks right to exercise it, to transfer the investigation or trial of any criminal offence committed in Calcutta to a Mofussil Court, which is otherwise competent to try it, or to direct the trial by the High Court of an offence committed in the mofussil. "Competent to investigate it" does not include competency as regards local jurisdiction, but only competency with regard to the offender, the nature of the offence, and the punishment. The High Court could have directed the preliminary investigation of the charge against N by the Deputy Magistrate of Serampore, but that it did not appear in the caption of the charge or in evidence that the Court had so directed it. *Held*, no ground for arrest of judgment, but the objection might have been raised before the jury was sworn, under s. 41 of Act XVIII. of 1862. The High Court being a Court of superior jurisdiction, the want of jurisdiction is not to be presumed, but the contrary. *Seemle.*—The High Court was bound to take judicial notice that R was a Justice of the Peace for Bengal.—*Queen v. Nabadwip Chandra Goswami*, 1 B. L. R. O. Cr. 15 [or p. 24].

**Stat. 31 Car. II.—**

C. 2. See HABEAS CORPUS, 2.

**Stat. 7 Will. III.—**

C. 3, s. 5. See ASSESSORS, 1.

**Stat. 13 Geo. III.—**

C. 63, s. 36. See HABEAS CORPUS, 2.

**Stat. 21 Geo. III.—**

C. 70. See HABEAS CORPUS, 2.

**Stat. 37 Geo. III.—**

C. 142, s. 8. See HABEAS CORPUS, 2.

**Stat. 4 Geo. IV.—**

C. 81. See EUROPEAN BRITISH SUBJECT.

**Stat. 3 & 4 Will. IV.—**

C. 85, s. 43. See HABEAS CORPUS, 2, 3.

**Stat. 12 & 13 Vic.—**

C. 96. See HIGH SEAS.

**Stat. 17 & 18 Vic.—**

C. 104, s. 267. See HIGH SEAS.

**Stat. 18 & 19 Vic.—**

C. 91, s. 27. See HIGH SEAS.

**Stat. 23 & 24 Vic.—**

C. 88. See HIGH SEAS.



**Stat. 24 & 25 Vic.—**

C. 104. See REMAND, 2.

C. 104, s. 9. See JURISDICTION, 9.  
s. 15. See HIGH COURT.TRANSFER OF  
CASE, 2.**Stat. 26 Vic.—**

C. 67, ss. 22, 42. See JURISDICTION, 8.

**Stat. 34 & 35 Vic.—**

C. 34. See JURISDICTION, 8.

**Stolen Property—**

Dishonestly receiving. See EVIDENCE, 9.

**Straying of Cattle—**

See CATTLE-STRAYING.

**Sub-Registrar—**

See JURISDICTION, 5.

**Sub-Registrar is a Court—**

See JURISDICTION, 7.

**Sub-Registrar's Power—**

See REGISTRATION, 1, 2.

**Summary Conviction—**SUMMARY CONVICTION—*Act IV. of 1866 (B.C.), s. 26—Penal Code (Act XLV. of 1860), s. 116.* A Police Magistrate has power to convict summarily, under Act IV. of 1866 (B.C.), s. 26, for an offence punishable under s. 116 of the Penal Code.—*Queen v. Mahbub Khan*, 1 B. L. R. O. Cr. 39 [or p. 39].**Summary Trial—**SUMMARY TRIAL—*Code of Criminal Procedure (Act X. of 1872), ch. 18, s. 228—Appeal.* If, on appeal from a summary trial under ch. 18 of the Criminal Procedure Code, the evidence before the Judge is not sufficient to reasonably satisfy him that the prisoner has been rightly convicted, he ought to acquit him.—*Queen v. Kheraj Mullah*, 11 B. L. R. 33 [or p. 588].**Summing-up—**

See ACCOMPLICE, 3.

JURY, 1, 4.

**Summing-up to Assessors—**

See ASSESSORS, 1, 2.

**Summoning Witnesses—**

See WITNESSES.

WITNESSES FOR DEFENCE, 1 TO 6.

**Summons—**

Disobedience of. See TOLLS.

**Summons to keep Peace—**

See RECOGNIZANCE, 2, 12.

**Summons or Warrant—**

Issue of, without specifying Charge.

See ARMS' ACT, 1.

**Summons-book of Small Cause Court—**

See EVIDENCE, 4, 5.

**Sunday—**

See TRIAL ON SUNDAY.

**Superintendence—**

High Court's Power of. See REMAND, 2.

**Suppression of Trade or Occupation—**

See NUISANCE, 9.

**Surety—**

See JURISDICTION, 1.

**Surety's Bond—**

See RECOGNIZANCE, 10.

**Suspension of Mookhtear—**

See MOOKHTEAR, 2.

**Suspension of Proceedings—**

See TRANSFER OF CASE, 3.

## T.

**Tender of Deposition—**

See THREAT.

**Tender of Pardon—**

See EVIDENCE, 3.

**Theft—**THEFT—*Penal Code (Act XLV. of 1860), s. 378—Partner.* K, the go-masta of a shop, was coming out of the Small Cause Court with some account-books belonging to that shop. A, who had a share in that shop, took these books out of the possession of K, and kept them against the will of K, saying they were his. Held that, as the taking was not dishonest, there was no theft, there being no intention of causing wrongful gain or wrongful loss.—*Kiamuddin v. Allah Baksh*, 6 B. L. R. Ap. 133 [or p. 354].

See DISMISSAL OF COMPLAINT, 5.

EVIDENCE, 9.

FALSE CHARGE, 1.

PARTNER, 2.

SEPARATE OFFENCES.

WHIPPING, 2.

**Threat—**THREAT—*Evidence Act (I. of 1872), s. 24—Confession under threat made for purpose other than to extort confession.* The prisoner was tried for wounding with intent to murder, and wounding with intent to do grievous bodily harm. The

**Threat (contd.)—**

crime was committed on the high seas on a ship on which the prisoner was a seaman. The Standing Counsel, having proved that the master of the ship had sailed from Calcutta, and could not be found, tendered, under ss. 33 and 80 of the Evidence Act (I. of 1872), his deposition before the committing Magistrate. The deposition contained an admission alleged to have been made to the deponent by the prisoner when in custody. Phear, J., refused to allow this, as the admission was stated to have been made immediately after the prisoner with others had been threatened by the witness, to whom the statement was made, with a loaded rifle. It was immaterial that the threat was not for the purpose of extorting the confession, but in order to suppress an attempt at mutiny.—*Queen v. Hicks*, 10 B. L. R. Ap. 1 [or p. 571].

**Title—**

Proof of. See MISCHIEF.

**Tolls—**

**TOLLS—Arrears of rent—Illegal arrest.** A, the lessee of a toll, was in arrear to Government in respect of the rent. The Magistrate issued a summons to him, whereby it was recited that a plaint had been preferred against him (A) for the offence of not paying the sum of Rs. 262 for arrears of rent, and A was summoned to appear before the Magistrate to answer the charge. A did not appear on the day appointed, but had an application presented for postponement of the demand for arrears of rent, on the grounds therein stated. On the following day, the Magistrate passed the following order: "Whereas the debtor, defendant, has not appeared in person, the summons has been disobeyed; therefore, it is ordered that a warrant be issued for the arrest of the defendant." Proceedings were afterwards taken upon the warrant. *Held* that all the proceedings taken by the Magistrate were irregular, and must be set aside.—In the Matter of Banka Bihari Ghose.—2 B. L. R. A. Cr. 17 [or p. 64].

**Trade or Occupation—**

Suppression of. See NUISANCE, 9.

**Transfer of Case—**

1. TRANSFER OF CASE—*Criminal Procedure Code (Act XXV. of 1861), s. 36—Removal of case by the Magistrate from file of Subordinate Magistrate.*

**Transfer of Case (contd.)—**

Interference by the High Court in a case where the Magistrate had improperly exercised his discretion in removing a case from the file of a Deputy Magistrate.—In the Matter of the Petition of Naba Kumar Banerjee, 5 B. L. R. Ap. 45 [or p. 230].

2. TRANSFER OF CASE—*Letters Patent, 1865, cl. 29—Jurisdiction—Power of single Judge sitting on original side—24 and 25 Vic., c. 104, s. 15.* On an application made for the transfer of a case from the Sessions Court at Patna for trial by the High Court at Calcutta, on the grounds, mainly, that all but one of the charges against the prisoners were for offences committed in Calcutta; that the selection of Patna as the place of trial was calculated to prejudice the prisoners; that the police at Patna were getting up the case against the prisoners by improper and illegal means; that by those means was created such a feeling of dread and insecurity among witnesses and others in Patna as would prevent a fair trial from taking place there; that some of the witnesses for the defence, although willing to give evidence in Calcutta, refused to go to Patna to give evidence; and that many difficult points of law were likely to arise at the trial; but these allegations were denied by the affidavits filed in opposition to the application: *Held* (Macpherson, J., doubting) that the High Court had power under cl. 29 of the Letters Patent to transfer the case for trial by itself. The Court, however, refused the application, on the ground that a sufficient case had not been made out for the exercise of the power of the Court. *Per* Phear, J.—A single Judge, sitting on the original side of the Court, has power to entertain an application for the removal of a criminal case from a Court in the mofussil to the High Court in the exercise of its extraordinary original criminal jurisdiction.—*Queen v. Ameer Khan*, 7 B. L. R. 240 [or p. 382].

3. TRANSFER OF CASE—*High Court's powers—Non-compliance with orders of High Court—Transfer of proceedings—Jurisdiction—Criminal Procedure Code (Act X. of 1872), ss. 64, 142, 297, 389, 390, 391, 398—Revision of interlocutory proceedings before Magistrate—Suspension of proceedings—Order for bail—Non-bailable offence—Warrant of arrest—Commitment to custody without evi-*

**Transfer of Case (contd.)—**

*dence taken—Remand without evidence taken.*] The High Court has jurisdiction, having regard to ss. 297 and 64 of the Code of Criminal Procedure, to take cognizance of and revise the proceedings of a Magistrate while they are in an interlocutory state of pending investigation, and may suspend such proceedings without having the record before it. It may also, in such a case, order bail to be taken from the person accused. A prisoner arrested under a warrant should be brought promptly before a Magistrate, who has then no authority to further detain him in custody or to remand him to prison without some reason made manifest to him, either in the shape of sworn testimony given before him, or of some other form which can be put upon the record, and which is sufficient to justify him in sending the prisoner to prison. The case was transferred to a specially appointed officer, as the Magistrate was strongly prejudiced against the accused, and was proceeding irregularly.—In the Matter of Moonshee Syud Abdool Kadir Khan v. Magistrate of Purneah, 11 B. L. R. Ap. 8 [or p. 604].

4. **TRANSFER OF CASE—High Court's Criminal Procedure Act (X. of 1875), s. 147—Transfer of case to High Court—Costs—Police Magistrates—Notes of evidence.**] In a case transferred to the High Court under s. 147, Act X. of 1875, the Court has no power to give costs. *Semble.*—The case may be transferred after final determination by the Magistrate. Notes of the proceedings before them should be taken in all cases by the judicial officers of all Criminal Courts subject to the Act.—In the Matter of J. Louis, and in the Matter of Beng. Act VI. of 1866, 15 B. L. R. Ap. 14 [or p. 687].

**Transportation—**

See SENTENCE, 1, 7.

**Treason—**

See ASSESSORS, 1.

**Trial by Jury—**

See CONFESSION, 3.

**Trial on Sunday—**

**TRIAL ON SUNDAY—Irregularity of proceeding—Criminal Procedure Code (Act XXV. of 1861), s. 171—Penal Code (Act XLV. of 1860), s. 174.**] A Magistrate, while travelling in his district, tried a case partly at a place, and then

**Trial on Sunday (contd.)—**

fixed Sunday next at noon for the further trial of the case, to be held in another village. On the Sunday the witnesses for the defence came to the village, but at 3 p.m., instead of noon. The Magistrate, after waiting an hour beyond the time fixed, moved to the next village, and subsequently sentenced the defaulting witnesses, under s. 174 of the Penal Code, to one month's simple imprisonment. The High Court, on reference, quashed the conviction.—*Queen v. Hargabind Datta Sirkar*, 8 B. L. R. Ap. 12 [or p. 472].

**U.****Uncorroborated Evidence—**

See FALSE EVIDENCE, 12.

**Unlawful Assembly—**

1. **UNLAWFUL ASSEMBLY—Common object—Murder—Penal Code (Act XLV. of 1860), ss. 149, 300.**] A large body of men belonging to one faction waylaid another body of men belonging to a second faction, and a fight ensued, in the course of which a member of the first-mentioned faction was wounded, and retired to the side of the road, taking no further active part in the affray. After his retirement a member of the second faction was killed. *Held*, by Norman, J. (whose opinion prevailed), that the wounded man had ceased to be a member of the unlawful assembly when he retired wounded, and that he could not, under s. 149 of the Penal Code, be made liable for the subsequent murder. *Held*, by E. Jackson, J., that he remained a member of the unlawful assembly.—*Queen v. Kabil Cazee*, 3 B. L. R. A. Cr. 1 [or p. 89].

2. **UNLAWFUL ASSEMBLY—Common object—Abduction—Murder—Penal Code (Act XLV. of 1860), ss. 149, 363, 300.**] Where a person was killed by a member of an unlawful assembly, in prosecution of the common object of that assembly, the common object being the abduction of that person's mother, *held* that all those who were members of the assembly at the time such person was killed were guilty of the offence of killing her.—In the Matter of Golam Arfin, 4 B. L. R. Ap. 47 [or p. 183].

3. **UNLAWFUL ASSEMBLY—Common object—Murder—Rioting armed with deadly weapon—Penal Code (Act XLV.**

**Unlawful Assembly (contd.)—**

*of 1860*), ss. 148, 149, 300. *except. 2.*] One member of an unlawful assembly, whose common object was to eject certain persons from a piece of land the title to which was disputed, fired at and killed one of such persons. *Held* (by Couch, C.J., and Jackson, Phear, and Pontifex, JJ.) that, the act being sudden and unpremeditated, the other members of the assembly were not guilty of the offence of murder under s. 149 of the Penal Code, but of rioting armed with a deadly weapon under s. 148. Ainslie, J., dissented.—*Queen v. Samed Ali*, 11 B. L. R. 347 [or p. 590].

**Unsoundness of Mind—**

**UNSOUNDNESS OF MIND—***Trial of fact of—Criminal Procedure Code (Act X. of 1872), s. 425.*] Where an accused person at his trial appears to the Sessions Judge to be of unsound mind, the High Court held, having regard to the provisions of ss. 232 and 425 of the Code of Criminal Procedure, that the trial of the issue of insanity is part of the trial of the accused, and ought to be tried by the jury, and not by the Sessions Judge personally.—*Queen v. Bheekoo Kalwar alias Bhik Sha*, 10 B. L. R. Ap. 10 [or p. 573].

**V.****Verdict of Jury—**

See **JURY**.

REVISION, 1.

**Verdict and Sentence—**

Alteration of. See **ACQUITTAL**.

**Verification of Plaint—**

See **FALSE EVIDENCE**, 2.

**Violation of Wife—**

See **CULPABLE HOMICIDE NOT AMOUNTING TO MURDER**, 1.

**W.****Waging War—**

**WAGING WAR—Jurisdiction—***Act XI. of 1857—Act XVII. of 1862, s. 4—Abetment—Penal Code (Act XLV. of 1860), s. 121—Criminal Procedure Code (Act XXV. of 1861), s. 28—Warrant of arrest under Reg. III., 1818—Effect and weight of evidence.*] Where the prisoner was charged with having, at Calcutta, abetted waging of war against the Queen, and was tried at the Sessions Court of Patna, it was held that the Court of Session at Patna had jurisdiction to try him,

**Waging War (contd.)—**

because he was a member of a conspiracy, other members of which had done acts within the district of Patna in pursuance of the original concerted plan, and with reference to the common object. The Court of Patna had jurisdiction also, because the prisoner had sent money from Calcutta to Patna by hundis, and, until that money reached its destination, the sending continued on the part of the prisoner. The Governor-General, in issuing a warrant of commitment under Reg. III. of 1818, does not, in any way, act judicially or as a Court of Justice, nor is he to be considered as having adjudicated that the person placed under personal restraint had been guilty of some specific offence. The proceeding is not in the nature of a conviction of the person placed under restraint; therefore the person so placed under restraint cannot, in any future proceeding against him, plead that he has been already tried, convicted, and punished. Letters, &c., found in a man's house, after his arrest, are admissible in evidence, if their previous existence has been proved.—*Queen v. Amir Khan*, 9 B. L. R. 36 [or p. 488].

See **ASSESSORS**, 1.

**Want of Evidence—**

See **DISCHARGE**, 3.

**Warrant—**

**I. WARRANT — Criminal Procedure Code (Act XXV. of 1861), ss. 66, 68, 76, 188, 207, 222, 224, 367—Act VIII. of 1869, s. 380—Arrest and detention of accused and witnesses.**] A belief, founded on private and anonymous information, is not "knowledge" within the meaning of s. 68 of the Criminal Procedure Code. A warrant issued under s. 68, which is a warrant of arrest as described under s. 76 (form B), is only for the purpose of bringing an accused person before the Magistrate. It is not a warrant for commitment, and does not authorise the detention of a person longer than is necessary for his production before the Magistrate. To detain him further there must be a fresh warrant under s. 222, charging the prisoner with some offence, on evidence taken on oath or affirmation, and in the presence of the accused. S. 188 only empowers a Magistrate to issue a warrant for the apprehension of a witness, when he has reason to believe that the witness will not attend to give evidence without being compelled to do so, and it does not empower a Magis-

**Warrant (contd.)—**

trate to commit a witness. S. 207 gives no power to the Magistrate to call up and examine witnesses for the defence whose names have been given in a list under s. 227, when the prisoners reserve their defence for the Court of Session; but under s. 228, he is bound to summon them to give evidence before the Court of Session. The necessity of a Magistrate acting in a dispassionate and impartial manner, and not in the spirit of a prosecutor, observed upon.—In the Matter of Mahesh Chandra Banerjee; *Queen v. Purna Chandra Banerjee*; *Queen v. Kali Sirkar*, 4 B. L. R. Ap. 1 [or p. 166].

2. **WARRANT—Magistrate—Arrest—Complaint—Remand—Commitment—Bail—Criminal Procedure Code (Acts XXV. of 1861 and VIII. of 1869), ss. 68, 77.]** S. 68 of the Criminal Procedure Code applies only to cases in which the private individual injured or aggrieved does not come forward to make a formal complaint. That section is intended for the purpose of enabling a Magistrate to take care that justice may be vindicated, notwithstanding that the persons individually aggrieved are unwilling or unable to prosecute; and even in such cases the jurisdiction to arrest requires, for its foundation, knowledge of the fact of an offence having been committed, and that knowledge must be either personal or derived from testimony legally given. The report of the police, or any statement which falls short of an actual formal complaint, or of a statement made on oath, is not sufficient in law to give a Magistrate jurisdiction to issue his warrant. Under s. 77 of the Criminal Procedure Code, a Magistrate ought not to issue a warrant to an unofficial person, except when he is without the assistance of competent police-officers, and unless the urgency is imminent. The force of a warrant of arrest is at an end when the prisoner is brought before the Magistrate; and the prisoner cannot lawfully be committed to prison or remanded without sufficient grounds; and in the absence of evidence, there can be no grounds. In this case, although the Magistrate had acted illegally before evidence was recorded, and had shown a want of discretion in some of the stages, the High Court refused to quash the Magistrate's order directing the prisoners to be put upon their defence, on the ground that the order had been made by a competent officer

**Warrant (contd.)—**

after hearing evidence which was judicially received and recorded.—In the Matter of the Petition of Surendra Nath Roy : *Queen v. Surendra Nath Roy*, 5 B. L. R. 274 [or p. 199].

3. **WARRANT—Issue of—Sufficient evidence—Specification of offence—Abduction per se no offence.]** A warrant, which did not specify a punishable offence, and which had been issued upon a statement not sufficient to make out any offence, quashed.—In the Matter of the Petition of Srimati Bidhumukhi Debi, 6 B. L. R. Ap. 129 [or p. 353].

**WARRANT—**

See HABEAS CORPUS, 3.

TRANSFER OF CASE, 3.

WAGING WAR.

Issue of, without specifying Charge.

See ARMS' ACT, 1.

**Warrant-case—**

**WARRANT-CASE—Criminal Procedure Code (Act XXV. of 1861), ch. 15—Offence punishable with more than six months' imprisonment.]** Offences punishable under the Penal Code with more than six months' imprisonment are not triable under ch. 15 of the Code of Criminal Procedure, and consequently do not fall within the provisions of s. 271 of that Code.—Anonymous Case, 4 B. L. R. F. B. 41 [or p. 145].

**Whipping—**

1. **WHIPPING—Act VI. of 1864, s. 4—Second conviction.]** The punishment of whipping under s. 4, Act VI. of 1864, can only be inflicted on a second conviction of a person, who, having served a sentence of imprisonment, again commits a crime.—*Queen v. Uday Patnaik*, 4 B. L. R. A. Cr. 5 [or p. 156].

2. **WHIPPING—Wrongful confinement, grievous hurt and theft—Penal Code (Act XLV. of 1860), ss. 342, 325, 378—Criminal Procedure Code (Act XXV. of 1861), s. 46—Whipping Act (VI. of 1864).]** Where the prisoner was convicted by the Magistrate of three distinct and separate offences, and was sentenced to a month's imprisonment for the offence of wrongful confinement under s. 342, six months' imprisonment for the offence of voluntarily causing grievous hurt under s. 325, and to whipping with 20 stripes for the offence of theft under s. 378 of the Penal Code, it was held (Kemp and

**Whipping (contd.)—**

Phear, J.J., *dissenting*) that the sentence was legal. Where a person is convicted at the same time of two or more offences punishable under the Penal Code, *held* (Kemp and Phear, J.J., *dissenting*) that it is lawful for the Court, in addition to the penalties prescribed by the Penal Code, to sentence the prisoner to whipping. *Nassir v. Chunder* [Reference by the Sessions Judge of Mymensingh under Circular Order (No. 17, dated 17th June 1863), March 12th, 1868] not followed. —*Maniruddin v. Gaur Chandra Shama-dar*, 7 B. L. R. 165 [or p. 374].

3. WHIPPING — *Act VI. of 1864 — Cumulative sentence—Criminal Procedure Code (Act XXV. of 1861), s. 46.* When a Magistrate, in exercise of the powers conferred by s. 46 of the Criminal Procedure Code, passes a cumulative sentence against a person convicted at one and the same time of two or more offences punishable under the Penal Code, *held per* Peacock, C.J., and Phear and Seton-Karr, J.J., that he cannot, in addition to the penalties prescribed by the Penal Code, sentence the prisoner to whipping under Act VI. of 1864, nor can he exceed twice the extent of his ordinary jurisdiction as defined by s. 22 of the Criminal Procedure Code. *Held further, per* Seton-Karr, J., that in the case of hardened offenders a Magistrate can award whipping in addition to the maximum of imprisonment which he is competent to award. *Held per* Macpherson and Jackson, J.J., that the Magistrate may in such case, in addition to awarding double the punishment which may be awarded for a single offence, award the punishment of whipping; but only one whipping can be awarded.—*Nassir v. Chunder*, Sup. Vol. 951 [or p. 752].

See SENTENCE, 5.

**Wife—**

Violation of. See CULPABLE HOMICIDE NOT AMOUNTING TO MURDER, 1.

**Wife's Evidence—**

See EVIDENCE, 12.

**Without Enquiry—**

See DISCHARGE, 4.

**Witness—**

WITNESS—*Evidence—Judge—Competent witness.* A Judge is a competent witness, and can give evidence in a

**Witness (contd.)—**

case being tried before himself, even though he laid the complaint, acting as a public officer; provided that he has no personal or pecuniary interest in the subject of the charge; and he is not precluded thereby from dealing judicially with the evidence, of which his own forms a part.—*Queen v. Mukta Sing*, 4 B. L. R. A. Cr. 15 [or p. 163].

**Witness for Prosecution—**

Recall of. See PROCEDURE, 1.

**Witnesses—**

WITNESSES—*Criminal Procedure Code (Act XXV. of 1861), s. 318—Summoning witnesses.* It is the duty of the Magistrate, in cases under s. 318 of Act XXV. of 1861, in which oral evidence as to possession is always adduced, to issue summonses to witnesses, if the parties cannot produce them.—In the Matter of the Petition of Shamasankar Mazumdar, 9 B. L. R. Ap. 45 [or p. 550].

**WITNESSES—**

Arrest and Detention of. See WARRANT, 1.

Examination of. See EXAMINATION OF WITNESSES.

Non-attendance of. See TRIAL ON SUNDAY.

Right to summon. See POSSESSION, 7.

**Witnesses for Defence—**

1. WITNESSES FOR DEFENCE—*Criminal Procedure Code (Act XXV. of 1861), s. 265.* Conviction set aside on the ground of the Magistrate's irregularity in refusing, in a trial before him, under ch. 15 of the Criminal Procedure Code, to allow the examination of a witness who had been tendered on behalf of the accused.—*Queen v. Mahima Chandra Chuckerbutty*, 4 B. L. R. Ap. 77 [or p. 187].

2. WITNESSES FOR DEFENCE—*Evidence—Particeps criminis—Refusal to summon witnesses for defence.* Refusal to summon witnesses cited by an accused, on the ground of their being implicated on the charge, vitiates the trial and conviction.—*Ram Shahai Chowdhry v. Sanker Bahadur*, 6 B. L. R. Ap. 65 [or p. 332].

3. WITNESSES FOR DEFENCE—*Evidence—Summoning of witnesses for defence—Criminal Procedure Code (Act XXV. of 1861), s. 253.* It is the Magistrate's duty to summon witnesses for the

**Witnesses for Defence** (*contd.*)—accused who can speak to the facts of the case, and he ought not to determine beforehand what credit he will give to their evidence.—In the Matter of the Petition of Mahima Chandra Shah, 6 B. L. R. Ap. 78 [or p. 335].

4. **WITNESSES FOR DEFENCE**—*Evidence*—*Cross-examination*—*Criminal Procedure Code* (Act XXV. of 1861), s. 375.] Having regard to s. 375 of the Code of Criminal Procedure (Act XXV. of 1861), a Magistrate is bound to take steps to procure the attendance of all the witnesses mentioned by the accused in the list delivered to the Magistrate by whom he was committed. Where a witness called by one of the parties is a competent witness, the opposite party has a right to cross-examine him, though the party calling him has declined to ask a single question.—*Queen v. Ishan Dutt*, 6 B. L. R. Ap. 88 [or p. 341].

5. **WITNESSES FOR DEFENCE**—*Criminal Procedure Code* (Act XXV. of 1861), ss. 252, 253, 254.] *Per Ainslie, J.*—In a trial under ch. 14 of the Criminal Procedure Code, the Magistrate is not bound, under s. 253, to summon any witness whom the accused may require. It is only discretionary with him to do so, and in the circumstances of the present case he exercised his discretion rightly in refusing to summon the witnesses asked for. *Per Paul, J.* (differing).—The right of an accused to have witnesses for his defence summoned during the pendency of the trial is an ordinary and natural right, and this right is not taken away, but affirmed, by s. 253; the Magistrate is bound to summon the witnesses,

**Witnesses for Defence** (*contd.*)—though it is discretionary with him to adjourn the trial. In the present case, treating it as a matter of discretion only, the Magistrate was wrong in refusing to summon the witnesses required.—*Queen v. Bholanath Mookerjee*, 7 B. L. R. 564 [or p. 433].

6. **WITNESSES FOR DEFENCE**—*Criminal Procedure Code* (Act XXV. of 1861), ch. 15.] S. 266 (and not s. 252) of the Code of Criminal Procedure is applicable to a case under ch. 15 of that Code; and under the former section a Magistrate is not bound to summon the witnesses for the defence.—In the Matter of the Petition of Bhikha Roy *v.* Dhotan Roy, 7 B. L. R. 568 note [or p. 436].

**Wording of Summons**—  
See **RECOGNIZANCE**, 12.

**Wounding with intent to Murder**—  
See **THREAT**.

**Writ of Certiorari**—  
See **SENTENCE**, 2.

**Writ of Mainprize**—  
See **MAINPRIZE**.

**Writing**—  
See **COMPLAINT**, 1 to 3.

**Wrongful Confinement**—  
See **ABSENCE OF COMPLAINANT**, 3.  
**JURY**, 3.  
**WHIPPING**, 2.

**Wrongful Gain**—  
See **CRIMINAL BREACH OF TRUST**, 2.

**Wrongful Loss**—  
See **MISCHIEF**.









